



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 311 OF 2017**

**JOHN KIBII ARAP KOSKEI.....PLAINTIFF**

**VERSUS**

**GEORGE KARIUKI KINYANJUI.....1<sup>ST</sup> DEFENDANT**

**PAMELA MUTHONI MACHARIA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated **21/07/2017** and filed in court on the same date the plaintiff sought the following orders against the defendants:-

**a) A declaratory order to the effect that the Plaintiff is the lawful proprietor of all that parcel of land known as Nakuru Municipality Block 23/620.**

**b) An order of permanent injunction restraining the Defendants from entering, being upon or in any other way interfering with the suit land.**

**c) Costs of this suit.**

**The Plaintiff's Case**

2. The plaintiff avers that he is the registered proprietor of all the parcel of land known as **Nakuru Municipality Block 23/620**, herein also referred to as the suit property, and that sometime in early **July 2017** the defendants entered into the suit property without his consent.

3. He further avers that the defendants have indicated their intention to further continue entering the suit land claiming that they own it necessitating filing of the instant suit as he has been deprived of the use and enjoyment of the suit property and has since suffered loss and damage.

**The Defendants' Defence and Counter-claim**

4. The defendants filed their defence and counterclaim dated **13/09/2017** on **20/09/2017** where they deny that the plaintiff is the registered proprietor of the suit property. They averred that they bought the suit property on **21/01/2011** from the then registered owners **Raymond Kipkorir Cheruiyot** and **Esther Chebii Cheruiyot** who had earlier purchased it from one **Peter Chepkonga Kibowen**. They further averred that the suit property was registered in their names on **23/09/2011**, that they are the lawful proprietors' and pray for an order of perpetual injunction against the plaintiff.

**The Plaintiff's Evidence**

5. The hearing of the case took place on various days the first day being **17/09/2019** where plaintiff gave his evidence. He testified that he is a farmer who resides at Kapkures, Nakuru County and that on **4/1/2008** he bought the suit property from Peter Chepkonga who showed him the Certificate of Lease at the time they met in a hotel. The plaintiff further testified that they agreed on **Ksh. 1,100,000** as the purchase price of the property and he paid a deposit of **Ksh. 600,000/=**. He produced an acknowledgement of receipt (**P. Exh. 2**). The plaintiff stated that the sale agreement (produced as **P. Exh. 3**) was dated **1/04/2008** since that was the date he paid the balance. He stated that he filled the transfer forms (**P. Exh. 4**) upon which a Certificate of Lease was issued in his name on **9/04/2008**. He produced the certificate of lease as (**P. Exh 6**). He testified that he had not developed the suit property since someone had claimed it and he had reported the matter to the CID who then obtained the green card which showed that the suit property belonged to him. He concluded by stating that the police keep harassing him over the suit property and prayed that judgment be entered in his favour as per his plaint.

6. Upon cross-examination, the plaintiff confirmed that he knows Peter Chepkonga but he is not a witness in his case. He stated that he paid

Peter Chepkonga **Ksh. 600,000/=** in cash and that the balance of the purchase price was also paid in cash from his pocket making the aggregated payment **Ksh. 1,100,000**. The plaintiff further stated that the title was processed and handed over to him by a Mr. Ombata an Advocate and that his transfer documents indicate that the consideration was **Kshs. 380,000**. He stated that he is unaware of the case **Nakuru ELC Case No. 241 of 2013** and that he had visited the suit property in **2008** which he confirmed that it is located near a school; that he does not know the school's name except that it is a private school. The plaintiff stated that he knows Raymond Cheruiyot but he was unaware that the suit property is near his home. He further stated that his transfer and that of Raymond Cheruiyot were both witnessed by Advocate Ombata and that he does not have his LCB consent. He stated that the suit property is not fenced and that since **2017** he never visited the suit property due to an existing court order and further, that he could not tell why Peter Chepkonga never gave him the original lease.

7. On re-examination, the plaintiff stated that he believed that had bought the suit property from a genuine seller and that he did not know what a stamp duty entails. He stated that he signed and made payment to the suit property before an advocate and that the Certificate of Lease was given to him by Mr. Ombata the Advocate.

8. On **27/5/2021** when the matter came up for further hearing, the plaintiff and his Advocate never attended and the plaintiff's case was closed for non-appearance after which the defendants' case proceeded.

### **The Defendant's evidence.**

9. The defendants opened their case by calling **DW1** Pamela Muthoni Macharia the 2<sup>nd</sup> defendant herein who is wife to the 1<sup>st</sup> defendant. She stated that she relies on the 1<sup>st</sup> defendant's statement dated **31/5/2021** and further produced a search document which she produced as **(DExh. 1)**. She stated that the suit property herein is known as **Nakuru Municipality Block 23/620**, located in Naka Estate and that the land is currently not occupied by anyone. That they took possession in **2011** until **2017** when they learnt that someone was selling the land. She testified that the seller was Raymond Cheruiyot who co-owned the suit property with Esther; she produced the Certificate of Lease **(DExh 2)**, the original sale agreement **(DExh 3)** dated **1/1/2011** signed by Advocate Ndungu Njuguna, a payment receipt **(DExh 4)** as well as an RTC form **(DExh 5)** dated **21/1/2011** to Raymond Cheruiyot.

10. She further testified that the sellers acknowledged receipt which they both signed and she produced an acknowledgment receipt **(DExh 6)**, transfer instrument **(DExh 7)**, application for consent to transfer **(DExh 8)** and a copy of the consent **(DExh 9)**. The 2<sup>nd</sup> defendant stated that they were then issued with the Certificate of Lease **(DExh 10)** as well as the relevant clearances from Nakuru Municipal Council and receipts of payment of rates which she produced as **(DExh 11 to DExh 14 a-g)**

11. She stated that after taking possession of the suit property they learnt in **2017** that Muigai Commercial Agencies were selling the suit land and they reported the same to CID. That the person who had sold them the land had earlier bought it from Paul Chepkonga and she produced a copy of the sale agreement dated **12/8/2003** as **(DExh 15)**. She also produced a statement **(DExh 16)** from Paul Chepkonga which, according to her testimony, she acquired through the CID and which states that he had acquired the land in **1980** and that at one time all his documents were stolen from his car including documents of title for the suit property. She stated that Paul Chepkonga is sickly and in a wheelchair and that he had testified in the criminal case against the plaintiff and he had also signed a statement dated **26/6/2021**. She concluded her testimony by stating that they are the registered owners of the suit property, produced a copy of the search certificate **(DExh 7)** and she urged the court to cancel the plaintiff's title and grant them the prayers sought in their counterclaim.

12. The defendants also called **DW2** Raymond Kipkorir Cheruiyot who testified that he is a resident at Naka Nakuru and that he is involved in the business of renting houses; that he had sworn a further affidavit on **13/9/2017** filed in court on **20/9/2017** which he adopted as his statement; that together with his wife Esther they sold the suit property to the defendants herein and they were paid the total consideration; that they had bought the suit property from Peter Chepkonga Kibowen and that no one had claimed the land at the time they were selling it. He stated that he is a witness in the criminal case which he is yet to give his testimony.

13. At that point the defendants' case was marked as closed and parties were directed to file and serve their submissions.

### **Submissions**

14. The defendants filed their submissions dated **21/01/2022** on **24/01/2022** where they raised five issues for determination. One, whether the defendants are the registered and legal owner of the suit property and whether they have demonstrated the process leading to them being the registered owners. They submit that they have demonstrated that they are the legal and registered proprietors and that they followed the due process in acquiring the title. They cited the Court of Appeal case of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**. Second issue was whether the plaintiff has demonstrated the process leading to it being issued with a certificate of lease for the suit property. Here the defendants argue that the only thing the plaintiff did was to wave a certificate of lease but failed to demonstrate how he became the registered owner. They placed reliance on the Court of Appeal case of Richard **Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others [2019] eKLR**

15. The third issue was whether the plaintiff has proved the allegation of fraud as against the defendants to the required standard. The defendants submit that there is no claim of fraud in the plaint and the plaintiff does not seek any cancellation of the title. The fourth issue for determination raised is whether the defendants' counterclaim is meritorious. The defendants in answering in the affirmative submit that they are the valid, legal and registered owners of the suit property and that the plaintiff failed to prove that he owned a valid title. The final issue for determination raised was who should bear the costs of this suit where the defendants submit that they are entitled to the costs as they have proved their case.

### **Determination**

16. Upon considering both parties pleadings, testimonies and submissions, it is this court's view that the issues that arise for determination are as follows: -

- i. Who between the plaintiff and the defendants are the lawful owners of the suit property?
- ii. Whether the plaintiff should be granted the prayers sought.
- iii. Whether the orders sought in the defendants defence and counter-claim should be granted.
- iv. Who shall bear the costs of the costs of this suit?

**Who between the plaintiff and the defendants are the lawful owners of the suit property?**

17. In determining the first issue, the plaintiff gave evidence that he is the registered proprietor of all the parcel of land known as **Nakuru Municipality Block 23/620** the suit property herein that he bought from Peter Chepkonga. He produced a certificate of lease issued on **9/04/2008**. He testified that he bought the suit property from Peter Chepkonga on **1/04/2008** and paid him the purchase price of **Ksh. 1,100,000** in two installments of **Ksh. 600,000** and **Ksh. 500,000** all in cash. He further testified that Mr. Ombati an advocate witnessed the same, processed and gave him the Certificate of lease. He stated that he was not familiar with the stamp duty. Upon cross-examination, he was unable to explain why the transfer of lease indicated **Ksh. 380,000** as the purchase price, why he did not have the original certificate of lease from Peter Chepkonga and the LCB consents. It was clear from this testimony that he was not quite certain of the location of the suit property. He never called any other witness to corroborate his testimony.

18. The defendants on the other hand went to great lengths to convince this court that they are the lawful owners of the suit property. The 2<sup>nd</sup> Defendant in a sequential order explained how they bought the suit property from Raymond Cheruiyot and his wife Esther. They produced the search certificate dated **12/5/2011** which showed that the suit property was owned by Raymond Kipkorir Cheruiyot and Esther Chebii Cheruiyot, a sale agreement dated **21/01/2011**, all the clearances certificates, RTGS receipt from Cooperative Bank for **Kshs. 2,500,000** confirming proof of payment of the purchase price from the defendants to Raymond Kipkorir Cheruiyot and Esther Chebii Cheruiyot, the certificate of lease issued to Raymond Kipkorir Cheruiyot and Esther Chebii Cheruiyot on **17/01/2008** and the defendant's certificate of lease issued on **23/09/2011**. The defendants also produced receipts of payment for the land rates they have been paying and further called **DW2**, Raymond Kipkorir who corroborated their evidence by confirming that he and his wife indeed sold the suit property to the defendants.

19. During hearing, the plaintiff confirmed that he knew Peter Chepkonga for a short period as he sold him the suit property. He also confirmed that he knew Raymond Cheruiyot since they come from the same home area Kaplong. The court notes that the plaintiff intended to call the Land Registrar to testify but despite summons being issued, the Land Registrar never gave evidence. The plaintiff was also not keen in following up his case as both himself and his advocate failed to attend the defence hearing forcing the court to close his case in their absence.

20. Both the plaintiff and the defendants claim ownership to the suit property and they have all presented to this court Certificates of Lease for the suit property issued on various dates. The court notes that Peter Chepkonga Kibowen's lease was issued on **11/10/2007**, plaintiff's Certificate of Lease issued on **9/04/2008** while Raymond Kipkorir Cheruiyot and Esther Chebii Cheruiyot Certificate of Lease was issued on **17/01/2008**. It is quite ironical that the plaintiff's Certificate of Lease was issued almost four months after a similar document was issued to Raymond Kipkorir Cheruiyot and Esther Chebii Cheruiyot yet the plaintiff testified that he bought the land from Peter Chepkonga. He never gave evidence to show that he had bought the suit property from Raymond Kipkorir Cheruiyot and Esther Chebii Cheruiyot and not Peter Chepkonga yet Raymond Kipkorir Cheruiyot and Esther Chebii Cheruiyot's Certificate of Lease was issued before the plaintiff's. The plaintiff never conducted an official search to the suit property prior to purchasing it; if he had, he would have established that the suit property was owned by Raymond Kipkorir Cheruiyot and Esther Chebii Cheruiyot and not Peter Chepkonga.

21. The plaintiff told this court that his transfer and that of Raymond Kipkorir Cheruiyot and Esther Chebii Cheruiyot were both witnessed by Mr. Ombati Advocate, however, upon looking at Raymond Kipkorir Cheruiyot and Esther Chebii Cheruiyot's documents, it is clear that their transfer was witnessed by one Mr. Njuguna J Ndung'u Advocate. The plaintiff produced evidence that he entered into a sale agreement with Peter Chepkonga on **1/04/2008** and paid the balance of the purchase price in cash and he was issued with his Certificate of Lease on **9/04/2008**. This clearly raises question marks on how his Certificate of Lease could have been issued on **9/04/2008** within a record span of **8 days** yet it is well known that the land buying process does not take that short of time from signing of the sale agreement to handing over of completion documents. Further, one can not find the plaintiff's evidence credible when he states that he paid consideration comprising of such a colossal sum in cash. Payment was therefore not proved.

22. From the above it is this court's view that the plaintiff's case is clearly marked with many indicators showing that the transaction for the purchase of the suit property by the plaintiff was suspect. The chronology of his testimony was riddled with a lot of inconsistencies, from the procedure through which he came to acquire the suit property to the documentary evidence produced, which all point to an illegality. It is clear to see that the plaintiff has not established that he obtained his certificate of lease document through the right procedures. It is this court's opinion that even though the plaintiff may hold a Certificate of Lease to the suit property he has failed to convince this court how he acquired the suit property.

23. The position of the holder of a title deed over a parcel of land is well stated under **Section 26(1) of the Land Registration Act** which provides that:

***"...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***

**b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” [Emphasis mine]**

24. In the case of **Daudi Kiptugen v Commissioner of Lands & 4 Others (2015) eKLR** the court held as follows:

**“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate through evidence that the Lease or Certificate of Lease that he holds was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title at a backyard or the corner of a dingy street and by virtue thereof claim to the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name [Emphasis mine] and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”**

25. It is worthwhile to note that the defendants’ evidence was never controverted by the plaintiff and this court is inclined to rely on their evidence as it was unshaken. The defendant through **DW2** testified that together with his wife bought the land from Peter Chepkonga and sold it to the defendants herein who took possession to date. It is also clear that from the plaintiff’s testimony, he has never been on the suit property and does not know its location. Looking at the defendants’ evidence and testimonies, this court is convinced that they are indeed the rightful owners to the suit property.

26. Overall, this court finds that the defendants are the rightful owners of the suit property and the Certificate of Lease held by the plaintiff over the suit property is invalid and of no legal effect for the reason that it was obtained irregularly and illegally.

**Whether the plaintiff should be granted the prayers sought.**

27. Having established that the suit property belongs to the defendants and not the plaintiff, it is this court’s view that the plaintiff is therefore not entitled to the orders sought in his plaint dated **21/07/2017**.

**Whether the orders sought in the defendants defence and counter-claim should be granted.**

28. Following the foregoing finding that the defendants are the duly registered proprietors of the suit property, it follows that they have the rights over the suit property as set out in **Section 24(a)** of the **Land Registration Act** which provides as follows:

**“Subject to this Act, 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.”**

29. It is therefore this court’s view that while the plaintiff’s claim ought to fail, the orders sought in their defence and counter-claim dated **13/12/2017** should be granted. Consequently, this court hereby finds that the plaintiff has failed to establish his claim on a balance of probabilities and that the defendants have established their claim on a balance of probabilities and it issues the following final orders: -

**a) The plaintiff’s claim is dismissed;**

**b) The defendants’ counterclaim is granted as follows:**

**c) A declaration is hereby issued declaring that the defendants herein are the lawful proprietors of Nakuru Municipality Block 23/620.**

**d) An order of perpetual injunction is hereby issued restraining the plaintiff by himself, his servants, agents, employees, assigns and or persons claiming authority from trespassing upon, entering, remaining, dealing in or otherwise in any other manner whatsoever from interfering with Nakuru Municipality Block 23/620.**

**e) The purported Certificate of Lease issued on 9/04/2008 which the plaintiff holds in respect to Nakuru Municipality Block 23/620 measuring approximately 0.0841 Ha is hereby cancelled and the Land Registrar Nakuru shall rectify the land register to reflect that cancellation of lease.**

**f) The plaintiff shall bear the costs of the suit and counterclaim.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 10TH DAY OF MARCH, 2022.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

