



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC No. 269 OF 2017

JOSEPH NJIHIA KIHICO.....PLAINTIFF

VERSUS

DORIS NYOKABI MWANIKI..... 1ST DEFENDANT

SAMMY NDUNGU MUNGAL..... 2ND DEFENDANT

JEREMIAH KAHANYA..... 3RD DEFENDANT

GEORGE MAINA GITAU..... 4TH DEFENDANT

MARY NYAMBURA NDUNGU..... 5TH DEFENDANT

LUCY WANJIRU MWANIKI..... 6TH DEFENDANT

ELIZABETH NJERI MWANIKI (also registered as

ELIZABETH NJERI MWANGI)..... 7TH DEFENDANT

PRISCILA NYAMBURA MARIGI..... 8TH DEFENDANT

SAMUEL WANJOHI WANJIKU..... 9TH DEFENDANT

JANE NJOKI MWANGI..... 10TH DEFENDANT

ESTHER NYABOKE BIRONGO..... 11TH DEFENDANT

GIDEON MUTISYA MUMBUA..... 12TH DEFENDANT

HARUN UFAKE JANDI (also registered as

HALUNI UFALE JADI)..... 13TH DEFENDANT

LEORNARD KAMAU KIMITI 14TH DEFENDANT

JAMES GITHINJI KURIA.....15TH DEFENDANT

ELIZABETH WANJIKU THUO.....16TH DEFENDANT

DISTRICT LAND REGISTRAR NAKURU.....17TH DEFENDANT

JUDGMENT

1. By plaint dated 28th June 2017, the plaintiff averred that he was the registered proprietor of a parcel of land known as Kiambogo/Kiambogo Block 2/321 (Mwariki) measuring approximately 1.05 hectares. That the 1st defendant unlawfully obtained a second title to the property and transferred the land to the 2nd defendant. That the 2nd defendant unlawfully subdivided the land into various portions some of which he retained and some of which he transferred to the 3rd to 16th defendants. He added that the defendants' actions were fraudulent.

2. The plaintiff therefore prayed for judgment against the defendants jointly and severally for:

a) A declaration that the plaintiff herein is entitled to Kiambogo/Kiambogo Block 2/321 (Mwariki) now sub-divided into Kiambogo/Kiambogo Block 2/20706 (Mwariki), 20707, 20708, 20709, 20710, 20711, 20712, 20713, 20714, 20715, 20716, 20717, 20718, 20719, 20720, 20721, 20722, 20723, 20724 and 20725 and the title deed issued to the 2nd -16th Defendants herein be cancelled and an order as against the 17th Defendant requiring him to reinstate the Plaintiff herein as the rightful and registered owner of the suit land.

b) A permanent injunction restraining the Defendants by themselves, their agents and or servants from trespassing, charging, selling, disposing, developing and or further developing, constructing and or further constructions, charging, and or interfering in any way with the parcels of land known as Kiambogo/Kiambogo Block 2/321 (Mwariki) and the subsequent subdivisions known as Kiambogo/Kiambogo Block 2/20706 (Mwariki), 20707, 20708, 20709, 20710, 20711, 20712, 20713, 20714, 20715, 20716, 20717, 20718, 20719, 20720, 20721, 20722, 20723, 20724, and 20725.

c) Costs of this suit.

3. The 1st, 2nd and 17th defendants filed statements of defence in which they generally denied the plaintiff's allegations. The 1st defendant denied that she has ever been a registered proprietor of the parcel of land known as Kiambogo/Kiambogo Block 2/321 (Mwariki) or that she has ever transacted with the 2nd defendant in respect of the property.

4. Although a notice of appointment of advocate was filed on behalf of the 15th defendant, the said defendant neither filed a statement of defence nor attended the hearings. Similarly, the 3rd to 16th defendants neither filed a statement of defence nor attended the hearings.

5. At the hearing, the plaintiff Joseph Njihia Kihiko, testified as PW1. He stated that he was the registered owner of the parcel of land known as Kiambogo/Kiambogo Block 2/321 (Mwariki) situated in Mwariki, Nakuru County. That he acquired the land from Mwariki Farm Company Limited and that he was issued with a title deed on 9th September 1992. That he had been in possession of the suit land since the time he acquired it and that no one had ever claimed it. That sometime in March, 2017 he became aware that third parties were attempting to develop various portions of the suit land and were in the process of depositing building materials. That when he visited the land, he found that 3 parties had erected dwelling house and others were in the process of doing so. He immediately consulted his advocates who wrote a letter to the Lang Registrar Nakuru requesting him to place a restriction on the suit land and also sought a certified copy of the green card for the parcel.

6. He further stated that upon perusing the green card, he learnt that the land had been transferred to the 1st defendant on 7th October 2005 without his knowledge or consent and that the 1st defendant thereafter transferred the land to the 2nd defendant on 25th January 2013. That the green card also indicated that his title had been closed on sub-division into smaller portions known as Kiambogo/Kiambogo Block 2/20706 (Mwariki), 20707, 20708, 20709, 20710, 20711, 20712, 20713, 20714, 20715, 20716, 20717, 20718, 20719, 20720, 20721, 20722, 20723, 20724 and 20725. That his advocates wrote another letter to the 17th defendant requesting for certified copies of the green cards for the subsequent sub-divisions and upon obtaining the green cards, he learnt that the 2nd defendant had transferred the sub-divisions to the 3rd to 16th defendant and retained other sub-divisions for himself. He added

that he does not know the defendants herein and that he has never transacted with the 1st defendant over the parcel of land known as Kiambogo/Kiambogo Block 2/321 (Mwariki). That the defendants acted fraudulently in obtaining their respective title deeds since at the time the said transactions were being registered, he was still in possession of his original title deed. He showed the court the original of his title deed. That as a consequence of the defendants' actions, he is unable to develop the suit land as he had intended. He produced a copy of the title in respect of Kiambogo/Kiambogo Block 2/321 (Mwariki) in his name, certified copy of green card in respect of the said parcel, mutation form dated 3rd October 2012 in respect of the said parcel, certified copies of the green cards in respect of Kiambogo/Kiambogo Block 2/20706 (Mwariki), 20709, 20710, 20711, 20712, 20713, 20714, 20715, 20716, 20717, 20718, 20719, 20720, 20721, 20722, 20723, 20724 and 20725.

7. PW1 went on to state that he does not know the 1st defendant, that he never signed transfer of the land to the 1st defendant or to anyone else and that he never appeared before the Land Control Board over the land. That since being issued with the title in the year 1992, he only visited the land in the year 2017 but had asked his neighbour to be checking on the land for him. That the neighbour did not update him.

8. The plaintiff's case was closed at that point.

9. Doris Nyokabi Mwaniki, the 1st defendant, opened the defence case by testifying next as DW1. She stated that she has never owned the parcel of land known as Kiambogo/Kiambogo Block 2/321 (Mwariki), that she does not know its location and that she learnt about the parcel for the first time in June 2017 when she was served with summons in this case. She added that she did not know the plaintiff and that she met him for the first time in this court at the hearing. She also stated that she did not know the 2nd defendant and that she had never had any transaction with him. That she was never issued with any title in respect of Kiambogo/Kiambogo Block 2/321 (Mwariki) and that she never entered into any sale agreement in respect of the plot with the 2nd defendant. When shown a copy of title in respect of Kiambogo/Kiambogo Block 2/321 (Mwariki) in her name as well as transfer in respect of the said parcel and copies of her national identity card, PIN certificate and her passport photo all of which were in the 17th defendant's bundle of documents, she stated that she had never seen the title before, that she never signed the transfer and that the signature on it is not hers. When shown an application for consent, she stated that she had never seen before, that the signature on it is not hers and that she did not appear before the board. Regarding the copies of her national identity card, PIN certificate and her passport photo, she acknowledged that they were hers and added that she had given her documents to a land broker by the name Stephen Gichoki Mwaniki when she was buying a parcel of land at Kiamunyeki in Lanet area on 8th March 2012. She added that the said broker must have been the source of her documents in the 17th defendant's bundle.

10. The 1st defendant's case was then closed.

11. The 2nd defendant, Sammy Ndungu Mungai, testified next as DW2. He stated that he is a businessman engaged in selling petroleum products as well as buying and selling land. That he learnt that the parcel of land known as Kiambogo/Kiambogo Block 2/321 (Mwariki) was on sale in the year 2012 and the owner was the 1st defendant. That he visited the land, met the 1st defendant and discussed the price with her after which he conducted a search through his employee and another through his advocate using a copy of the title which the 1st defendant gave him. He added that the 1st defendant's advocate later prepared a sale agreement and that the land was later transferred to his name. He did not however produce the agreement or even the transfer and stated that he had not traced them. He further stated that he later obtained consent of the Land Control Board, subdivided the parcel and sold some of the subdivisions. That he followed procedure when doing the subdivision and that all his documents were accepted and acted upon at the Land Registry and that it took him two years to sell the subdivisions. That during the said period, he advertised the land for sale and placed a prominent "For Sale" sign at the property without anybody complaining. That those who purchased from him were issued with title deeds and started to develop their properties. That the development/construction by the buyers was done openly without protest from anybody. He produced a copy of title dated 7th October 2005 in the 1st defendant's name, a copy of certificate of official search dated 26th October 2012, a copy of letter of consent dated 9th August 2012 authorizing subdivision of Kiambogo/Kiambogo Block 2/321 (Mwariki) and a copy of mutation form dated 3rd October 2012.

12. Under cross-examination and re-examination, DW2 stated that he could not remember the name of the person who told me that the land was on sale and that when he to view the area, he was shown the land by a Mr. Mwangi and Mr. Mwaniki. That he could not remember the actual day and month when he met the 1st defendant and that he had not met her prior to the transaction. That the sale agreement was prepared in the office of Mr. Geke who was the 1st defendant's advocate.

13. DW2 further acknowledged that by the time the letter of consent dated 9th August 2012 authorizing subdivision of Kiambogo/Kiambogo Block 2/321 (Mwariki) was issued to him and the mutation form dated 3rd October 2012 prepared, he had not

yet become the registered owner of the property. He also acknowledged that item number 6 on his list of documents is an application for registration of transfer which was presented at the Land Registry on 18th January 2013. He added that the purchase price was KShs 3 million which he paid it in cash in instalments. He did not however produce any documents to demonstrate payment of the purchase price. He went on to state that the transfer was prepared for him by a Land Officer but he could not remember which particular land officer did it.

14. The 2nd defendant's case was then closed.

15. Next on the witness stand was Eric Munene Nyamu, a Land Registrar working at Nakuru Land Registry, who testified as DW3. He stated that the first entry in the register in respect of Kiambogo/Kiambogo Block 2/321 (Mwariki) shows that the government of Kenya was registered as proprietor on 3rd December 1988 and that the plaintiff became registered proprietor on 9th September 1992. That on 7th October 2005, the parcel was transferred from the plaintiff to the 1st defendant and on 25th January 2013 it was transferred to the 2nd defendant. That on 15th March 2013, the title was closed on subdivision and issuing of new parcel numbers 20706 to 20725.

16. DW3 went on to state that in the file at Nakuru Land Registry, there is only the transfer from the 1st defendant to the 2nd defendant but no record of the transfer from the plaintiff to the 1st defendant. Further, that in regard to the transfer from the plaintiff to the 1st defendant, the registry has no consent of the Land Control Board and no documents regarding registration and payment of stamp duty. Regarding the transfer from the 1st defendant to the 2nd defendant, DW3 noted that it is dated 26th January 2013, was received for registration on 25th January 2013 and was registered on 25th October 2012. The date of attestation of the transferor's and transferee's signature is not indicated. DW3 further stated that he did not have any document showing if the original title in the name of the plaintiff was surrendered to the registry.

17. DW3 further stated that the consideration was not indicated in the transfer from the 1st defendant to the 2nd defendant and that normally, the land registrar assesses the stamp duty payable based on a valuation report. That stamp duty for the transfer from the 1st defendant to the 2nd defendant was assessed at KShs 3,000. That there is no valuation report in respect of the transfer at the registry.

18. The 17th defendant's case was closed at that point.

19. Parties were then ordered to file and exchange submissions. The plaintiff filed submissions on 13th July 2021, the 1st and 2nd defendants on 13th September 2021 and the 17th defendant on 21st September 2021. The rest of the defendants did not file any submissions.

20. I have considered the pleadings, the evidence and the submissions of the parties. The issues that emerge for determination are whether the transfer from the plaintiff to the 1st defendant was unlawful and or fraudulent, whether the transfer from the 1st defendant to the 2nd defendant and onto the 3rd to 16th defendants was unlawful and or fraudulent and lastly whether the reliefs sought should issue.

21. Fraud is a serious allegation that has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. See Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR and John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR. Black's Law Dictionary defines fraud as follows: -

Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. ... Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.

22. Under **Section 26** of the **Land Registration Act**, the court is required to accept a certificate of title or title deed as proof of ownership. Nevertheless, a title can be nullified if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme. The section provides:

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) 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.

(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.

23. There is no dispute that the plaintiff was registered as proprietor of the parcel of land known as Kiambogo/Kiambogo Block 2/321 (Mwariki) on 9th September 1992 and a title deed issued to him on the same date under the **Registered Land Act** (repealed). It is equally not disputed that on 7th October 2005, an entry was made on the register to the effect that the 1st defendant had become the registered proprietor of the parcel and on 25th January 2013 another entry was made on the register to the effect that the 2nd defendant had become the registered proprietor. Subsequently, on 15th March 2013, the title was closed on subdivision of the parcel into new parcel numbers 20706 to 20725. Title documents in respect of the new parcels were issued in favour of the 2nd defendant who then transferred several of the parcels to the 3rd to 16th defendants.

24. The plaintiff's case is that he did not transfer the property to the 1st defendant and that the defendants acted unlawfully and fraudulently in obtaining their respective title deeds since at the time the said transactions were being registered, he was still in possession of his original title deed. He showed the court the original of his title deed. The 1st defendant has categorically denied ever acquiring the property from the plaintiff or even transferring it to the 2nd defendant. The land registrar who testified confirmed that the land registry does not have any records or documents supporting the registration of transfer from the plaintiff to the 1st defendant. The said transfer was registered on 7th October 2005, under the **Registered Land Act** (repealed). Under **Section 6 (1) (c) and (d)** of the said statute, it was mandatory that the registry maintains a parcel file containing instruments which support all entries in the register and a presentation book in which all instruments presented at the registry are recorded.

25. The 2nd defendant has suggested in his submissions that there was collusion between the plaintiff and the 1st defendant. I have not been shown any evidence of such collusion. Assuming for a moment that there was even the remotest possibility of such collusion, the 2nd defendant described himself in his testimony as a businessman engaged in selling petroleum products as well as buying and selling land. He is no novice in land sale transactions, was no doubt familiar with the perils that abound in the land market in Kenya and would certainly not approach such a transaction with “*with the alacrity of a potato dealer in Wakulima market.*” See **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**.

26. One would have expected the 2nd defendant to have conducted due diligence and in so doing would have insisted on obtaining all documentation supporting the 1st defendant's alleged acquisition of the property from the plaintiff. His failure to produce such documents in the face of the 1st defendant's denial of having acquired the property is quite telling. In saying so I bear in mind that the plaintiff and the 1st defendant are alleging a negative, that the plaintiff did not transfer and the 1st defendant did not acquire the property, and that consequently the task facing them is a difficult and almost an impossible one. In the circumstances of this case, I am persuaded that the plaintiff has sufficiently discharged the burden of proof and that pursuant to **Section 109** of the **Evidence Act**, it was incumbent upon the 2nd defendant who insists that the 1st defendant acquired the property and sold it to him, to prove that fact. See **Francis Maina Njogu v Nicolas Kiragu Ngacha [2017] eKLR**. It is certainly not enough for the 2nd defendant to incessantly dangle the very title whose root is under challenge. He must do more to establish sanctity of his title. See **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**.

27. Since no valid explanation has been offered for the non-availability of the supporting documents, I agree with the plaintiff and the 1st defendant that no such documents exist. I therefore find that the transfer from the plaintiff to the 1st defendant was both unlawful and fraudulent.

28. The foregoing finding resolves all the next issue for determination, as to whether the transfer from the 1st defendant to the 2nd defendant and onto the 3rd to 16th defendants was unlawful and or fraudulent. If the 1st defendant did not have any good title to pass, it follows that the 2nd defendant and the 3rd to 16th defendants could not get any good title. As the Court of Appeal stated in **Teresia Kamene King'oo v Harun Edward Mwangi [2019] eKLR**:

We hasten to add that any proprietary interest that Mr. Sang acquired, shall acquire or shall not acquire over the suit property, depends on whether the appellant had any legal interest and entitlement to the suit property capable of being transferred to Mr. Sang. A purchaser can only acquire a good title as that which inheres or is vested upon the vendor. This is represented by the latin maxim nemo dat quod non habet, literally meaning "no one gives what they don't have."

29. Over and above the foregoing, I note that the 2nd defendant claimed that he purchased the property from the 1st defendant through a sale agreement which was prepared in the office of Mr. Geke Advocate. He neither produced the agreement nor called the advocate to testify. In fact, he expressly stated that he had no intention of calling the advocate to testify. In those circumstances, the natural inference is that Mr Geke's evidence would be adverse to the 2nd defendant. The court stated in Teresia Kamene King'oo v Harun Edward Mwangi (supra):

... in Bukenya and Others -v- Uganda [1972] EA 549, it was stated a court may infer that the evidence of an uncalled witness would tend to be adverse. In Mann Holdings Pte Ltd and another -v- Ung Yoke Hong [2018] SGHC 69, the Singapore High Court drew adverse inference against a party who had failed to call crucial witnesses to testify. In Elgin Finedays Ltd -v- Webb 1947 AD 744, it is stated at 745:

"... it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him ..."

30. Further, there are grave inconsistencies in the documents supporting the transfer from the 1st defendant to the second defendant. The transfer is indicated as having been received for registration on 25th January 2013 and that it was registered on 25th October 2012 yet the transfer itself is dated 26th October 2012. The signatures of the transferee and transferor are not attested. I am persuaded that the transfer from the 1st defendant to the 2nd defendant and onto the 3rd to 16th defendants was both unlawful and fraudulent.

31. In view of the foregoing discourse, I am persuaded that the plaintiff has proven his case and that he is entitled to the reliefs sought. So as to enable the 17th defendant to implement the orders made, I will not extend the permanent injunction to him.

32. I therefore make the following orders:

a) A declaration is hereby issued that the plaintiff herein is entitled to Kiambogo/Kiambogo Block 2/321 (Mwariki) now subdivided into Kiambogo/Kiambogo Block 2/20706 (Mwariki), 20707, 20708, 20709, 20710, 20711, 20712, 20713, 20714, 20715, 20716, 20717, 20718, 20719, 20720, 20721, 20722, 20723, 20724 and 20725.

b) The title deeds issued to the 2nd to 16th defendants herein in respect of the parcels of land known as Kiambogo/Kiambogo Block 2/20706 (Mwariki), 20707, 20708, 20709, 20710, 20711, 20712, 20713, 20714, 20715, 20716, 20717, 20718, 20719, 20720, 20721, 20722, 20723, 20724 and 20725 are hereby cancelled.

c) 17th defendant is hereby ordered to reinstate the plaintiff herein as the rightful and registered owner of the parcel of land known as Kiambogo/Kiambogo Block 2/321 (Mwariki).

d) A permanent injunction is hereby issued restraining the 1st to 16th defendants by themselves, their agents and or servants from trespassing, charging, selling, disposing, developing and or further developing, constructing and or interfering in any way with the parcels of land known as Kiambogo/Kiambogo Block 2/321 (Mwariki) and the subsequent subdivisions known as Kiambogo/Kiambogo Block 2/20706 (Mwariki), 20707, 20708, 20709, 20710, 20711, 20712, 20713, 20714, 20715, 20716, 20717, 20718, 20719, 20720, 20721, 20722, 20723, 20724 and 20725.

e) Costs of the suit are awarded to the plaintiff and shall be borne by the 2nd defendant.

Dated, signed and delivered at Kakamega this 27th day of April 2022.

D. O. OHUNGO

JUDGE

Delivered through electronic mail in the presence of:

Court Assistant: E. Juma



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