



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELC NO 609 OF 2017**

**NAOMI KAGURE MARAGUA.....PLAINTIFF**

**VERSUS**

**GEORGE KINUTHIA THIONGO.....1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF LANDS, THIKA.....2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiff filed her plaint dated 20/6/2017 against the Defendants for orders THAT; -

**a. A permanent injunction order against the 1<sup>st</sup> Defendant from trespassing the suit land RUIRU/RUIRU EAST BLOCK 2/1400 orders be enforced by the DCIO and OCS Juja.**

**b. The Registrar for Lands Thika to avail by reconstructing the Green Card for parcel No. RUIRU/RUIRU EAST BLOCK 2/1400 on Registry Map sheet 2 in the name of the Plaintiff.**

**c. Costs of this suit.**

**d. Any other order this Honorable Court may deem fit to grant.**

2. The Plaintiff averred that she is the registered owner of land parcel **RUIRU/RUIRU EAST BLOCK 2/1400** (*hereinafter referred to as the suit land*) having purchased it from Nyakinyua Investments Limited. That the suit land was allocated ballot No. 747 and certificate No. 05632. That she has the original title deed for the suit land and supporting documents from Nyakinyua Investment Ltd in her name.

3. The Plaintiff accused the 2<sup>nd</sup> Defendant of fraudulently issuing the 1<sup>st</sup> Defendant with a title of the suit land. She enumerated particulars of fraud to include procuring parallel registration of her property and the subsequent unlawful registration. As a result, the Plaintiff contended that the 1<sup>st</sup> Defendant's claim over the suit land contravene her right of ownership and quiet possession hence this suit.

4. The 1<sup>st</sup> Defendant filed her statement of defence dated 26/7/2017. He denied the Plaintiff's claim and insisted that he is the legal and rightful owner of the suit land. That he lawfully purchased the suit land from the then registered owner, **Peris Wairimu Kabiru** on 12/6/2010. That prior to the purchase, he conducted due diligence and paid the purchase price of **Kshs. 375,000/=**.

5. The 2<sup>nd</sup> and 4<sup>th</sup> Defendants filed a joint statement dated 1/8/2017. They refuted the Plaintiff's averments and put her to strict proof thereof. In paragraph 2 of the statement of defence, the 4<sup>th</sup> Defendant denied that it could be sued on behalf of the 3<sup>rd</sup> Defendant for reason that it is a defunct office.

6. The Plaintiff called two witnesses. The Plaintiff, Naomi Kagure Maragua testified as **PW1**. She relied on her witness statement dated 8/7/2019 that was adopted as her evidence in chief. PW1 produced the documents contained in her List of Documents dated 20/6/2017 as Pexh.1-6 alongside her original title deed. It was her evidence that she was registered as the proprietor of the suit land in 1988. That she has been in occupation of the suit land and carrying out farming activities until the year 2019 when the 1<sup>st</sup> Defendant started laying claims over

the land.

7. Further, PW1 testified that her investigations revealed that the 1<sup>st</sup> Defendant had obtained a false title of the suit land. That the Registry Index Map (RIM) of the 1<sup>st</sup> Defendant's alleged plot is map sheet No. 3 whereas the suit land is contained in map sheet No. 2. She urged the Court to restrain the 1<sup>st</sup> Defendant's actions that included harassment through the Directorate of Criminal Investigations Office (DCIO) Juja Police Station.

8. On **cross-examination**, PW1 was emphatic that she legally purchased the suit land in 1988 from Jane Wanjiku Ngugi. She did not have a sale agreement to that effect and neither obtained any Land Control Board (LCB) consent thereto. Moreover, she did not present the transfer forms for the transaction in Court. PW1 also conceded that Jane Wanjiku did not have a title deed for the suit land at the time of the alleged purchase. That Jane was a member of Nyakinyua Investment Ltd and had an original ballot but the same was not presented in Court.

9. It was noted that Pexh.4 being alleged payment receipts were missing. Tasked to explain the issue of the clearance certificate dated 21/2/2017 against her assertion that she purchased the suit land in 1988, PW1 said the first clearance certificate got lost and she replaced it in 2017. This is despite the fact that her title deed was issued in 1988.

10. On re-examination, PW1 clarified that she did not see the need to call Jane Wanjiku, the alleged seller as her witness. Notably she stated that Jane did not convey the land to her by way of transfer but she was directly registered by Nyakinyua Investment Ltd.

11. Ruth Wanjiru Muchira, the Land Surveyor took the stand as PW2. She produced RIM for Ruiru/Ruiru East Block 2 Sheet No. 2 as P.Exh.7 and Sheet No.3 as Pexh. 8. She informed the Court that she conducted a search on the suit land and confirmed it is on sheet No. 2. On cross-examination, she confirmed that the suit land is on sheet No. 2 and not sheet No. 3. That a title can only exist in one RIM and not two.

12. The 1<sup>st</sup> Defendant George Kinuthia Thiong'o testified and relied on his witness statement dated 16/8/2019 and produced the documents listed in the List of Documents of even date as Dexh.1 -10. He stated that he lawfully purchased the suit land from Peris Wairimu Kabiru in 2010 who was the then registered owner. That he conducted due diligence before the said transaction and satisfied himself of its legality. That he paid the full consideration price of Kshs. 350,000/=, obtained LCB consent and ultimately became registered as the owner of the suit land and eventually was issued with title deed on 2/11/2010.

13. On **cross-exam**, DW1 confirmed that the suit land belonged to him. He said he did not enlist the services of a surveyor in the purchase transaction but maintained that his land is on sheet No. 2. He was ardent that he conducted an official search over the suit land before purchasing it and confirmed it belonged to Peris. However, he did not present the alleged official search to that effect.

14. DW2 was Robert Mugendi Mbuba, the Land Registrar based at Ruiru Lands Registry. His witness statement dated 19/10/2021 was adopted as evidence in chief and he produced documents contained in the List of Documents of even date as Dexh. 11-29. A copy of the green card of the suit land was also produced as Dexh. 30. He admitted that though the land is on sheet No 2, the green card erroneously indicates sheet No 3 which in his opinion is an error that is rectifiable on application by the land owner.

15. DW2 expounded that any discrepancy in the sheets, did not affect ownership of the suit land. That according to the Registry records, there was only one title in the green card. That there was no green card for the title issued in 1988. Therefore, it was his testimony that the records showed that the suit land belonged to the 1<sup>st</sup> Defendant. He narrated the history of the title as initially belonging to Jane Wambui Njoroge who transferred to Peris Wairimu Kabiru and later on to DW1.

16. The defence case was closed at that point. Parties elected to file their written submissions. The Court record contains the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' submissions only.

17. They invited the Court to determine who the bona fide registered of the suit land is. It was submitted that in the instant case where there are two parallel titles, a title deed is not the conclusive evidence of proprietorship as was held in the CoA case of **Munyu Maina v Hiram Gathika Maina [2013] eKLR** and **Hubert L. Martin 2 Others v Margaret J. Kamar & 5 others [2016] eKLR**. That it was upon the rival parties to establish the root of their respective titles. According to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, the Plaintiff had failed to prove the origin of her title because she did not have a sale agreement and LCB consent in support of her impugned transfer.

18. Besides, it was pointed out that the Plaintiff's clearance certificate dated 21/7/2017 (P. Exh. 3) directed the Land Registrar to issue a title deed in favor of Jane Wanjiku Ngugi yet the Plaintiffs' deed was allegedly issued in 1988. They submitted that the 1<sup>st</sup> Defendant has successfully proven the root of his title and urged the Court to find in his favor and dismiss the Plaintiff's suit with costs. Reliance was placed on the case of **James Njoroge Gitau v Lucy Chepkurui Kimutai [2018] eKLR**.

19. The germane issue for determination is whether the Plaintiff has proven her claim to warrant the prayers sought.

20. It is trite that he who alleges must prove. The balance of proof in civil cases is on a balance of probabilities. See sections 107, 108 and 109 of the Evidence Act.

21. Moreover, **Section 26** of the Land Registration Act (LRA) 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.”**

22. Similarly, **Article 40** of the Constitution of Kenya (CoK) affords every person the protection of the right to own property. However, that right is not absolute because the protections under **Article 40(6)** do not extend to any property that has been found to have been unlawfully acquired.

23. The Plaintiff contended that she is the registered owner of the suit land having purchased the same from Jane Wanjiku Ngugi. She admitted that the said Jane Ngugi did not have a title but was given copies of receipts, share certificate, ballot and clearance certificate. She informed the Court that she did not produce the ballot in Court. The share certificate No 05632 in the name of Jane Wanjiku Ngugi has no link with the suit land. Interalia, the receipt dated the 11/5/1979 in the name of the said Jane Wanjiku Ngugi does not indicate the number of the suit land leaving doubt as to the nexus between it and the suit land. The witness admitted all these gaps in her evidence in Court.

24. While under intense cross examination by Mr Oyicho, the Learned Counsel representing the 1<sup>st</sup> Defendant, the Plaintiff stated as follows;

**“ ... I am the registered owner of the suit land. I bought it from Jane Wanjiku Ngugi. I do not have any agreement for sale between myself and Jane Wanjiku Ngugi. ... I did not obtain Land Control Board consent... I do not have a duly executed transfer in Court... Jane did not have any title to the land at the time I bought the land... She had an original ballot but I did not file the same in Court...Jane did not transfer the land to me. I was registered directly by Nyakinyua Investments Limited”.**

25. I have seen the clearance certificate dated the 21/2/2017 allegedly issued by Nyakinyua Investments Limited to the said Jane Wanjiku Ngugi purporting to confirm that the said Jane was the owner of the suit land. The title of the Plaintiff was issued on the 26/8/1988. The Land Registrar in his testimony informed the Court that before a title emanating from the land buying company is registered the following must be submitted; original clearance certificate confirming that the presenter is the rightful owner of the land; original share certificate; certified copy of the PIN of the owner. When asked to explain this anomaly the Plaintiff had a feeble answer which was that the original clearance certificate got lost and she sought a new one. The Court is not convinced. The natural explanation is that there was no clearance certificate from Nyakinyua Investment Limited because the land did not belong to the said Jane Wanjiku Ngugi at that time or at all.

26. I have examined the green card of the suit land which shows that the land was registered in the name of the Government of Kenya on the 22/4/92; Jane Wambui Njoroge on the 22/4/92; Peris Wairimu Kabiru on the 26/10/99 and finally, George Kinuthia Thiongo on the 25/10/10. It was the 1<sup>st</sup> Defendants case that he purchased the land from Peris Wairimu Kabiru. He led evidence and produced documentary evidence to wit; the agreement for sale, transfer, title in the name of Peris and land control board consent. Of importance is the letter dated the 20/7/99 from Nyakinyua Investments Limited indicating that the owner of the land is Jane Wambui Njoroge vide entry No 2 on the green card as the 2<sup>nd</sup> proprietor of the suit land.

27. From the details shown in the green card the root of the title of the suit land is explained by the 1<sup>st</sup> Defendant.

28. The next issue is whether the suit land is on RIM sheet No 2 or 3. It was the Plaintiff's case that the 2<sup>nd</sup> -4<sup>th</sup> Defendants fraudulently procured parallel registration of the Plaintiff's land in the name of the 1<sup>st</sup> Defendant. PW2 testified and informed the Court that the suit land is on RIM Sheet No 2 and not 3. That a parcel of land can only appear on one RIM and not on both. To answer this question, the land Register who testified as DW2 stated that;

**“There is only one green card in respect to the suit land which was opened in 1992. ... The land being on sheet No 3 and not No 2 is an error which can be rectified by the survey office and the Land Registrar upon being supplied with the rectified blue print of RIM. Thereafter the current registered owner will be required to bring the title for rectification. The discrepancy in the sheet number does not affect the ownership of the land.”**

29. I have looked at the Green card which indicates that the land is on RIM sheet No 3. The Court has no reason to disbelief PW2 and DW2 who have confirmed that there is a rectifiable error on the green card.

30. As rightly submitted by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, whereas Section 26 of the LRA above affirms the rights of a registered proprietor, the Plaintiff was bound to highlight the root of her title. See the Court of Appeal case of **Munyu Maina v Hiram Gathiha Maina [2013]eKLR** that in proving ownership of land, the registered proprietor must go beyond the instrument and proof the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. So that it is not enough for the Plaintiff to produce a copy of certificate of title only without showing its genesis. The case of **Munyu** was cited with approval in recently in the CoA case of **Daniel Kiragu Kinyua v Consolata Kipsoi [2020] eKLR**.

31. The Court of Appeal in **Kinyanjui Kamau vs. George Kamau (2015) eKLR** held that any allegations of fraud must be pleaded and strictly proved. That in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. It is also accepted that the standard of proving fraud is higher than on a balance of probabilities but not beyond reasonable doubt. The Plaintiff did not proffer any evidence to support her fraudulent allegations.

32. On the other hand, the 1<sup>st</sup> Defendant has defended the origin of his title in opposing the Plaintiff's claim. DW2's evidence and by extension submissions by 3<sup>rd</sup> and 4<sup>th</sup> Defendants corroborated the evidence revolving the 1<sup>st</sup> Defendant's title.

33. The totality of the Plaintiff's evidence before Court does not prove her claim on a balance of probabilities.

34. Having read and considered the pleadings, the evidence tendered at the hearing and the written submissions I have come to the conclusion that the Plaintiff has not proven her case on a balance of probabilities. The same is dismissed.

35. The Plaintiff shall pay the costs of the suit in favour of the Defendants.

36. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 28<sup>TH</sup> DAY OF MARCH, 2022 VIA**

**MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Plaintiff – Kimani

Defendant 1 – Oyucho

Defendant 2, 3 & 4 - Absent

Phyllis – Court Assistant