



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 136 OF 2017**

**ALEX MURIITHI KANGANGI..... PLAINTIFF**

**VERSUS**

**EUNICE WANGIRU NGATU (Sued in her capacity as the**

**Legal Representative of the Estate of the late**

**GEOFFREY NGATU GITHETHUKI).....DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit by way of a Plaint dated and filed on 20<sup>th</sup> September, 2017 whereby he prays for judgment against the Defendant for orders: -

a. A declaration that the Award of the District Land Disputes Tribunal – Mwea Division ref no. D26D/VOL.5/137 dated 10.5.2007 and the subsequent decree issued vide Wang’uru Senior Resident Magistrate Arbitration Case No. 8 of 2007 is a nullity ab initio for want of jurisdiction and the existence of the said award and subsequent orders issued in fraudulent of the same be quashed, revoked and or set aside.

b. A declaration that the registration of the late Geoffrey Ngatu Githethuki over L.R Kirinyaga/Gathigiriri/994 was fraudulently and irregularity done and the said registration be cancelled and or revoked and the land registrar – Kirinyaga County be ordered to cancel his registration and revert the suit land in the names of the plaintiff herein.

c. An order of permanent injunction do issue against the Defendant, her servants, agents or anybody claiming over her or the late Geoffrey Ngatu Githethuki for unlawfully interfering with the Plaintiff’s quite possession and enjoyment of his proprietary rights over L.R Kirinyaga/Gathigiriri/994.

d. Costs of the suit.

2. The defendant filed her defence and counterclaim on 16<sup>th</sup> July, 2017. She prayed that the plaintiff’s suit be struck out and/or be dismissed with costs.

3. In her counterclaim she made the following prayers: -

a. Order the eviction of the plaintiff in L.R TITLE NO. KIRINYAGA/GATHIGIRIRI/994.

b. That the O.C.S Wang’uru Police Station do supervise the demolition of any building belonging to the plaintiff on in L.R TITLE NO. KIRINYAGA/GATHIGIRIRI/994 during eviction.

c. The plaintiff be condemned to pay the costs of the suit, counterclaim as well as costs of eviction.

4. Later, the plaintiff filed a reply to defence and defence to counterclaim dated 1<sup>st</sup> November, 2017, whereby he prayed that the counterclaim be dismissed with costs.

**PLAINTIFF’S CASE AND SUBMISSIONS**

5. The Plaintiff called two witnesses, the Court Administrator of Wang’uru Law Courts who was PW2 and his father who was PW3. He produced the documents listed in his list of documents dated 20<sup>th</sup> September, 2017 and further list of documents dated 11<sup>th</sup> March, 2019.

6. The Plaintiff's case is that he was the registered proprietor of Land Parcel no. Kirinyaga/Gathigiriri/994 having purchased it from the Defendant's father for a valuable consideration of Kshs. 81,000 and has been living thereon ever since.
7. That the Defendant's father filed a reference at the District Land Dispute Tribunal Mwea and an award was made in his favor that the suit land be transferred to him and was adopted as judgment of the court on 10.5.2007 and a decree was issued thereof.
8. The plaintiff was aggrieved by the said award and appealed against it vide Provincial Appeals Tribunal – Central Province Appeal Case No. 9 of 2007 which overturned the award on 3.12.2008.
9. The Defendant's father made an application dated 18.11.2010 asking the Honourable Court to effect transfer of the suit land in his favour notwithstanding the fact that the award had been overturned, however the Honourable Court dismissed it.
10. The Defendant's father used fraudulent means to have the title cancelled by the land registrar and secured registration on 7.4.2009 and on 14.4.2011 he was issued with title deed.
11. On 20.3.2012 he learnt of the fraud upon being served with an affidavit dated 8.3.2012 whereby he had attached copies of the title deed and search certificate, in respect to Embu Misc. Application 185 of 2011 whereby he sought leave to appeal against the orders dated 8.2.2011 out of time.
12. On 8.2.2011, the said application was dismissed as there was no final decree and or award of the tribunal capable to be enforced in view of the award of the Provincial Land Appeal Tribunal – Central Province dated 3.12.2008.
13. He applied that the decree dated 10.5.2007 and order dated 10.2.2009 be reviewed and/ set aside and that this Honourable Court allows the prayers in the plaint as prayed.
14. In his submissions, he argued that from the decree used by the defendant's father, the same does not confer a lawful or clean title by virtue of the fact the award by the District Land Disputes Tribunal - Mwea had been set aside by the Provincial Appeals Tribunal – Central Province.
15. He submitted that the acts of the defendant's father to have the title of the suit land cancelled and the subsequent issuance of another title in his names are evidence of fraud, misrepresentation and corruption on his part and did not confer a clean title deed.
16. He submitted that section 26 of the Land Registration Act provides that a title deed may be challenged on the grounds of fraud and/ or misrepresentation or where the certificate of title was acquired illegally, un-procedurally or through a corrupt scheme.
17. He submitted that the acquisition of the suit land by the Defendant's father was tainted by fraud and the same should be revoked and be reverted to the plaintiff herein. He relied on the case of Elijah Makeri Nyamgw'ra versus Stephen Mungai Njuguna & Another (2013) e KLR.
18. On the issue of jurisdiction, he submitted that upon establishment of this court, the lower court was given jurisdiction to handle all matters which previously handled under the land disputes tribunal (repealed)
19. He submitted that he had proved his case for granting of the orders sought and that the defence and counterclaim lack merits and prayed that the same be dismissed with costs.

#### **DEFENDANT'S CASE AND SUBMISSIONS**

20. The Defendant adopted her witness statement and produced her documents as tabulated in her list of documents dated 16/10/2017.
21. The defendant's case is that her late father successfully obtained Title to L.R title No. Kirinyaga/Gathigiriri/994 after it was held that the plaintiff herein had acquired title to the suit land fraudulently.
22. She stated that she was aware that the plaintiff had attempted to overturn the orders obtained by his late father but did not succeed.
23. She stated that the plaintiff's case can only lie if he has other grounds of fraud separate from those raised before the Tribunal but failed to adduce.
24. She stated that on 17/5/2017, the Judge in ELC No. 649 of 2013 ordered that the High Court does not have jurisdiction to entertain land disputes tribunal proceedings because they had been repealed and ordered the matter to be returned to Wang'uru Law Courts.
25. She further stated that the plaintiff's cause of actions is a reversal of the High Court's order dated 17/5/2017 and a back door resurrection of ELC No. 649 of 2013.
26. She submitted that there was nothing pending regarding the suit land to warrant filing of the current suit and the Plaintiff was only attempting to convert this Honourable court as a second land disputes tribunal which cannot lie.
27. She submitted that the Plaintiff did nothing with the orders obtained at Nyeri Provincial Land Appeals Tribunal but instead sat on his

rights and thus he cannot now blame the defendant for his inaction.

28. She submitted that it is now over 12 years since the Court ordered the plaintiff's title to be cancelled and directed that he vacates the suit land for illegally occupying it.

29. She prayed that the plaintiff's suit be dismissed and the orders sought in the counter claim be allowed.

### **ANALYSIS**

30. I have considered the pleadings of the parties herein, the exhibits as well as their rival submissions.

31. The issues for determination are as follows: -

- a. Whether the defendant's title was acquired through fraud and/or misrepresentation, illegally, un-procedurally, or through a corrupt?
- b. Whether the Defendant has proved the counterclaim to the required standard
- c. Who should bear the costs.

### **WHETHER THE DEFENDANT'S TITLE WAS ACQUIRED THROUGH FRAUD AND/OR MISREPRESENTATION, ILLEGALLY, UNPROCEDURALLY, OR CORRUPT SCHEME?**

32. To succeed in a claim of fraud, the particulars of fraud have to be specifically pleaded and proved. This position was held in the case of ***Demutilla Nanyama Purumu Vs Salim Mohamed Salim [2021] e KLR*** where the Court of Appeal held as follows:

*"20. As regards the standard of proof, this Court in the case of Kinyanjui Kamau Vs George Kamau [2015] e KLR expressed itself as follows:-*

*"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo Vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."(Emphasis ours)"*

33. The burden was thus on the Plaintiff to prove on a standard higher than a balance of probability and lower than beyond reasonable doubt that indeed the appellant engaged in fraud.

34. The Plaintiff's case is that on 10<sup>th</sup> February, the Defendants father by use of fraud and through concealment of facts, knowingly and unlawfully misled the subordinate court to issue an order dated 10.2.2009 and dated 1.3.2009 which cancelled the plaintiff's title to the suit land.

35. From the evidence tendered by the parties, it is not in dispute that the plaintiff's father had bought land from the defendant's father and the plaintiff's father was issued a title deed dated 15.07.1994.

36. It is not also in dispute that the plaintiff's father took possession and proceeded to settle his family on the said land where they live to-date.

37. It is not contested that the defendant's father later filed a reference at the District Land Disputes Tribunal-Mwea being Ref. D.26/VOL. 5/137 against the plaintiff's father and the elders heard the complaint and awarded the land in dispute to Geoffrey Ngatu Githethuki the complainant therein ( defendant's father).

38. It is also not contested that the said award was later read and adopted as an order of the court and subsequently a decree was issued vide Wang'uru S.R.M Arbitration case No. 8 of 2007.

39. The Plaintiff's father was aggrieved by the said award, Adoption and decree and successfully appealed against the same to the provincial land appeals tribunal vide case NO. 9/2007 (Nyeri).

40. It is not in dispute that an award was delivered on 03/12/2007, whereby it was declared that the District Land Disputes Tribunal lacked the requisite jurisdiction to make the award and overturned the same.

41. In a surprise turn of events and through fraud and misrepresentation, the defendant's father Geoffrey Ngatu Githethuki, used the very same award and decree which had been appealed against and which was subsequently overturned to hoodwink the lower court at Wang'uru and was issued an order on 10/02/2010.

42. I agree with counsel for the plaintiff that the Decree and subsequent orders of 10/02/2009 do not confer a lawful or clean title to the

defendant's father by virtue of the fact that the Award of the District Land Disputes Tribunal- Mwea and the subsequent Decrees and orders from Wan'guru magistrate's court had been set aside by the provincial Appeals Tribunal committee- Central province vide case No. 9/2007 dated 3/12/2008.

43. I also agree with Mr. Kiguru Kahigah, learned Counsel for the plaintiff that the acts of the Defendant's father to have the plaintiff's title for land parcel NO. KIRINYAGA/GATHIGIRIRI/994 cancelled and the subsequent issuance of title in his name on 14.04.2011 which acts was against the ruling of 25.01.201 and orders of 08.02.2011 are clear evidence of fraud, misrepresentation illegality, unprocedural and corrupt scheme on his part which this court cannot countenance.

44. **Section 26(1)(a) and (b) of the Land Registration Act, 2012** gives power to the court(s) to cancel, annul or revoke a title challenged on grounds that it was acquired through fraud or misrepresentation illegality, unprocedurally, or through corrupt scheme.

45. I am satisfied that the acquisition by the defendant's father over land parcel NO. KIRINYAGA/GATHIGIRIRI/994 and the issuance of title in his name are clear acts of fraud, misrepresentation, illegality and corrupt scheme which makes it liable to be impeached. In the case of **Elijah Makeri Nyanwara Versus Stephen Mungai Njuguna & Another (2013), Justice S. Munyao** held:-

*a. "----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. For the first limb, it appears to me that the title of the 1<sup>st</sup> defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1<sup>st</sup> defendant was a party to the fraud or misrepresentation. Indeed, to me, the 1<sup>st</sup> defendant was an innocent purchaser for value. He was probably conned of his money by the 2<sup>nd</sup> defendant and that is why he is the complainant in the first count of the criminal charges facing the second defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2<sup>nd</sup> defendant. I cannot therefore impeach the title by virtue of the provisions of action 26(1)(a). Is the title impeachable by virtue of section 26(1)(b)? First, it needs to be appreciated that the vitiating factors noted therein which are that, the title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to the vitiating factors. The purpose of section 26(1) in my view is to protect the real title holder from being deprived of the title by subsequent transaction."*

46. I agree with the decision by the learned judge. Before I conclude, I have noted that the defendant is challenging the jurisdiction of this Honourable court to look into and interrogate any actions done legally or otherwise during the legal regime of the land disputes tribunal Act No. 18 of 1990(now repealed). It is my respective view that **Article 162(2)(b) of the Constitution of Kenya, 2010** established courts through parliament with equal status of the High Court to hear and determine disputes relating to the environment and the use and occupation of and title to land.

#### **WHETHER THE DEFENDANT HAS PROVED HER COUNTER-CLAIM TO THE REQUIRED STANDARD?**

Having carefully evaluated the testimony by the defendant and the documents produced as well as the submission by her counsel, I find that her counter-claim has not been proved on a balance of probabilities. The Authorities cited by her Counsel in support of the counter-claim are distinguishable and irrelevant.

47. Pursuant to that constitutional command, parliament enacted the **Environment and Land Court Act NO. 19 of 2011** which under **Section 31 thereof repealed the Land Disputes Tribunal No. 18 of 1990.**

48. **Section 30(b) of the Environment and Land Act No. 19 of 2011** provides for transitional provisions on all proceedings relating to the Environment or the use and occupation and title to land. As a result, therefore, I find that this Honourable Court is clothed with jurisdiction to determine the dispute herein and to interrogate any 'historical injustices ' and any matters which fell previously under the land Disputes Tribunal (repealed).

49. For all the reasons given hereinabove, I enter judgment for the plaintiff in the following terms;-

**a. A declaration that, the award of the District Land Disputes Tribunal- Mwea Division ref. No. D26D/VOL.5/137 dated 10.05.2007 and the subsequent Decree issued vide Wang'uru Senior Resident Magistrate Arbitration Case NO. 8 of 2007 is a Nullity ab initio for want of jurisdiction and the existence of the said Award and subsequent orders issued in fraudulence manner be and is hereby quashed, revoked, and/or set aside.**

**b. A declaration that the registration of the late Geoffrey Ngatu Githethuki over L.R. KIRINYAGA/GATHIGIRIRI/994 was fraudulent and irregularly done and the said registration be cancelled and/or revoked and the Land Registrar – Kirinyaga County be and is hereby ordered to cancel his registration and revert the suit land in the name of Alex Muriithi Kangangi, the plaintiff herein.**

**c. An order of permanent injunction do issue against the defendant, her servants or anybody claiming over her or the late Geoffrey Ngatu Githethuki or unlawfully interfering with the plaintiff's quiet possession and enjoyment of his proprietary rights over L.R. KIRINYAGA/GATHIGIRIRI/994.**

**d. The defendant's counter-claim is dismissed.**

**e. The costs of this suit and the counter-claim shall be borne by the defendant.**

JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 18TH DAY OF FEBRUARY, 2022.

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**HON. E.C. CHERONO**

**ELC JUDGE**

*In the presence of:*

1. Maina Kagio holding brief for Mr. Kahigah for Plaintiff
2. Defendant/Advocate – absent
3. Kabuta – Court clerk.