



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 248 OF 2017

(FORMERLY NRB 106 OF 2007)

CATHERINE NJERI NGUNJIRI

CAROLINE WAMBUI NGUNJIRI

HARIT A. SHETH.....PLAINTIFFS

(in their capacity as Administrators of the Estate of Anthony Nahashon Ngunjiri)

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

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

JAMES NDIRANGU.....3RD DEFENDANT

JUDGMENT

The instant suit was commenced by way of Plaint dated 27th March 2007, by the Plaintiff who was **Anthony Nahashon Ngunjiri**. However, he passed on before the conclusion of the case and his Administrators substituted him. The Plaintiff had sought for the following orders as against the Defendants jointly and severally;

- a) *A Declaration that the Plaintiff is the bonafide registered proprietor of all that parcel of Land Known as L.R No. Ruiru East Block 1/23.*
- b) *A Declaration that the registration of the 3rd Defendant as the registered proprietor of all that parcel of land known as L.R No. Ruiru East Block 1/23 is fraudulent, illegal, null and void .*
- c) *A mandatory injunctive order directing the 2nd Defendant to cancel the Title issued to the 3rd Defendant over the suit property .*
- d) *A mandatory injunctive order directing the 2nd Defendant to rectify the Thika District Land Register to reflect the Plaintiff as registered proprietor of L.R No. Ruiru East Block 1/23.*
- e) *The 3rd Defendant, his agents, servants and or employees be permanently restrained from entering, interfering with, trespassing on , alienating ,wasting, damaging, selling , mortgaging, disposing , transferring or in any manner dealing with the suit property .*
- f) *General Damages*
- g) *Costs of this suit*
- h) *Interest on (f) an (g) above .*

It was the Plaintiff's contention that he is the bonafide registered owner of the suit property **L.R No. Ruiru East Block 1/23**, having purchased it in **1990**, at a public auction conducted by the then official receiver and interim Liquidator of **Rural Urban Credit Finance Limited**. That at the time of purchase, the suit property was charged to Rural Urban Credit Finance Limited by one **Andrew Njuguna Chebe**, the then registered proprietor and it was sold in exercise of its statutory power of sale. That pursuant to the purchase, the transfer was executed on **9th April 1990**, and the Plaintiff registered as the absolute owner and a title deed was issued on **10th April 1990**. That in **2004**, the Plaintiff conducted an official search which revealed that he was the registered owner.

Further, that by a Certificate of official search dated **16th November 2006**, the Plaintiff learnt that the suit property had been registered in the name of **James Ndiragu** allegedly in **1996**, and he lodged a caution. The Plaintiff further stated that he has never sold nor transferred the suit property and the **3rd** Defendant's registration as the proprietor is illegal and fraudulent. That the **3rd** Defendant misrepresented and/or connived with the **2nd** Defendant to defraud the Plaintiff of his bona fide and legally acquired title to the suit property.

He particularized misrepresentation and fraud by the **3rd** Defendant as:- alleging to have bought the suit property and being the bonafide owner;- purporting to have obtained the requisite consents when he had not;- presenting falsified documents to the **Thika District Land Registrar**, and obtaining a certificate of title over the suit property during subsistence of the Plaintiff's Title.

He further particularized fraud by the **2nd** Defendant as colluding with the **3rd** Defendant and changing particulars in the register without any supporting documents;- issuing a title to the **3rd** Defendant's without cancelling the Plaintiff's;- issuing two titles over the same property;- carrying out his/her work negligently and backdating the date on the green card. That the Plaintiff has suffered loss and damage.

The suit was contested and the **3rd** Defendant filed his statement of Defence on **31st October 2007**, and denied that he was at any material time the registered proprietor of the suit property. He further averred that if the suit property had been registered in his name, the same was registered without his knowledge, participation or consent. He further denied the alleged or any misrepresentation, connivance or fraud and denied that the Plaintiff suffered any loss or damage.

The **1st** & **2nd** Defendants filed their statement of Defence dated **9th November 2009**, and denied all the allegations made in the Plaint and averred that the Plaintiff presented a duly executed transfer together with the supporting documents and was registered as the proprietor of the suit property on **10th April 1990**. That on **10th June 1996**, another transfer in favour of **James Ndiragu** was presented before the **2nd** Defendant who after careful evaluation of the documents presented registered the **3rd** Defendant as the proprietor of the suit property. It was their contention that if there was any fraud, then the same was carried out by the **3rd** Defendant. They particularized fraud by the **3rd** Defendant as; preparing documents purporting to be genuine transfer documents;- forging the Plaintiff's signature;- misrepresenting that the said documents were genuine.

It was their contention that the **2nd** Defendant has no sophisticated mechanism to ascertain whether the documents presented are genuine and relies on the honesty of the members of the public. That the moment the **3rd** Defendant disowned the transaction, the **2nd** Defendant contacted the Plaintiff to have the mistake rectified and the Plaintiff has refused to be re-registered as the owner and insists on compensation. That in light of the **3rd** Defendant's denial that he is the registered owner, the **2nd** Defendant has no objection to the Plaintiff being registered as the proprietor and if the Court is to allow any damages, it is the **3rd** Defendant who ought to be condemned.

The matter proceeded by way of viva voce evidence wherein the Plaintiffs called one witness and closed their case. Despite being served with the Hearing Notice as per the Affidavit of Service dated **27th November 2020**, sworn by **Ishmael Nguringa**, the Defendants did not attend Court to defend the suit and the case therefore proceeded without their participation.

PLAINTIFFS' CASE

PW1 Catherine Njeri Ngunjiri, an Advocate of the High Court of Kenya, adopted her witness statement dated **13th October 2015**, as her evidence in Court. She further produced the bundle of documents dated **12th October 2015**, as **Exhibit 1**. It was her further evidence that there is a confession by the **3rd** Defendant vide a Replying Affidavit dated **31st January 2008**, where in he stated that he had unknowingly been registered as the proprietor of **Ruiru East Block 1/23**, whether by way of purchase or gift, transmission or whatsoever and the registration against the title was wholly without his knowledge participation or consent. That the **3rd** Defendant has always stated that he did not know the registered owner of the suit property and the pleadings by the **1st** & **2nd** Defendants indicate some sense of remorse. She urged the Court to grant her the reliefs she has sought for.

The Plaintiff thereafter, filed written submissions which the Court has carefully read and considered. The Court has also read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and finds as follows; -

It is not in doubt that though the Defendants filed their statements of Defence, they did not give evidence in Court to support their pleadings and since pleadings are not evidence, the statement of Defence remain mere allegations. The Defendants did not give evidence and thus the allegations have not been substantiated. However, the Plaintiffs still have an obligation to prove their case on the required balance of probability. See the case of **Gichinga Kibutha vs Caroline Nduku [2018] eKLR** where the Court held;

“ It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest”.

The Plaintiff sought for various orders amongst them, a Declaration that he is the bonafide owner of the suit property; that the registration of

the 3rd Defendant as the proprietor of the suit property was fraudulent and therefore the issuance of mandatory injunctive orders and the rectification of the register to reflect the Plaintiff as the registered owner of the suit property.

The suit herein was filed in the year **2007**, before the enactment of the **Land Registration Act, 2012** and any rights and interests to the suit property having been acquired before the coming into force of the **Land Registration Act**, would therefore stand to be construed under the provisions of the **Registered Land Act, Cap 300(Repealed)**. Although the **Registered Land Act** together with other Acts were repealed following the enactment of the **Land Registration Act No. 3 of 2012, Section 107** of the **Land Registration Act, 2012**, provided that any right, interest, title, power or obligation acquired, accrued or established under the repealed Acts would continue to be governed by the law applicable to it immediately prior to the commencement of the new Act.

The provisions of **Section 27 of the Registered Land Act(Repealed)** that have since been repeated under **Section 24(1) of the Land Registration Act No. 3 of 2012**, provide for the absolute ownership by a registered proprietor of any registered land in his favour.

Further **Section 28 of Cap 300 (Repealed)** provides that the Rights acquired by an owner of the parcel of land cannot be defeated except as provided by the Law.

“28 (a)The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

These provisions are repeated in **Section 25 of Land Registration Act**, which also state: -

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

Further, **Section 26 (1) of the Land Registration Act** provides for indefeasibility of the title and provides as follows; -

“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.

The Court is empowered by the provision of **Section 80 of the Land Registration Act** to order for the rectification of the Land Register, if it is satisfied that any registration was made fraudulently. See **Section 80 of the Land Registration Act, 2012**. Which provides;

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

The Court having held that the 3rd Defendant’s registration was acquired fraudulently only means that his registration has to be cancelled and given that the Deceased **Antony Nahashon Ngunjiri** is the rightful owner of the suit property, the register should be rectified to reflect the rightful position. Further having found that the deceased **Nahashon Ngunjiri** is the rightful owner of the suit property, his Estate ought to enjoy all the rights and privileges appertaining to the said ownership, and this enjoyment can only be achieved if the Court grants the mandatory injunctive orders and restraining the 3rd Defendant.

The Plaintiff had sought for General Damages, without stating General Damages for what. The Court is not satisfied that the Plaintiffs are entitled to the said general damages as none has been proved.

On the issue of costs, **Section 27 of the Civil Procedure Act** gives the Court the discretion to grant costs. Ordinarily, costs usually follow the event, unless special circumstances are presented to Court. However, none has been presented herein and the Court therefore finds that the Plaintiffs are entitled to the costs of the suit.

Having carefully read and considered the pleadings herein, the evidence adduced by the Plaintiffs and the relevant provisions of law, the Court finds and holds that the Plaintiffs have proved their case on the required standard of balance of probabilities. Consequently, the Court enters judgment for the Plaintiffs against the Defendants herein jointly and severally and grants the following orders;

- a) A Declaration be and is hereby made that the Plaintiff is the bonafide registered proprietor of all that parcel of Land Known as L.R No. Ruiru East Block 1/23.***
- b) A Declaration be and is hereby made that the registration of the 3rd Defendant as the registered proprietor of all that parcel of land known as L.R No. Ruiru East Block 1/23 is fraudulent, illegal, null and void.***
- c) A Mandatory Injunctive Order be and is hereby issued directing the 2nd Defendant to cancel the Title issued to the 3rd Defendant over the suit property.***
- d) A Mandatory Injunctive Order be and is hereby issued directing the 2nd Defendant to rectify the Thika District Land Registrar to reflect the Plaintiffs as register proprietor of L.R No. Ruiru East Block 1/23.***
- e) An order be and is hereby made restraining the 3rd Defendant, his agents, servants and or employees from entering, interfering with, trespassing on, alienating ,wasting, damaging, selling , mortgaging, disposing , transferring or in any manner dealing with the suit property .***
- f) The Plaintiff is awarded costs of the suit.***
- g) The Plaintiff is awarded interest of the costs of the suit.***

It is hereby ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 27TH DAY OF JANUARY, 2022.

L. GACHERU

JUDGE

Delivered online:

In the presence of

N/A for the 1 & 2nd Plaintiffs

Though aware of the Judgment dates.

N/A for the 1st – 3rd Defendants

Kuiyaki – Court Assistant

L. GACHERU

JUDGE