



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE NO. 1 OF 2020

LUCY WANJIKU MWANGI (Suing as the legal Representative

of the estate of BENSON MWANGI MACHARIA PLAINTIFF

VERSUS

CHIEF LAND REGISTRAR1ST DEFENDANT

RICHARD MWANIKI KAMARU 2ND DEFENDANT

JAMES TANUI CHEPKOLE 3RD DEFENDANT

JUDGMENT

The Plaintiff vide the Amended Plaint dated 20/5/2021 seeks the following orders:

- a. Declaration that the deceased is the lawful owner of the parcel of land known as DUNDORI/MUGWATHI BLOCK 2/163 (the suit parcel of land).**
- b. ORDER directing or compelling the 1st Defendant to cancel the registration documents in the possession of the 2nd and 3rd Defendants and to restore the deceased as the legal and rightful owner of the parcel of land known as DUNDORI MUGWATHI BLOCK 2/163.**
- c. A permanent injunction restraining the 2nd and 3rd defendants and any other person from interfering with the deceased's titles to the said parcels of land or otherwise from quiet enjoyment and possession of the suit property.**
- d. In the alternative, an Order directing the 1st defendant to indemnify or otherwise to facilitate the indemnification the deceased estate in respect of the loss of the suit parcels of land at the current value thereof.**
- e. Costs and interests at court rates.**
- f. Any other relief that this Honourable Court may deem fit to grant.**

2. The plaintiff's case is that he has been the legal proprietor of the suit land, having held the title documents since 2002. He states that he first took ownership of the suit land through a company known as Bewama Company Ltd wherein he was a majority shareholder and later the suit land was registered in his own name as from 24th August 2016. The plaintiff subsequently discovered on an unstated date that the 2nd and 3rd defendants had allegedly in collusion with the 1st defendant clandestinely procured their registration as the proprietors of the suit land. He pleads that the defendants used forged documents and faked his signature and impersonated him in the process of that registration.

3. The plaintiff states that he and members of his immediate and extended family have been residing on the suit land without any interruption since 2002 and that he has never sold it to the 2nd and 3rd defendants. He therefore seeks a declaration that he owns the land, cancellation of the title issued in the 2nd and 3rd defendant's names and that he be restored in the records as the proprietor and an injunction. In the alternative he seeks indemnity from the 1st defendant for his failure to detect and halt the purported fraud.

4. Midway through the proceedings the original plaintiff Benson Mwangi Macharia died and was substituted with the current plaintiff Lucy Wanjiku Mwangi, his daughter and the original plaintiff was amended to reflect that change.

5. The 1st defendant filed a defence on 30th April 2021 denying the claim entirely and putting the plaintiff to strict proof thereof.

6. The 2nd and 3rd defendants did not respond to the claim.

7. Hearing proceeded on **23/11/2021** when PW1 and DW1 testified and the plaintiff's and the 1st defendant's respective cases were closed.

8. The plaintiff gave evidence and adopted the deceased's witness statement filed in the record. The plaintiff's evidence is that she is daughter to Benson Mwangi Macharia the original plaintiff and administrator to his estate; that she and her brothers reside on the suit land; that their father acquired the land in **2002** through a company in which he, his wife and his son were shareholders; that the company was thus a family company; that however the land was subsequently transferred back to her late father's name on **24/8/2016**; that she is not aware of any transaction that could have transferred any interest in the land to the 2nd and the 3rd defendants and that the defendants have never appeared on the land; that **PEXh 1** which she produced while giving evidence is the genuine original title issued in her father's name. She also produced certified extract of the register and a copy of the identity card of her deceased father and the PIN certificate.

9. The 1st defendant's chief witness was the Land Registrar by the name Raymond Gitonga. He testified that the first entry as to ownership reflected on the green card in respect of the suit land read "the Government of Kenya, the second entry was in the name of the deceased original plaintiff; the third entry was in the name of Bewama Company Limited and the fourth in the name of the original deceased plaintiff. Thereafter the suit land was transferred to the names of the 2nd and the 3rd defendants on **23/1/2018**. The witness further stated that a restriction was registered against the title to the suit land following a letter from the Criminal Investigations Department. The witness testified that a Land Registrar registers transactions as per applications made by parties.

10. Upon cross-examination by Mr Kisilah, DW1 stated that he had no supporting documents to back the registration of the 2nd and 3rd defendants as proprietors of the suit land. He also stated that the old title held by a proprietor must be surrendered in each case upon transfer and registration of the land into the name of another person and that in this case since the plaintiff still holds the original of the old title, then the validity of the registration of the land in the names of the 2nd and 3rd defendants is doubtful.

Submissions.

11. Only the plaintiff and the 1st defendant filed submissions as ordered by this court. The plaintiff cited **Article 40** of the Constitution of Kenya as granting any person the right either individually or in association with others to acquire and own property of any description in any part of the country. **Section 24** and **Section 25** of the **Land Registration Act** were further cited in aid of the proposition that registration is proof of ownership, and that the 1st defendant's deregistration of the plaintiff and the subsequent registration of the 2nd and 3rd defendants as proprietors of the suit land was a miscarriage of justice and a breach of trust bestowed upon him. The plaintiff submitted that the defence of the 1st defendant failed to explain the circumstances in which land whose original title is still held by the plaintiff was registered in the name of the rest of the defendants.

12. The plaintiff cited the case of **Peter Kaguny Kiragu Vs Anne H.G. Muchunke 2021 eKLR** for the proposition that when a court is faced with two or more titles over the same piece of land it has to investigate it, starting from the root of title and tracing all the processes and procedures that brought forth the titles at hand and that the title to be upheld in those circumstances is the one that conformed to procedure and in respect of which there is no break in the chain of processes and procedures. The plaintiff pointed out that the 2nd and the 3rd defendants never entered appearance or filed defence and there is thus no explanation as to how the title to the suit land was transferred to them. The plaintiff further cited the case of **Samuel Kamere Vs Land Registrar Kajiado 2015 eKLR** wherein the court observed that without any documents to support the registration of the appellant as proprietor of the land subject matter of that suit the appellant had failed to discharge the evidentiary burden of proof as required, and that he had not demonstrated the root of his purported title to the property and that he could not consequently claim title to the property. In the instant case the plaintiff submitted that there was no evidence of any issuance of a land control board consent for any transaction between the plaintiff and the 2nd and 3rd defendants as required by **section 6** of the **Land Control Act**. In the alternative the plaintiff, citing the decision in **Gitwany Investments Ltd & 3 Others 2006 eKLR** and the decision in **Livingstone Kunini Ntutu Vs Minister of Lands & 4 others 2014 eKLR**, submitted that where there is a mistake, as he urges there was in this case, the equitable maxim of the "*first in time*" ought to prevail in respect of the titles issued to the suit land, and since the plaintiff's title came first, it is the one that ought to be upheld.

13. Section 26 of the **Land Registration Act** was cited for the proposition that the certificate of title issued by the Registrar shall be deemed conclusive evidence of ownership and can not be subject to challenge except on the grounds of fraud and misrepresentation to which the person is proved to be a party or where it has been acquired illegally unprocedurally or through a corrupt scheme.

14. Citing the decision in **Zacharia Wambugu Gathimu & Another Vs John Ndungu Maina, 2019 eKLR**, plaintiff submitted that the real import of **Section 26** of the Act is to protect the genuine proprietor from being deprived of his rights by third parties, and that all the defendants in this case are therefore liable for the purported fraudulent transfer. Citing the case of **Josephat Muthui Mwangi Vs Chief Land Registrar & 2 Others 2015 eKLR** and **Alice Chemutai Too Vs Nickson Kipkurui & 2 Others 2015 eKLR** it is urged that two original titles can not be held by the two parties at the same time.

15. The 1st defendant submitted that the issue in this suit is who between the plaintiff on the one hand and the 2nd and 3rd defendants on the other holds valid title to the suit land, and whether the 1st defendant has committed any fraud in relation to the suit property and if the plaintiff is entitled to indemnity from the 1st defendant. While citing the case of **Munyu Maina Vs Hiram Gathira Maina 2013 eKLR** the 1st defendant concurs with the plaintiff that in seeking to establish validity it is not the mere issuance of title that matters but the process through which it was acquired. The defendant urged that apart from the title deed produced by the plaintiff no other supporting documents including transfers was availed to demonstrate how the plaintiff acquired title to the suit land. The defendant points out the discrepancy in the dates, saying that though the plaintiff states that the land was registered in his name in **2002** the land register shows that he was registered as proprietor in **1992**. However, the defendant avers that of the titles issued in respect of the suit land under the Torrens registration system, the title that was registered first should be upheld. Citing **Insurance Company of East Africa Vs, The Attorney General & 3 Others HCCC No 135 Of 1998** and **Bullen & Leake's Precedents of Pleadings, 13th Edition**, the 1st defendant advanced the argument that fraud

allegations must be strictly proved after being distinctly pleaded and that fraud is a matter of evidence. It is urged that though the plaintiff alleged that “*acceptance for registration incomplete and fraudulent documents and facilitating the transfer of the plaintiff’s land*” was part of the fraud on the part of the 1st defendant, the registration of proprietorship in Kenya is largely based on presentation of documents rather than physical presence of parties and whenever documents are presented to the 1st defendant they should be deemed to be regular. The 1st defendant argues that he issued title to the 2nd and 3rd defendants on the basis that the documents presented by them were proper and that he could not have a basis for suspecting fraud unless it was quite evident on the face of the record.

16. In respect of the claim for indemnity the 1st defendant advanced the argument that no notice of claim of indemnity against the 1st defendant had been issued. The 1st defendant avers that the claim for indemnity is based on **Section 81** of the **Land Registration Act**. However, it is urged, the remedy applies to situations where a title holder suffers damages emanating from negligence, mistake or fraud on the part of the Land Registrar while undertaking the process of registration or rectifying the register including double registration. The 1st defendant urges that the plaintiff has not demonstrated that there was double registration of the property by the 1st defendant and no negligence, error or mistake had been established as against the 1st defendant. It is stated that the 1st defendant has limited powers in that he is only required to confirm whether an instrument is fit for registration as prescribed in **Sections 44, 45 and 46** of the **Land Registration Act**, that is, proper execution and verification. The 1st defendant avers that he is not required to check the documents for fraud or improper dealings and that his power is administrative in nature; that as long as the documents submitted meet the statutory requirements, he may proceed with registration thereof.

17. Citing the case of **Sukhdev Sing Laly Vs Philip Ojwang Kamau & 3 Others 2018 eKLR**, the 1st defendant finally urges that he was not party to any transaction and that it is the 2nd and 3rd defendants who ought to be pursued for indemnity.

DETERMINATION.

Issues for determination.

18. The 2nd and 3rd defendants never defended the claim against them. The 1st defendant filed defence and has filed submissions strongly objecting to the claim of indemnity against him and deflecting liability therefor towards the 2nd and 3rd defendants. The main issues that arise for determination are as follows:

i. Whether the registration of the 2nd and 3rd defendants as proprietors of the suit land is regular.

ii. Whether there was fraud proved as against the 1st defendant and whether the plaintiff is entitled to indemnity from the 1st defendant.

iii. Who should bear the costs of the suit.

19. The only parties who brought any kind of evidence in support of their claim and defence respectively were the plaintiff and the 1st defendant. The court perceives the 2nd and 3rd defendant to be not interested in defending the registration of the suit land in their names. The plaintiff brought evidence of issuance of title in his name, which issuance preceded the registration of the 2nd and 3rd defendants as proprietors. If the 2nd and 3rd defendants never presented in evidence any title in their names to the court, then the only document the court has to scrutinise is that of the plaintiff. Besides the 1st defendant has corroborated the plaintiff’s evidence that the land was, after a series of transactions, registered in his name. He also pointed out that there were no supporting documents to back the registration of the 2nd and 3rd defendants as proprietors. Though the 1st defendant also points out that the plaintiff did not also produce any supporting documents to back his registration as proprietor, it is apparent from DW1’s concession that the history of the registration of the suit land began with the name of the plaintiff and that at some point the land reverted back to his name and it is only after that reversion that it was registered in the names of the 2nd and 3rd defendants. It cannot be easily understood and no reasons have been advanced as to why the plaintiff fiddled with the registration of the suit land so extensively and ended up where he began- as the registered proprietor; however I will ignore that aspect as I know not of any law that prevents an owner from lodging as many transaction documents as he desires provided they meet the statutory requirements for registration.

20. Of the two sides, the plaintiff on the one hand and the 2nd and 3rd defendants on the other, this court is bound to take the plaintiff’s claim or proprietorship as genuine particularly because the 2nd and 3rd defendants failed to raise any defence to the claim. In those circumstances only the plaintiff’s title was available for examination by this court and the Registrar having confirmed that title was issued to him, the plaintiff’s title must be taken to be the genuine document in this case. The 2nd and 3rd defendants’ failure to appear and file defence or to give evidence must be construed as an admission that they never obtained the title to the suit land procedurally.

21. As to whether there was any fraud established against the 1st defendant I must agree with his submission that in certain circumstances he would not be expected to discover fraud perpetrated by deceptive persons including outright impostors who may present documents for registration. In the instant case the plaintiff did not provide documentary evidence of the culpability of the 1st defendant and this court can not in the circumstances find that the 1st defendant was liable for any participation in the fraud committed by the 2nd and 3rd defendants.

22. However, the mystery that arises in this case is how the supporting documents that led to the registration of the 2nd and 3rd defendants, if any were used, disappeared. It is quite surprising that DW1 should state that the supporting documents are not available now whereas he had earlier testified that he registered those documents on the basis that he had determined that they met the statutory requirements. I must state that it is the duty of the Registrar to retain each and every document used in registration of transactions to land as scrupulously as possible in the event questions arise later regarding that transaction, in which case the same can be scrutinised for their genuineness or otherwise. A

Registrar who provides no supporting documents to a transfer transaction is exposing himself to sanctions including indemnity at the instance of an aggrieved claimant. The reason for this position is that if the names of the fraudsters were entered into the register without any supporting documents the Land Registrar would be utterly at fault, whereas his culpability would be open to debate if he presented supporting documents and demonstrated that he believed them to be genuine at the time of registration.

23. In a case such as the present, the Land Registrar may escape liability with ease where the claimant's case is not opposed by the alleged fraudsters, in which case the eligibility of the fraudulent title to cancellation by this court overshadows and obviates the need to address the claim for indemnity.

24. In the end I find that the plaintiff has established the claim against the 2nd and 3rd defendants on a balance of probabilities while she has failed to establish the claim for indemnity against the 1st defendant to the required standards and I issue the following final orders:

a. An order of Declaration, declaring that the parcel of land known as DUNDORI/MUGWATHI BLOCK 2/163 belongs to Benson Mwangi Macharia (deceased).

b. The 1st Defendant shall cancel the registration of the 2nd and 3rd Defendants as proprietors of the suit land and also cancel the title they hold and register the Estate of Benson Mwangi Macharia (deceased) as the legal proprietor of the parcel of land known as DUNDORI MUGWATHI BLOCK 2/163.

c. An order of permanent injunction is hereby issued restraining the 2nd and 3rd defendants and any other person acting for or under them from interfering with the title to the parcel of land known as DUNDORI MUGWATHI BLOCK 2/163 or otherwise interfering with the deceased's Estate's quiet enjoyment and possession of the suit property.

d. The 2nd and 3rd defendants shall jointly and severally bear the Costs of this litigation.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 21ST DAY OF APRIL, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU