



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NO 217 OF 2005**

**DANSON MUGO MACHARIA.....PLAINTIFF**

**VERSUS**

**LILIAN WAMBUI KAMAU.....1<sup>ST</sup> DEFENDANT**

**JOHN MAINA KAMAU .....2<sup>ND</sup> DEFENDANT**

**SARAFINA WANJIRU KAMAU ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiff vide a plaint dated 4<sup>th</sup> February 2005 filed the instant suit inter alia praying for the following orders:-

- a. A declaration that the plaintiff is the absolute proprietor of the said parcel **Loc.2/Makomboki/658**.
- b. Eviction order.
- c. Order for vacant possession.
- d. Permanent injunction restraining the Defendants and/or the Defendant's agents and/or servants from trespassing and/or harvesting and/or destroying the plaintiffs tea and/or trees.
- e. Costs of the suit.

The Defendants filed an amended defence and counter claim dated 26<sup>th</sup> September 2011 in which they contend the transfer to the plaintiff was fraudulent and did not pass any legal interest to the plaintiff and was at any rate subject to the 2<sup>nd</sup> Defendant's proprietary rights that had accrued to the 2<sup>nd</sup> Defendant by the time of the transfer of the parcel of land to the plaintiff. The Defendants seek a revocation of the title registered in the plaintiff's name.

The parties to this suit filed their respective witness statements and bundles of documents in compliance with order 11 of the Civil Procedure rules and the suit was set down for hearing before me on 8<sup>th</sup> July 2013 when one Samuel Gathogo Macharia a brother of the plaintiff testified on behalf of the plaintiff by virtue of a power of attorney that the plaintiff had donated to him. John Maina Kamau the 2<sup>nd</sup> Defendant testified on behalf of himself and the other two defendants.

The evidence adduced on the part of the plaintiff is to the effect that **Pw1 Samuel Gathogo Macharia** acted on behalf of his brother **Danson Mugo Macharia** who is resident in the United States of America during the purchase of title **Loc.2/Makomboki/658** and that he carried out all the negotiations with the

registered proprietor of the parcel of land. The witness testified that his brother had given him a power of attorney to represent him. **Pw1** testified that he conducted a search on the title before the purchase and the search did not disclose any encumbrances on the title and at the time of the purchase he was not aware that there was any dispute touching on the suit land. The witness produced the plaintiffs bundle of documents which were marked as **PEX2** and included

- i. A duly certified abstract of title for **Loc.2 Makomboki/658**.
- ii. Certificate of official search in respect of title **Loc.2 Makomboki/658** as at 26/4/2004.
- iii. Copy of Title Deed Title **Loc.2 Makomboki/658** dated 13/3/2002.
- iv. Copy Transfer dated 12/3/2002 registered on 13/3/2002.
- v. Copy of Land Board consent from **Henry Kamau Kahora** to **Danson Mugo Macharia** dated 12/3/2002.
- vi. Land Board application for consent dated 6/3/2002.

**Pw1** testified that at the time of the purchase the suit land was free and was not occupied but there were tea bushes which were comprised in the purchase. The witness testified that even at the present moment the suit land is unoccupied but the Defendants continue to pluck the tea and that the plaintiff has filed this suit seeking orders of the court that the suit land belongs to him and for orders restraining the Defendants from using the suit land. The witness confirmed having visited the property before purchase and that he witnessed there were tea bushes on the property. The plaintiff stated there is a physical boundary for the suit land and contended that the transaction was not fraudulent as alleged by the Defendants. **Pw1** testified that he knew **Henry Kamau Kahora** as the owner of the suit land and he dealt with him as such and that he was not aware there was any dispute between the said **Henry Kamau Kahora and Kamau Kahora**. He denied any knowledge of the case between **Henry Kamau Kahora** and **Kamau Kahora** before the land disputes Tribunal and at the Thika chief Magistrate's court.

The 2<sup>nd</sup> Defendant **John Maina Kamau** testified on behalf of himself and the other two defendants. The witness relied on his witness statement dated 20<sup>th</sup> September 2011 filed in court on 23/11/2011 and adopted the contents as his evidence in chief. This witness evidence was to the effect that on or about 1996 his elder brother one **Joseph Kahora Kamau** conspired with his family members and illegally and unlawfully acquired their father's land parcels and that his said brother through fraudulent means transferred parcel numbers **Loc.2/Makomboki/500** and **Loc 2/Makomboki/658** which belonged to their father one **Kamau Kahora** who was registered as owner on 25<sup>th</sup> September 1997 as per the abstract of title. The witness stated their father had no idea what was going on and when he became aware the father referred the matter to Kigumo Land Disputes Tribunal which after hearing the matter ruled that the transfer had been fraudulently procured and directed the property to be retransferred to **Kamau Kahora**.

An appeal against the decision of the Kigumo Land dispute Tribunal to the Provincial Land Dispute appeals committee in Nyeri was unsuccessful and the decision of the Kigumo Land dispute Tribunal was upheld. The witness further testified that the Chief Magistrate's court at Thika on 16/10/2001 issued an order requiring **Henry Kamau Kahora** to transfer Land parcels **NO. Loc 2/Makomboki/500** and 658 to **Kamau Kahora** but claims that before this order could be given effect to the said **Henry Kamau Kahora** fraudulently sold and transferred Land parcel **Loc 2/Makomboki/658** to the plaintiff for the consideration of Kshs.600,000/-.

In his oral testimony in court the 2<sup>nd</sup> Defendant stated that the suit land was given to him by his father and that he has been in occupation since the late 1980's and that he had built a house thereon but the house was burnt down while he was working in Mombasa. The witness stated he has a small temporary house on the suit land and that he continues to use the parcel of land and contended that the parcel of land was fraudulently transferred to **Henry Kamau Kahora** and consequently the transfer to the plaintiff was ineffectual and no interest could have passed. The Defendant produced in evidence a bundle of documents as follows:-

- i. Court order from Thika CM's court marked D EXI.

ii. Abstract of Title marked DEX2.

iii. Provincial Land Dispute Appeals Committee Central Province of May 2001 marked DEX3.

The Plaintiff and Defendants filed written submissions on 23<sup>rd</sup> July 2013 and 8<sup>th</sup> August 2013 respectively. The Plaintiff in his submissions contended that he validly purchased the suit land from one Henry **Kamau Kahora** after ascertaining the later was the registered owner and that all the necessary legal process for acquiring the property were observed. The Plaintiff submitted that at the time of purchase, the suit land had no encumbrances registered against the title to prevent the sale and transfer from taking effect. The Plaintiff further submitted that following the sale he was registered as the absolute proprietor of title no. LOC 22/**Makomboki/658** and that he acquired an indefeasible title under the provisions of the land Registration Act NO. 3 of 2012. The Plaintiff contends that the Defendants claim that the plaintiff acquired the suit property fraudulently has no basis in the face of the documentary evidence that the suit land had been transferred as a gift by **Kamau Kahora** to **Henry Kamau Kahora** as a gift and avers that the Defendants contention lacks any merit and should be dismissed.

The Defendants have submitted that the plaintiff did not acquire a good title from Henry **Kamau Kahora** stating that the transfer to the Plaintiff was procured fraudulently. The Defendants submit that **Joseph Kahora Kamau** in collusion with his son **Henry Kamau Kahora** fraudulently transferred the suit land to Henry **Kamau Kahora** on 25<sup>th</sup> September 1997 without the knowledge of **Kamau Kahora** who was until then the registered owner of the land.

The Defendants further submitted that the matter had been dealt with by the Kigumo Land Disputes Tribunal and the Provincial Land Dispute Appeal Committee Nyeri following a reference by **Kamau Kahora** which ruled that the suit land had been fraudulently transferred to **Henry Kamau Kahora**. The Defendants submit that the Provincial Land Dispute Appeal committee upheld the Kigumo Land Disputes Tribunal that had decided that the suit land should be transferred back to **Kamau Kahora** as per its decision of 10<sup>th</sup> May 2001 which was endorsed by the Senior Principal Magistrate's court Thika on 16<sup>th</sup> October 2001. The Defendants thus submit by reason of these findings the claim that the Land was transferred to **Henry Kamau Kahora** by the late **Kamau Kahora** cannot hold and the Defendants further submit that the dispute relating to the suit land was common knowledge in the locality and that the plaintiff ought to have known if he had exercised and/or carried out any due diligence.

The 2<sup>nd</sup> Defendant further submits he has been in actual occupation of the suit land where he has been farming and has tea bushes and other crops and contends that his rights and interest over the parcel of land had crystallized into a registrable right and hence the plaintiff's acquisition thereof was subject to the 2<sup>nd</sup> Defendant's proprietary rights in terms of section 30(g) of the Registered Land Act (now referred). The Defendants have referred the court to the decision by **Hon. Justice Martha Koome** in the case of **JANE WANJIRU KIARIE & ANOTHER Nakuru High Court Civil case NO. 259 of 2002** to support their submission that their occupation of the suit land would constitute an overriding interest which would not require any noting in the register and in support of their averment that the transfer to the plaintiff was subject to their accrued proprietary rights over the subject parcel of land.

I have broadly set put the rival positions of the plaintiff and the Defendants and the facts in support of each of the positions. The parties did not file any set of agreed issues but the plaintiff on 25<sup>th</sup> March 2008 framed the following issues:-

1. Is the plaintiff the absolute proprietor of parcel **Loc.2/Makamboki/658**?
2. Have the Defendants raised any basis for the counter claim?
3. Is the plaintiff entitled to orders sought in this matter?

The Defendants did not file any set of issues. Having regard to the pleadings and the evidence by the parties the court frames the issues for determination as follows:-

- i. Whether the 2<sup>nd</sup> Defendant has a proprietary interest/right to title NO.**Loc.2/Makomboki/658**.
- ii. Whether the Defendant has a proprietary interest/right to title NO.**LOC.2/Makomboki/658**.

- iii. Whether the plaintiff is entitled to a declaration that he is the absolute proprietor of title **NO.LOC.2/Makomboki/658**.
- iv. Whether the previous registered owner of title **NO. LOC.2/Makomboki/658** was estopped by reason of the 2<sup>nd</sup> Defendant's acquired proprietary rights (if any) to the parcel of land from making the transfer to the plaintiff and if the transfer to the plaintiff was thus subject to the 2<sup>nd</sup> Defendants rights.

I have considered the evidence adduced in this matter and firstly I wish to deal with the issue of the reference to the Kigumo Land Disputes Tribunal and the Provincial Land Disputes Appeals Committee. The 2<sup>nd</sup> Defendant relied on the decision by Provincial Land Disputes Appeals Committee to buttress his claim that Henry **Kamau Kahora** was directed to retransfer the suit land to **Kamau Kahora**. The proceedings before the Provincial Land Dispute Appeals Committee and award given on 10<sup>th</sup> May 2001 was tendered in evidence by the 2<sup>nd</sup> Defendant and it is clear and evident that the parcels of land that were in dispute were **Loc.2/MAKOMBOKI/686** and **Loc.2/MKOMBOKI/500**. These are the ones that were ordered to be retransferred to **KAMAU KAHORA** and is not the suit land **Loc.2/MAKOMBOKI/658**. It is unclear how the Chief Magistrate's court at Thika in D.O. case NO. 103/2000 got the Land Reference **Loc.2/MAKOMBOKI/658** to be included in the order in place of **Loc.2/MAKOMBOKI/686** which was in the award from the Provincial Land Dispute Appeals Committee of 10<sup>th</sup> may 2001.

From the Abstract of Title produced in evidence **Kamau Kahora 'A'** was on 27/7/62 registered as proprietor of title **NO. LOC.2/Makomboki/74 measuring 11.01 Hectrares** but which was subdivided into parcel NOS.498, 499,500,501,502,503 and 504. Parcel 504 was subdivided on 25/5/90 and parcel **NO.LOC.2/MAKOMBOKI 658 measuring 1.214 Hectares** was created out it and this parcel as per the abstract of title was transferred to **Henry Kamau Kahora** by **Kamau Kahora** as a gift on 25/9/97. It is this parcel that the said **Henry Kamau Kahora** sold and transferred to **Danson Mugo Macharia**, the plaintiff herein for the consideration of Kshs.600,000/- and the plaintiff was registered as absolute proprietor on 13/3/2000 and was issued with a title deed.

At the time the Plaintiff purchased the suit property the same was registered in the name of **Henry Kamau Kahora** and in the absence of any restriction registered against the title there was nothing to prevent the transaction from taking place. The transaction was consented to by the relevant Land Control Board and the transfer duly registered and the plaintiff issued with a title deed whereupon the plaintiff became the absolute proprietor of the suit property. No evidence has been tendered to demonstrate there was any fraud in regard to the transfer to the plaintiff and/or to demonstrate that the plaintiff was party to any fraud as relates to the transaction. The plaintiff by all accounts appears to have been an innocent purchaser for value without any notice of any defect in the title and having been registered as owner is entitled to enjoy the rights and privileges of ownership.

The plaintiff in his evidence stated that before he purchased the land he visited the land and there were tea bushes which were comprised in the purchase. There is no inconsistency in that since a sale and transfer of land includes and goes with whatever is attached and/or embedded to the soil. The plaintiff however states that the Defendants refused and/or failed to cease plucking the tea giving rise to the institution of this suit. The Plaintiff testified that no one lives on the parcel of land. The 2<sup>nd</sup> Defendant testified that he had built on the land but the house was burnt while he was away and that he has reconstructed a temporary house. I accept the plaintiffs evidence that no one lives on the property and hold that even if there is a temporary structure on the property as claimed by the Plaintiff (and there is no evidence) it can only be for shelter when people are working on the land.

The Land Registry records show that Henry **Kamau Kahora** was the registered absolute proprietor of the suit property when he sold it to the plaintiff and in law he was entitled to deal with the property in whatever manner he pleased. The Land Disputes Tribunal to the extent that the Disputes would related to title to land have had no jurisdiction to deal with the matter and any findings and/or award rendered would have been a nullity. In the premises it is my holding and finding that no fraud has been established to vitiate the transfer to the plaintiff and therefore hold that the plaintiff hold the suit

property as the absolute registered proprietor and is entitled to a declaration in that regard.

There is no dispute that **Kamau Kahora** was registered in 1962 as proprietor of title NO. **LOC2/Makomboki/74** as trustee of family land then measuring 11.01 hectares and that in 1986 the same was subdivided into 7 portions presumably for distribution to the other family members. Thus it is not inconceivable that the said **Henry Kamau Kahora** could have obtained registration of the suit property which was a subdivision out of plot 504 as a gift. The 2<sup>nd</sup> Defendant claims he is in occupation and continues to harvest the tea and farm on the suit land and the plaintiff claims that the Defendants started interference after the land was transferred to him from about the month of April 2004 thus preventing the plaintiff from enjoying his rights of ownership. There is no evidence that the Defendants were using the suit land prior to the sale and transfer to the plaintiff and it is my view that in order to assert their rights and interest the Defendants and more specifically the 2<sup>nd</sup> Defendant must have determined to invade and interfere with the plaintiff's usage of the land. It is thus my finding that the Defendants use of the plaintiff's parcel of land since he got registered as the owner is unlawful and amounts to trespass onto the plaintiff's property. Section 24 (a) of the Land Registration Act NO. 3 of 2012 provides:-

**24.” Subject to this Act-**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.**

**The rights of a proprietor are provided for under section 25 (1) of the Act which provide thus:-**

**25.(1) The rights of a proprietor, whether acquired on 1<sup>st</sup> 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-**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

A certificate of title issued by the Registrar upon registration constitutes prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the property in terms of section 26 (1) of the Act and such title can only be challenged on ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.

The current section 28 of the Land Registration Act replaced section 30 of the repealed Registered Land Act (**Cap 300 Laws of Kenya**). The equivalent of section 30(g) of Cap 300 Laws of Kenya would be section 28 (h) of the Land Registration Act which provides:-

**“28(h) rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”.**

The 2<sup>nd</sup> Defendant claims that he was in occupation of the suit land at the time the plaintiff bought the same and that the plaintiff bought the land subject to the 2<sup>nd</sup> Defendant's accrued rights. I have held that there is indeed no evidence that the 2<sup>nd</sup> Defendant was in occupation prior to the time the plaintiff purchased the land and thus the 2<sup>nd</sup> Defendant cannot bring himself within the scope of the previous section 30(g) of the Registered Land Act or section 28 (h) of the Land registration Act.

It is noteworthy that the Defendants have alleged fraud on the part of **Henry Kamau Kahora** in procuring the transfer of the suit Land to himself from **Kamau Kahora** the previous registered owner. **Henry Kamau Kahora** was not enjoined in the suit and thus the allegations of fraud against him remained mere allegations. No allegations of fraud was made against the plaintiff. I am in the premises not satisfied that the 2<sup>nd</sup> Defendant has a proprietary interest in the suit property and/or that he has acquired proprietary rights to the parcel of land by reason of possession and occupation. The 2<sup>nd</sup> Defendant claims proprietary interest to land title no. **LOC2/Makomboki/504** yet this parcel of land is shown by evidence adduced by the 2<sup>nd</sup> Defendant to have been subdivided and out of which parcel NO. **LOC2/Makomboki/658** was created which means parcel NO. LOC. 2/Makomboki/504 no longer exists.

The authority **Jane Wanjiru Kiarie & Another – vs- Maria Wanjiku (supra)** which the Defendants referred the court to is clearly distinguishable from the facts and circumstances of the instant case. In that case the Defendants were in occupation and were living in the suit premises which was owned by their father but was transferred to their step mother who their father had married and she wanted them evicted from the parcel of land. Occupation and possession in that case was not in doubt and that property had been transferred to their step mother whilst they were still living on and in occupation of the land.

In the instant suit possession and occupation is not as clear and there is no evidence any of the Defendants is actually living on the suit property. Additionally in the present case the suit property was sold and transferred by the registered owner to a third party buyer for valuable consideration and the land is not within the family as in the referred to suit.

Having considered all the evidence and the circumstances of this case I am satisfied that the plaintiff has proved his case on a balance of probabilities and I enter judgment in his favour as against the Defendants. I hold and find that the Defendants have not proved their counter claim against the plaintiff and the same is dismissed with costs to the plaintiff.

**In the result I make the following orders:-**

- i. The plaintiff be and is hereby declared the absolute proprietor of land parcel **Loc.2/Makomboki/658**.
- ii. The Defendants are ordered to vacate the Land Parcel **Loc.2/Makomboki/658** forthwith failing which an eviction order to issue on application.
- iii. The costs of the suit and the counterclaim are awarded to the plaintiff.

Judgement dated and delivered at Nairobi this.....14<sup>TH</sup> .....day of....FEBRUARY.....2014

**J.M. MUTUNGU**

**JUDGE**

**In presence of:-**

.....**PLAINTIFF**

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

.....**2<sup>ND</sup> DEFENDANT**

.....**3<sup>RD</sup> DEFENDANT**