



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**ELC SUIT NO. 214 OF 2008**

**MARY ELIZABETH WANGARI ..... PLAINTIFF**

*versus*

**TIMOTHY GITONGA ..... 1<sup>ST</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR KAJIADO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a further amended plaint dated the 24<sup>th</sup> June 2005 and

filed on 27<sup>th</sup> June 2005, the plaintiff seeks relief as follows:-

- a. *A permanent injunction to issue restraining the 1<sup>st</sup> defendant, his servants or agents from entering, selling, wasting, damaging, disposing, constructing developing or in any way interfering with the plaintiff's quiet possession of land parcel No. Ngong/Ngong/8732 (subject land).*
- b. *A declaration that the plaintiff is the rightful owner of the said land parcel No. Ngong/Ngong/8732 and the 1<sup>st</sup> defendant be evicted from the premises.*
- c. *Rectification of the Register at Kajiado Land Registry cancelling the 1<sup>st</sup> defendant's title and retaining the plaintiff's title deed.*

2. In her pleadings the plaintiff stated that she is the registered proprietor of Land - Ngong/Ngong/8732 which measures 0.10 hectares. On the 8<sup>th</sup> day of October 2002 she found the 1<sup>st</sup> defendant having occupied the land. She confirmed from Kajiado Land Registry that the 1<sup>st</sup> defendant had been issued with title to the land. She stated that the purported transfer was fraudulent and illegal.

3. She particularized the fraud perpetrated as:

- i. Forging and making a land title deed in respect of the suit and presenting the same to the District Land Registrar Kajiado purporting the same to be genuine.**
- ii. Forging the plaintiff's signature in signing the transfer from the Land Control Board.**
- iii. Obtaining and filing forms for consent to transfer from the Land Control Board.**

4. In an amended statement of defence dated the 5<sup>th</sup> December 2005 the 1<sup>st</sup> defendant denied an

allegation that the plaintiff is the registered proprietor of the suit premises. He averred that he (1<sup>st</sup> defendant) is the registered proprietor of the suit premises as he holds title documents issued by the 2<sup>nd</sup> defendant. He denied the fraud insinuated. Further he stated that the plaintiff through her agents advertised the land for sale and received the purchase price which they failed to remit to her. He prayed for dismissal of the suit.

5. The 2<sup>nd</sup> defendant filed a defence dated 23<sup>rd</sup> February 2005 and denied the allegation that the plaintiff is the registered proprietor of Land parcel No. Ngong/Ngong/8733. He also denied the alleged fraud.

6. At the hearing the plaintiff, Mary Elizabeth Wangari (PW 3) stated that she bought the suit land between 1989 and 1990 and was issued with a title deed on 5<sup>th</sup> April 1990. She denied having sold the subject land or having surrendered the title to the land registry for cancellation upon transfer to a third party. In the year 2002 she intended to sell the property where by she gave a copy of her title deed to an agent Mr. Paul Mwita with instructions to sell it at Kshs.1.2 million. The agent did not get any buyer therefore returned the title deed to her.

7. Thereafter she went to the subject land to find the 1<sup>st</sup> defendant having trespassed thereon. He claimed that he purchased it from a Mary Elizabeth Wangari. She denied having sold it.

8. PW 1 Emmanuel Kenga a forensic examiner with the police received documents for examination from the DCIO, Ngong.

These included: A title deed in the name of Mary Elizabeth Wangari dated 5<sup>th</sup> April 1990; A transfer of land dated 23<sup>rd</sup> September 2002; specimen signatures of the plaintiff, Mary Elizabeth Wangari; seal impression from the Kajiado Land Registrar; and specimen signatures of the Kajiado Land Registrar.

9. On examination he found no evidence that Mary Elizabeth Wangari (Plaintiff) appended her signature on the transfer of land document. The signature appearing on the Title deed was not from the Land Registrar and the seal impression on the cancelled Title Deed was made by a different seal from the one at the Registry.

10. PW 2 Mercy Wambui from the Law Society of Kenya stated that C.M. Mureithi who purportedly witnessed the execution of the Transfer of Land by both the transferor and transferee never took out a practicing certificate since admission to the Bar in the year 1997.

11. The 1<sup>st</sup> defendant, Timothy Njuguna Gitonga stated that he saw an advertisement in the Daily Newspaper in regard to sale of land at Ngong at Kshs. 0.4 million. He called an agent, one Mwirigi and expressed his interest in the property. They arranged for a meeting and he was told that the seller was one Mary Elizabeth Wangari. Subsequently he met both the agent and seller who gave him a copy of the title deed. He carried out a search at the Land Registry and later paid Kshs.400,000. The agreement was commissioned by Mureithi Advocate. They signed the transfer documents in the presence of the said advocate. Later, the plaintiff approached him claiming to be the owner of the land. She told him that she entrusted some people to sell for her the land but they did not give her the proceeds of sale. She asked to be compensated. The matter was reported to the police where he was threatened.

12. DW 2 Josephine Nduta Gitonga stated that she participated in the process and appended her signature on the document as witness.

13. The 2<sup>nd</sup> defendant though represented by counsel called no evidence.

14. The plaintiff and both defendants filed submissions that have been taken into consideration.

15. Issues for determination:

**i. Whether there was a sale of land agreement between the plaintiff and 1<sup>st</sup> defendant.**

**ii. Whether the 1<sup>st</sup> defendant was a bonafide purchaser.**

**iii. Whether the plaintiff was the owner of the suit land.**

**iv. Whether the case is proved to the required standard.**

16. It is not in dispute that the plaintiff intended to sell the suit premises. She has confirmed that pursuant to her decision to dispose of the land she instructed an agent and entrusted him with a copy of the title deed. She expected to sell it at Kshs.1.2 million. On 16<sup>th</sup> day September of 2002, an advertisement of sale of ½ acre of land at Ngong (Muthaiga) in the sum of 0.4 million was featured in the Daily Nation Newspapers. A cell phone No. was given. No name was given therefore this court cannot tell whether the advertisement was made by “Mwirigi” the agent retained to by the plaintiff or the agents, Mwita and Murigi who allegedly eventually transacted with the 1<sup>st</sup> defendant. The plaintiff however denied having sold the land and adduced evidence of an original title deed that she possessed.

17. The 1<sup>st</sup> defendant gave a sequence of events as they purportedly happened. On the 17<sup>th</sup> September 2002 they viewed the land. He carried out a search and confirmed it belonged to the plaintiff. They went to the Advocate Mureithi who witnessed as they signed the transfer document. He paid for the registration of title on 23<sup>rd</sup> September 2002 and he was issued with the title document on the same day. He paid and the plaintiff allegedly acknowledged receipt. He was eventually issued with a letter of consent from the Land Control Board dated 4/9/2002. It was backdated.

18. First and foremost it is important to note that the 1<sup>st</sup> defendant came to know about the intention to sell the land on the 16<sup>th</sup> September 2002. It is surprising that the letter of consent from the Land Control Board is dated 4<sup>th</sup> September 2002. The Land Control Board purportedly consented to the subject land being transferred prior to the intended purchaser knowing that

It would be sold.

19. The 1<sup>st</sup> defendant alleged that there was a sale agreement they signed before the advocate. He alleged it formed part of his list of documents which was not the case. He eventually admitted not having it. There was therefore no conclusive proof of the alleged sale agreement having been executed.

20. The purported documents used in the transaction were examined by the document examiner. It was established that indeed the transfer document was not signed by the plaintiff. The title deed did not have a signature that could be identified as for the Land Registrar. The seal impression on the transfer document and the title deed was different from the impressions submitted by the Land Registrar. This means that the documents were made to make them look like the original ones with an intention of deceiving or defrauding which makes it a forgery. In their submissions the 2<sup>nd</sup> defendant denied having been accused of perpetrating the fraud.

21. It was argued that the transfer document (form) and the application for the consent and letter of consent were presented at the registry duly prepared and signed. And, that there was nothing suspicious about them to lead to their rejection therefore the transfer was effected. What they failed to appreciate was why the transfer was effected on 23.9.2002 prior to the consent from the Land Control Board being given.

22. In the case of **Elijah Makori Nyangw’ra vs Stephen Mungai Njuguna & another (2013) eKLR** the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme.

23. Evidence adduced by the plaintiff is not challenged materially. There is proof that the transfer

document used to convey the land to the 1<sup>st</sup> defendant does not bear the signature of the plaintiff. Evidence of payment made is questionable. Some two (2) withdrawal of cash vouchers dated 23<sup>rd</sup> September 2012 were produced in evidence indicating the 1<sup>st</sup> defendant withdrew Kshs.3,402 and Kshs.105,002 at 15.33 and 15.33 hours respectively from the Barclays Bank of Kenya Ltd – the Haile Selassie Avenue Branch. There is a document (defence exhibit 4) indicating that Mary Elizabeth Wangari Received Kshs.400,000 in exchange of the title deed. If this happened then it was after the cash was withdrawn from the bank at 15.33 hours. No evidence was adduced to suggest that they returned to Kajiado after the transaction. This would mean that the title deed was issued prior to the vendor receiving the sale proceeds. It is unbelievable that the transfer documents would be presented to the Land Registry on 23.9.2002 and a title deed issued on the same day without any consent being given by the Land Control Board and before the payment of the purchase price. The documents having been far from being genuine, the 1<sup>st</sup> defendant cannot be a bonafide purchaser.

24. The plaintiff has adduced evidence on a balance of probability that indeed the sale of land in issue was fraudulent. Although the 2<sup>nd</sup> defendant claims that there was no wrong doing on its part, it failed to explain how it issued a title deed without any consent from the Land Control Board. It also failed to explain how entries were made in the register of a title issued to the 1<sup>st</sup> defendant bearing seal impressions that were forged. They were to blame for having colluded with the 1<sup>st</sup> defendant in the completion of a fraudulent transaction. The registration of the title deed in the name of the 1<sup>st</sup> defendant was obtained as a result of fraud. This should be rectified. (See **section 143 (1) of the Registered Land Act (Cap 300) Laws of Kenya** (now repealed).

25. The plaintiff herein having proved the case, judgement is entered for the plaintiff as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally.

Accordingly, I issue orders as follows:

- i. The plaintiff who holds the original title deed for Title No. Ngong/Ngong/8732 be and is hereby declared as the rightful owner.**
- ii. The Register at the Kajiado Land Registry shall be rectified. The title in the name of the 1<sup>st</sup> defendant shall be cancelled.**
- iii. A permanent injunction shall issue restraining the 1<sup>st</sup> defendant, his servants and agent from entering, selling or in any other manner interfering with the quiet possession of the subject land.**
- iv. Costs of the case shall be borne by the defendants jointly and severally.**

26. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 28<sup>TH</sup> day of JULY, 2015.**

**L. N. MUTENDE**

**JUDGE**