



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 111 OF 2020 (O.S)**

**LUCY WANGARI WAMBURI**

**(Suing as the administrator of the estate**

**of Wamburi Bobi, deceased).....APPLICANT**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> RESPONDENT**

**MANAGING DIRECTOR**

**KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> RESPONDENT**

**MINISTRY OF LANDS**

**AND PHYSICAL PLANNING.....3<sup>RD</sup> RESPONDENT**

**PAULINE WAITHERA GITAU.....4<sup>TH</sup> RESPONDENT**

**GEORGE NGUGI KARU.....5<sup>TH</sup> RESPONDENT**

**ELIJAH OTIENO JUMA.....6<sup>TH</sup> RESPONDENT**

**WINNIE WAMBUI KABUTHI.....7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

The applicant is the administrator of the estate of Wamburi Bobi, deceased (hereinafter referred to only as “the deceased”. The deceased died on 19<sup>th</sup> September, 2017 and the applicant was issued with a Grant of Letters of Administration in respect of his estate on 2<sup>nd</sup> March, 2018. The said Grant was confirmed on 22<sup>nd</sup> October, 2018. In 2001/2002 or thereabouts, the deceased purchased from the 1<sup>st</sup> respondent all that parcel of land known as L.R No. Nairobi Block 93/1440(formerly L.R No. 209/9534(Part)/46) Plainsview South B Nairobi (hereinafter referred to as “the suit property”) at a consideration of Kshs. 800,000/-. The deceased paid the full purchase price and was granted possession of the suit property by the 1<sup>st</sup> respondent. Upon taking possession of the suit property, the deceased proceeded to develop the same by putting up temporary structures thereon.

The deceased passed on while in possession of the suit property but before the property was transferred to his name. The 1<sup>st</sup>

respondent executed a transfer of lease in respect of the suit property in favour of the deceased on 26<sup>th</sup> April, 2007 but the same was not lodged for registration until 11<sup>th</sup> September, 2017. The application for registration of the suit property in favour of the deceased was rejected by the 3<sup>rd</sup> respondent on the ground that there was already a title issued in respect of the suit property. Due to this turn of events, the applicant carried out a search on the suit property which revealed that the property was registered in the names of the 4<sup>th</sup> to 7<sup>th</sup> respondents as tenants in common in equal shares on 30<sup>th</sup> December, 2010.

The applicant brought this suit by way of Originating Summons dated 16<sup>th</sup> June, 2020 seeking the following reliefs;

1. A declaration that the applicant is the lawful owner of the suit property.
2. An order revoking the illegally obtained title held by the 4<sup>th</sup> to 7<sup>th</sup> respondents in respect of the suit property.
3. An order directing the 3<sup>rd</sup> defendant to register the applicant as the sole proprietor of the suit property.
4. Such further or other orders as the court may deem just and expedient to grant in the circumstances.
5. The costs of the application.

The Originating Summons was brought on the grounds set out on the affidavit of the applicant sworn on 16<sup>th</sup> June, 2020. The applicant averred that the deceased had over the years been in possession of the suit property and that upon his death his estate remained in possession of the suit property. The applicant averred that the 1<sup>st</sup> respondent wrote to the 3<sup>rd</sup> respondent confirming that the deceased was the lawful owner of the suit property and requested the 3<sup>rd</sup> respondent to cancel the fraudulent registration of the suit property in the names of the 4<sup>th</sup> to 7<sup>th</sup> respondents to facilitate the registration of the property in the name of the applicant. The applicant averred that the 3<sup>rd</sup> respondent advised the applicant that the registration of the 4<sup>th</sup> to 7<sup>th</sup> respondents as the proprietors of the suit property could only be cancelled by the court. The applicant averred that although the 4<sup>th</sup> to 7<sup>th</sup> respondents were allegedly registered as the owners of the suit property on 30<sup>th</sup> December, 2010; over 10 years ago, none of them had entered the suit property or attempted to claim the same.

The applicant averred that the 4<sup>th</sup> to 7<sup>th</sup> respondents worked in cahoots with the 1<sup>st</sup> and 3<sup>rd</sup> respondents in the illegal transfer of the suit property to the 4<sup>th</sup> to 7<sup>th</sup> respondents which may lead to the deprivation of the estate of the deceased of the suit property if not stopped by the court. The applicant urged the court to allow the application.

The application was served upon the respondents but none responded to the same. On 25<sup>th</sup> January, 2021, the court directed that the Originating Summons be heard through affidavit evidence and written submissions. None of the parties filed submissions within the time that was prescribed by the court. I have considered the Originating Summons together with the affidavit filed in support thereof. As I have stated earlier, the Originating Summons was not opposed. What I need to determine in this suit are; whether the applicant has established that the deceased purchased the suit property from the 1<sup>st</sup> respondent, whether the suit property was illegally registered in the name of the 4<sup>th</sup> to 7<sup>th</sup> respondents and whether the applicant is entitled to the reliefs sought. I am satisfied from the material placed before the court that the 1<sup>st</sup> respondent sold the suit property to the deceased in 2001/2002 at a consideration of Kshs. 800,000/-. The agreement for sale is evidenced by among others, a letter of offer dated 13<sup>th</sup> November, 2001, undated agreement for sale made in 2002, lease dated 10<sup>th</sup> January, 2003, transfer of lease executed in 2007, a letter by the 1<sup>st</sup> respondent dated 15<sup>th</sup> April, 2009, a letter by the 1<sup>st</sup> respondent dated 26<sup>th</sup> July, 2017 and a letter by the 1<sup>st</sup> respondent dated 29<sup>th</sup> January, 2019. I am also satisfied that the deceased paid the purchase price in full and that he was given possession of the suit property and that the deceased's estate was still in possession of the suit property as at the time this suit was filed. I am persuaded from the evidence on record that the deceased lawfully purchased the suit property from the 1<sup>st</sup> respondent and that he performed his part of the contract with the 1<sup>st</sup> respondent.

On whether the 4<sup>th</sup> to 7<sup>th</sup> respondents were unlawfully registered as the owners of the suit property on 30<sup>th</sup> December, 2010, there is no evidence on how the said respondents came to be registered as owners of the suit property. In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milan Kumar Shah & 2 others v City Council of Nairobi & another, a three judge bench stated as follows:

**“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of**

**probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.**

In Munyu Maina v Hiram Gathiha Maina, Civil Appeal No. 239 of 2009, the Court of Appeal stated that:

**“We state 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.”**

The 4<sup>th</sup> to 7<sup>th</sup> respondents did not defend the Originating Summons. The applicant’s contention that the 4<sup>th</sup> to 7<sup>th</sup> respondents acquired the suit property illegally was not rebutted. The applicant’s contention that the 4<sup>th</sup> to 7<sup>th</sup> respondents have never set foot on the suit property for the last 10 years they are said to have been registered as the owner of the suit property was not rebutted. The applicant’s contention that the deceased has always been the lawful owner of the suit property was also not rebutted. The applicant having proved that the suit property was purchased by the deceased from the 1<sup>st</sup> respondent way back in 2001/2002 and that the 1<sup>st</sup> respondent executed a transfer of lease in favour of the deceased in respect of the suit property on 26<sup>th</sup> April, 2007, the burden shifted to the 4<sup>th</sup> to 7<sup>th</sup> respondents to show how they acquired the suit property in 2010. In the absence of any evidence from the 4<sup>th</sup> to 7<sup>th</sup> respondents, that burden was not discharged. In the circumstances, the only inference the court can make is that the suit property was registered in the names of the 4<sup>th</sup> to 7<sup>th</sup> respondents illegally.

On the last issue, it is my finding from the foregoing that the applicant has proved her case against the 4<sup>th</sup> to 7<sup>th</sup> respondents. I am not satisfied that any wrong doing has been established against the 1<sup>st</sup> to 3<sup>rd</sup> respondents. I am of the view however that the 1<sup>st</sup> and 3<sup>rd</sup> respondents were necessary parties to the suit. The 2<sup>nd</sup> respondent was in my view wrongly joined in the suit. It was not necessary to join the 2<sup>nd</sup> respondent to the suit after joining the 1<sup>st</sup> respondent. The applicant has proved that the deceased purchased the suit property from the 1<sup>st</sup> respondent and paid the full purchase price. The applicant is entitled to a declaration that the deceased’s estate is the lawful beneficial owner of the suit property. The applicant is also entitled to an order for the revocation of the title held by the 4<sup>th</sup> to 7<sup>th</sup> respondents.

The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Under section 143 of the Registered Land Act, this court has power to rectify the register of land if it finds that the registration was made by fraud or through a mistake. Under section 26 of the Land Registration Act, 2012, the conclusiveness of proprietorship of land or lease conferred upon registration can be challenged on the grounds of fraud or misrepresentation to which the registered proprietor is proved to be a party or where the title has been acquired illegally, unprocedurally or through a corrupt scheme. I am satisfied that a case had been made out for the rectification of the register of the suit property by cancellation of the registration of the 4<sup>th</sup> to 7<sup>th</sup> respondents as the owners of the suit property.

The other order sought by the applicant is for the 3<sup>rd</sup> respondent to be ordered to register it as the owner of the suit property. I am of the view that this order is not necessary. From the evidence on record, the 3<sup>rd</sup> respondent’s refusal to register the applicant as the owner of the suit property was not unreasonable. The property was already registered in the name of the 4<sup>th</sup> to 7<sup>th</sup> respondents. There was no way in the circumstances how the 3<sup>rd</sup> respondent could have registered the property in the name of the applicant unless the property was being transferred to the applicant by the 4<sup>th</sup> to 7<sup>th</sup> respondents which was not the case. With this court’s finding that the 4<sup>th</sup> to 7<sup>th</sup> respondents were illegally registered as the owners of the suit property and that their title should be cancelled, I am unable to see any other impediment to the registration of the applicant as the owner of the suit property in her capacity as the administrator of the estate of the deceased. An order compelling the 3<sup>rd</sup> respondent to register the applicant as the owner of the suit property is in the circumstances unnecessary. I will nevertheless make a conditional order for such registration now that the prayer is not opposed by the respondents.

In conclusion, I hereby enter judgment for the applicant against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents on the following terms;

1. It is declared that the applicant, Lucy Wangari Wamburi in her capacity as the legal representative of the estate of Wamburi Bobi, deceased is the beneficial owner of all that parcel of land known as L.R No. Nairobi Block 93/1440(formerly L.R No. 209/9534(Part)/46) Plainsview South B, Nairobi (“the suit property”).

2. The registration of Pauline Waithera Gitau, George Ngugi Karu, Elijah Otieno Juma and Winnie Wambui Kabutha, the 4<sup>th</sup> to 7<sup>th</sup> respondents herein as the leasehold proprietors of the suit property on 30<sup>th</sup> December, 2010 and the issuance of a Certificate of Lease to the said respondents on the same date pursuant to the said registration are cancelled.

3. The applicant, Lucy Wangari Wamburi in her capacity as the legal representative of the estate of Wamburi Bobi, deceased shall be registered as the proprietor of the suit property upon presentation to the 3<sup>rd</sup> respondent of, a valid transfer of lease executed by the 1<sup>st</sup> respondent and the applicant, all the necessary consents and certificates if required and payment of the requisite charges.

4. The suit is dismissed with no order as to costs as against the 2<sup>nd</sup> respondent.

5. The applicant shall have the costs of the suit to be paid by the 4<sup>th</sup> to 7<sup>th</sup> respondents jointly and severally.

**DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF DECEMBER 2021**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Mukuna for the Applicant

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

N/A for the 3<sup>rd</sup> Respondent

N/A for the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents

Ms. C. Nyokabi-Court Assistant



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