



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 46B OF 2021**

**ETHICS AND ANTI CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**SIMON THUO MUCHIRI .....DEFENDANT**

**JUDGMENT**

1. In its plaint dated 2/6/2021 and filed on 3/6/2021 the plaintiff seeks the following orders:

- a) **A declaration that the Certificate of Lease held and/or in favour of 1<sup>st</sup> Defendant in respect of Nakuru Municipality Block 7/138 was irregularly and fraudulently acquired, consequently null and void, ineffectual to confer any right, interest or title upon the 1<sup>st</sup> Defendant.**
- b) **An order for rectification of the land register by cancellation of the lease certificate of lease and all entries on the Land Register in respect to Land parcel Nakuru Municipality Block 7/138, held or made in favour of the 1<sup>st</sup> Defendant so as to restore the suit property to the PPCK.**
- c) **An order of permanent injunction against the 1<sup>st</sup> Defendant his agent, servants or assigns restraining them from leasing, transferring, charging, taking possession or in any other manner howsoever from dealing with the suit property, Nakuru Municipality Block 7/138 other than by transfer, delivery up or surrender of the same to PPCK.**
- d) **General damages for fraud.**
- e) **Costs and incidental to the suit.**
- f) **Any other or further relief the court may deem fit and just to grant.**

2. The plaintiff is a body corporate, a constitutional Commission established under the provisions of the **Ethics and Anti Corruption Commission Act No 3 of 2011**. It brought the present proceedings under the provisions of **Section 11(1) (j)** of the said Act.

3. The plaintiff joined the District Land Registrar as the 2<sup>nd</sup> defendant but subsequently withdrew the suit against him on **9/11/2021** and proceeded *ex parte* with the case against the 1<sup>st</sup> defendant who despite substituted service effected on him by leave of court vide a press advertisement dated **22/9/2021** failed to file a memorandum of appearance or defence.

4. The plaintiff's case is that at all material times the suit land, known as **Nakuru Municipality Block 7/138** situate within Nakuru County initially known as **LR NO 455/71** and measuring **1.672 acres** was part of alienated government land vested in the Managing Director of **Pyrethrum Processing Company Of Kenya** (herein PPCK) a state corporation.

5. The history of the land is given in the plaint as follows: that in or about **1957** the PPCK (then known as Pyrethrum Board of Kenya) acquired all that land known as **LR No 455/71B** from one Alfreda Frances Bell vide an agreement executed by both in the same year and the parcel was subsequently transferred to PPCK for its use as a public institution. **Parcel No 455/71** was then converted to **Nakuru Municipality Block 7/138** under the survey map registered at the Survey Of Kenya under **Folio Register No 75/60**; the plaintiff having conducted investigations discovered that the defendant wrongfully and fraudulently procured a lease over the suit property for private purposes and that the said lease was purportedly registered at the District Land Registry Nakuru on **21/12/1989**; that a certificate of lease was issued in the name of the defendant on the same day. Under the particulars of fraud the plaintiff pleaded that the defendant ought to have known that the suit property belonged to and was in the actual possession of the PPCK and that the defendant obtained the lease without the knowledge of the corporation. The plaintiff claimed that the PPCK has been in occupation of the suit land from **1957** to date and that it has currently leased the property to one Peter Kimani Kirika who is in actual occupation.

6. The plaintiff contends that the defendant's purported registration is illegal and fraudulent, null and void ab initio and can not confer any estate right or interest upon the defendant; it is further pleaded that the alleged fraudulent acquisition of the suit property for private purposes conflicted with the clearly intended public user for which the land was vested in the PPCK hence the prayers in the plaint as set out herein above.

7. As stated before, the suit proceeded *ex parte*.

8. The plaintiff called three witnesses who adopted their witness statements and gave additional oral evidence: Wilson Kibichii a qualified Surveyor and Head of the Survey Records in Survey Department of the Ministry of Lands and Physical Planning (**PW1**), Wesley Kiprono Korir an administrative officer working with the Pyrethrum Processing Company of Kenya (**PW2**) and Ephraim Shombe, an investigating officer with the Ethics and Anti-Corruption Commission (**PW3**).

9. The evidence produced by the plaintiff was quite comprehensive. **PW3** led investigation by the EACC into reports made to the plaintiff Commission to the effect that the suit land had been illegally acquired by an individual and in the process documents regarding the suit land were collected from various offices; it was then established that **Nakuru Municipality Block 7/138** was formerly **LR NO 455/71** measuring **1.672 acres**; that it was formerly owned by one Alfreda Frances Bell; that it was transferred to the PBK by Alfreda in December **1958** as per the memorandum of registration of transfer produced in evidence; that the indenture (**PExh 5**) then reflected the PBK as the new owner; that PBK had been paying land rent for the suit land and was in occupation; that a search at the Land Registry Nairobi showed that by **September 2018** the land was still registered in the name of the PBK; that **PW3** visited the suit premises and established that the PPCK have a bungalow built thereon used for housing their staff; that PBK had through several correspondences attempted to engage the Commissioner of Land's office to reverse the acquisition by the defendant; that the Minister Of Lands had written a letter acknowledging that the land was owned by the PBK and had instructed that investigations be launched into how the suit premises had been acquired by the defendant. Evidence was adduced to the effect that the defendant had never taken possession of the suit premises and that they had been leased to an individual with the PPCK collecting the rents. During the investigations the defendant could not be traced; the green card also read that the suit land is **0.029 acres** instead of the actual ground measurement of **1.672 acres**. Evidence was given that the green card now reflects one *Ranchordas Kalyanyi Abdi* as the lessee but there is no evidence or any records at the Land Registry at either Nakuru or Nairobi to show that the PBK ever transferred the suit land to any person. The evidence of the other two witnesses was corroborated the evidence of **PW3**.

10. I have considered the plaint and the evidence given by the witnesses in this case which the defendant never opposed. I have also considered that part of the plaintiff's evidence in disclosure that suggested that the suit land may have been charged to a bank which could not be verified as the said bank failed to give details during investigations by the plaintiff's officers. In this court's view a case must be determined by the evidence and between the parties actually before the court and it is the rule in our code of civil procedure that the non-joinder or misjoinder of a party or parties cannot operate to defeat a claim.

11. The plaintiff's claim is founded on fraud. "Fraud" is defined in the **Black's Law Dictionary** as:

*"a reckless misrepresentation made without justified belief in its truth to induce another person to act."*

12. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** it was stated as follows:

**"It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent on pleadings 13th Edition at page 427:**

**"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).**

**The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 Ch.D. 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice".**

13. The very fact that the suit land was eventually registered in the name of the defendant renders it possible on a balance of probabilities that he, as the beneficiary of that registration, knowingly acted to have it effected. It is clear that the title holder to the suit land was the PPCK. The memorandum of registration of transfer of lands dated **30/12/1957** and the indenture produced before court are clear evidence of this fact. The misrepresentations of the defendant led to the issuance of the purported lease and certificate of lease in his favour much to the detriment of the PPCK. In this court's view the evidence of the plaintiff is strong enough to support the claim of fraud and illegality.

14. I find that the plaintiff has established its claim against the defendant on a balance of probabilities.

15. **Section 26** of the **Land Registration Act** provides that:

**"26. (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.”

16. I therefore enter judgment in favour of the plaintiff against the defendant and I issue the following final orders:

a) A declaration is hereby issued declaring that the purported Certificate of Lease held and/or in favour of Simon Thuo Muchiri in respect of Nakuru Municipality Block 7/138 was irregularly and fraudulently acquired, and is consequently null and void, ineffectual to confer any right, interest or title upon the 1<sup>st</sup> Defendant.

b) An order that the Land Registrar Nakuru shall forthwith rectify the Land Register and cancel the purported certificate of lease issued in the name of Simon Thuo Muchiri and all entries on the Land Register in respect to Land parcel Nakuru Municipality Block 7/138, held or made in favour of Simon Thuo Muchiri so as to restore the suit property to ownership by the Pyrethrum Processing Company of Kenya.

c) An order of permanent injunction is hereby issued against Simon Thuo Muchiri, his agents, servants and/or assigns restraining them from leasing, transferring, charging, taking possession or in any other manner howsoever from dealing with the suit property: Nakuru Municipality Block 7/138 other than by transfer, delivery up or surrender of the same to Pyrethrum Processing Company Of Kenya.

d) The defendant shall bear the costs of and incidental to this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 18TH DAY OF JANUARY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU