



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 32 OF 2018

TERESIA WANGARI MBUGUA.....PLAINTIFF

VERSUS

JANE NJERI NDUATI.....1ST DEFENDANT

THE LAND REGISTRAR, THIKA.....2ND DEFENDANT

JUDGMENT

By a Plaint dated 5th February 2018, the Plaintiff sought Judgment against the Defendant for the following orders:-

1. That a mandatory order be issued against the 2nd Defendant to cancel and/or annul the registration made on the Register in respect to land parcel Title No. Ruiru Kiu Block 2 (Githunguri)2622, including the illegal and fraudulent subdivisions resulting to plot numbers 19506-19525 in the 1st defendant's name.

2. That In the alternative to prayer (1) above, there be reversion of registration and proprietorship into the name of Teresiah Wangari Mbugua, as the proprietor.

3. A Perpetual injunction do issue against the 1st defendant, her servants, agents, beneficiaries and/or any persons claiming through them from entering, encroaching, constructing, barricading, occupying, trespassing, destroying, alienating or in any manner whatsoever dealing with parcel Title No. Riu Kiu Block 2 (Githunguri) 2622.

4. Mesne profits at Kshs,10,000/= per month from January 2018.

5. Costs of the suit and interest

In her statement of Claim, the Plaintiff averred that her husband **Solomon Mbugua Kiguongo**, bought some shares in **Githunguri Constituency Ranching Company Limited**, and was issued with a share **Certificate No. 4092** and participated in land allocation, balloted and was issued with ballot **No. 2173**. The plaintiff further averred that upon her husband's demise on **12th May 1995**, she approached the land buying Company and paid **Kshs.10,000/=**, to have the suit property transferred in her name as the rightful heir and paid for the survey fees. Being a new shareholder, she was issued with a Share Certificate **No. B-528**, a clearance certificate and was granted the go ahead to process the title deed in her name. That the officials of the Company executed vesting transfer instruments to have the land transferred into her name and registered in her favour.

That upon presenting the completion documents for registration at the 2nd Defendant's office, the documents were declined. She

was informed that the register of the suit property had been previously opened in the name of the 1st Defendant and closed on the subdivision of the same into plots No. **19506-19525**. Therefore, the registration in favour of the Plaintiff was untenable. The Plaintiff further contended that the registrations made by the Defendants were made through fraud, misrepresentation, illegally and unprocedurally and cannot be allowed to stand. She particularized fraud by the 1st defendant as; causing the suit property to be registered in her name fraudulently, forging completion documents and misrepresenting to the 2nd Defendant to irregularly cause to be registered illegal dispositions, and illegally and unprocedurally obtaining an illegal title.

Further that she attempted to take possession but she has been inhibited by the 1st Defendant who has bifurcated her from taking possession pegged on an illegal claim of ownership. The Plaintiff particularized prejudice, damage and loss as; continued interference with the suit property without reasonable cause, subdivision of the suit property devoid of any lawful authority, obstruction of user of the suit property. That she has suffered loss and damage and she particularized damages as mesne profit in the tune of **Kshs. 10,000/=**.

The suit is contested and the 2nd Defendant filed its statement of Defence dated **25th April 2018**, and denied all the allegations made in the Plaint. It was its contention that the registration of the suit land in favour of the 1st Defendant was not fraudulent, Illegal nor unprocedural as it was on the basis of the documents presented before the 2nd Defendant by the 1st Defendant. That should the Court find that the suit land was illegally and fraudulently registered in the name of the 1st Defendant, then the 1st Defendant should indemnify the 2nd Defendant of any liability arising from such finding. The Court was urged to dismiss the Plaintiff's suit.

Though served with the suit papers, the 1st Defendant did not enter appearance nor file any Defence. The matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for herself and called one witness. The 2nd Defendant called one witness and closed their case.

PLAINTIFF'S CASE

PW1 Teresiah Wangari Mbugua adopted her witness statement dated **5th February 2018** as her evidence in Court. It was her testimony that the suit property is hers and that it was balloted by her husband, one **Solomon Mbugua**. She produced the list of documents as **Exhibit 1**. That after **Mbugua** died, she paid **Kshs. 10,000/=** for the title and she produced the receipt dated **4th October 2013** as Exhibit 2. Further that she was issued with a share certificate on **11th October 2013**, which she produced as Exhibit 3 and the land was to be registered in her name and was issued with clearance certificate on **10th February 2017**. It was her further testimony that when she took the clearance certificate to the Lands office at **Thika Land Registry**, she found that the land was registered in the name of the 1st Defendant. Then she instructed her Advocate to file this suit. She denied selling the suit property and that she did not know the 1st Defendant who is in her land illegally.

That she reported the matter to **Githunguri Ranching Company Ltd** and when she went to the Lands offices, she found that the land was subdivided in the names of other persons, but that the lands office noted that the title was in the name of the 1st Defendant.

PW2 John Maina Mburu, the Chairman of **Githunguri Ranching Company Limited** since **12th September 2009**, testified that the suit property is **Ruiru Kiu Block 2/ Githunguri/2622**, that it originally belonged to **Mbugua Kiguongo**, who was issued with a member's receipt and the ballot card. It was his testimony that on **11th September 2013**, the land was transferred to **Teresiah Mbugua** and they issued her with a share certificate **No, B528** dated **11th October 2013** and a clearance certificate dated **10th February 2017**. That the transfer form was prepared and signed by the Director and it was submitted to the lands office for purpose of issuance of title deed. That there was no title deed at the lands office.

Further that another person was fraudulently issued with a title deed as there was another green card for a person known as **Jane Njeri Nduati**. It was his further testimony that the green card was prepared on **21st January 2017**, in the name of **Githunguri Constituency Ranching Company Limited** and was transferred to **Jane Njeri** who was not their member. That it is **Githunguri Constituency Ranching Company Ltd** that submitted the documents to the Lands office and they submitted for **Teresiah Wangari** and so the land belongs to **Teresiah Wangari**.

Further that he did not sign the transfer form in the bundle of documents and that the same is a forgery. That Document No 4, a certificate of incorporation for **Githunguri Constituency Ranching Company Ltd** is certified by an Advocate, but that they do

not do that. That the certificate was certified by an Advocate on **15th June 2015**, and the title is issued on **21st February 2017**. It was his testimony that the transfer forms were certified in 2015. Further that document No. 5 is another forgery as the handwriting is not for any of their Directors.

DEFENCE CASE

DW1 Robert Mugendi Mbuba testified that he is a Land Registrar stationed at Ruiru Land Registry. That he relied on the witness statement by **Bernard Leitich**, the former Land Registrar dated **31st October 2018**. He produced the list of documents as Exhibit 1 to 10.

It was his testimony that the suit property is **Ruiru/Kiu Block 2(Githunguri)/2622**, and the registered owner is **Jane Nduati of ID No. xxxx**. That the register was opened on **21st February 2017** in the name of **Githunguri Constituency Ranching Company Limited** and on the same day the land was allocated to **Jane Njeri Nduati** and a title deed was issued. Further that the documents needed were duly signed transfer form from **Githunguri Ranching Company Limited** to the allottee, a clearance certificate and a certified copy of the Identity Card and Pin of allottee. That the said documents were submitted and they were used for registration on **21st February 2017**.

He further testified that he had certified copies of the Original Documents and the said documents emanated from Githunguri Ranching Company Ltd as the lands Registry has a seal of the Company and passport photos are affixed. That they had no reason to doubt their authenticity. He further testified that the land has since been subdivided into 20 plots bearing titles no **19506-19525** and the green cards have restrictions in favour of **DCIO Ruiru** prohibiting any dealings pending investigations on ownership. Further that there is a Caveat Order in **ELC 32 of 2018**, prohibiting any dealings until the case is heard and determined. He produced the green cards as Exhibit No. 11.

He testified that he has been a Land Registrar from **23rd February 2015** and he served in Thika Lands Registry from **7th March 2016 to 22nd May 2019** and so he is conversant with the registration of land in Githunguri and one needed to be a member of the Company. He confirmed that **Jane Njeri Nduati** did not produce any share certificate but the clearance certificate was from Githunguri Ranching Co. Ltd. It was his evidence that the copy of the transfer had a signature that resembles that of the Chairman of Githunguri Ranching Co. Ltd and the seal belongs to the Company. Further that it took about 5 days for the title to be issued and it was possible for documents to be lodged and a title issued on the same day. It was his further testimony that the title on the document must match the document lodged and that the title is in the name of **Jane Njeri Nduati**.

Thereafter, the parties filed written submissions which the Court has carefully read and considered. The Court finds the issues for determination are as follows;

- 1. Who is the Lawful owner of the suit property*
- 2. Whether the Plaintiff is entitled to the orders Sought*
- 3. Who should bear the costs of this suit*

1. Who is the Lawful owner of the Suit property

The Plaintiff has laid claim to the suit property and averred that she is the owner of the suit property having bought shares from **Githunguri Ranching Company limited**, and was issued with a share certificate, a clearance certificate and a transfer form signed in her favour. She also averred that when she presented the said documents before the 2nd Respondent to enable her to be registered as the proprietor, she learnt that the 1st Defendant had already been registered as the proprietor of the suit property which registration was fraudulently done.

In this regard, the plaintiff averred that the registration of the suit property in favour of the 1st Defendant was fraudulently done and the same ought to be impeached. When a person's ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. See the case of **Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others [2016] eKLR**, where the Court held that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

In the case of Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Appeal Court held that:-

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

Who between the Plaintiff and 1st Defendant has certainly shown the root of her title" The Plaintiff has averred that her deceased husband had bought the shares at **Githunguri Constituency Ranching Company Limited** and after his death, she took over to which she paid **Kshs. 10,000/=** which she produced a receipt for. That as a new member, she was given the share certificate issued on **11th October 2013**, being Share **B528** and she was further given a clearance certificate that was issued on **10th February 2017**. Her evidence has been corroborated by the evidence of PW2, who is the Chairman of the land buying Company that was the initial allottee of the suit property. The Court is therefore satisfied that the Plaintiff has been able to explain the root of her title.

On the other hand the 1st Defendant did not defend the suit and therefore the Plaintiff's evidence against her remains uncontroverted. However, the 2nd Defendant had produced some documents in favour of the 1st Defendants that attempted to show that the 1st Defendant was lawfully registered as the proprietor of the suit property. It was PW2's evidence that the documents produced by the 2nd Defendant that were used by it to register the 1st Defendant as the proprietor were forgeries. He denied signing the transfer that was certified in **2015**, and given that he was the Chairman of the Company since **2013**, the Court is satisfied that the said documents were forgeries as the purported person who is alleged to have signed it has since denied signing the same.

Further DW2 acknowledged that for a person to be a member of the land buying Company, the said person needed to possess a share certificate. It was his evidence that in the documentations that were presented for registration of the 1st Defendant as the proprietor, she did not present a share certificate and therefore the Court finds and holds that the 1st Defendant's root of title has not been established.

The Plaintiff has averred that the 1st Defendant has fraudulently registered the suit property in her name.

Was the suit land therefore transferred fraudulently to the 1st Defendant" **‘Fraud’** has been defined in Blacks Laws Dictionary as;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

Further Black's Law Dictionary Ninth Edition at Page 731 also defines **‘fraud’** as:-

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

With the definition of fraud in mind and having held that the 1st Defendant documents were forgeries based on the fact that the person that was alleged to have signed them denied signing, It then follows that there were deceitful acts of providing documents that were not genuine or whose authenticity is in doubt and that amounts to fraud.

Having carefully analyzed the available evidence, the Court finds and holds that the Plaintiff herein is the lawful owner of the suit

property having satisfactorily explained the root of her title.

2. Whether the Plaintiff is entitled to the orders Sought

The Plaintiff has sought for the cancellation of the proprietorship of the 1st Defendant and reversion of the registration and proprietorship to her. The Court has already held and found that the Plaintiff is the lawful owner of the suit property, the registration of the 1st defendant having been procured fraudulently and therefore **null** and **void ab initio**.

It is trite that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. However, the holding of such title is not absolute as the same may be impeached under certain circumstances. **Section 26 (1)** of the **Land Registration Act**, which provides;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

This Court having held and found that the transfer of the suit property to the 1st Defendant was done through **fraud** as the root of her title could not be explained, the Court further finds that the titles held by the 1st Defendants fall under the category of titles that must be impeached. The protection that was provided to the 1st Defendant by law must then be lifted once the Court holds that there was fraud and misrepresentation of facts. See the case of **Alice Chemutai Too ...Vs... Nickson Kipkurui Korir & 2 Others [2015] eKLR**, where the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

The Court having found and held that the Certificate of title held by the 1st Defendant was procured by fraud and therefore **null** and **void** must then determine whether the said title can be cancelled.

Section 80(1) of the **Land Registration Act** comes into play herein. It provides:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

This Court is satisfied that the Certificate of title held by the 1st Defendant was procured by **fraud** and as such it is impeachable and ought to be cancelled. Further this Court has already held and found that the Plaintiff is the legal owner of the suit property and it is only fair that the register be rectified to cure the fraud perpetrated by the 1st Defendant and return the suit property to its rightfully owner who has demonstrated how she purchased or earned the same.

The Plaintiff has also sought for mesne profits. Section 2 of the Civil Procedure Act Cap 21 Laws of Kenya defines **mesne profits** as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

Further in the case of **Attorney General ...Vs... Halal Meat Products Limited [2016] eKLR** considered when mesne profits could be awarded.

The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42.”

The Court notes that the Plaintiff has specifically pleaded mesne profits and further that the plaintiff has proved that the 1st Defendant has been in wrongful occupation of her property. Therefore the Court finds and holds that the Plaintiff is entitled to the prayers for mesne profits as pleaded.

It is the Court’s considered view that the Plaintiff is entitled to the orders sought.

3. Who should bear the Costs of the Suit

It is trite that costs usually follow the events. **Section 27** of the Civil Procedure Act gives the Court discretion to grants costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the Plaintiff being the successful litigant is entitled to the costs of the suit.

Consequently, the Court finds that the Plaintiff has proved her case on the required standard of balance of probability and is entitled to the prayers as sought in the **Plaint** dated **5th February 2018**.

Having found that the Plaintiff has proved her case on the required standard, the court enters judgment for the Plaintiff against the Defendant herein jointly and severally in terms of **prayers no. 1, 2, 3, and 4** of the **Plaint** herein. The Plaintiff is also entitled to the costs of the suit.

It is so ordered.

Dated, signed and Delivered at Thika this 14th day of December, 2020.

L. GACHERU

JUDGE

14/12/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions

issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff

No appearance for the 1st Defendant Though Notice was issued.

No appearance for the 2nd Defendant

L. GACHERU

JUDGE

14/12/2020



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