



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 445 OF 2012**

**DANIEL WAOTHI MBURU.....PLAINTIFF**

**VERSUS**

**JANE NJAMBI.....DEFENDANT**

**JUDGMENT OF THE COURT**

This suit was instituted by way of a Plaint dated 25<sup>th</sup> July 2012. Therein, the Plaintiff claims to be the owner of Land Parcel No. Ruiru/Ruiru East Block 2/4834 having acquired the same through purchase from one Edward Gatiba Mbugua for a consideration of Kshs. 400,000/-. The Plaintiff avers that he was issued with a title in his name on 20<sup>th</sup> March 1996 upon payment of the purchase price. The Plaintiff avers that he is a third owner of the said property, the initial owner being Lucy Wanjiku Karanja. It is the Plaintiff's averments that Kiambu Lands Registry served Kikuyu, Limuru, Githunguri, Gatundu and Ruiru areas within Kiambu District until 1996 when Kiambu District was split into two – Kiambu and Thika Districts. He avers that a Lands Registry was opened in Thika and all records relating to land in Gatundu Division which includes Ruiru, where the land parcel the subject matter of this suit is situate, were transferred to Thika Lands Registry.

The Plaintiff avers that on an unknown date, the Defendant colluded with unknown people in Thika Land Registry and caused the disappearance of the original green card of the suit parcel and forged a green card which purportedly indicates that the suit land was registered on first registration on 26<sup>th</sup> August 1988 in Thika Lands Registry, while the said land registry was not in existence at the said time. The Plaintiff avers further that on inquiry over the anomaly, the Land Registrar in Thika confirmed that there exists two green cards in respect to the same parcel, one in favour of the Defendant which is in conflict with the one issued to him at Kiambu Lands Registry and that an aggrieved party has the liberty to go to court.

The Plaintiff thus prayed for orders that, firstly, he be declared the lawful owner of the suit property, secondly, the document held by the Defendant purporting to show that the suit property belongs to the Defendant be declared void and incapable of transferring legal interest to the Defendant and declaring the green card showing the Defendant null and void. Thirdly, the Land Registrar Thika be directed to adopt the green card that has been issued and certified as the true copy of the original by the Land Registrar Kiambu on 13<sup>th</sup> June 1996 as the correct record and use the same to reflect the state of the suit property for present and future dealings. Lastly, costs of the suit.

The Plaint was accompanied by a verifying affidavit sworn by the Plaintiff that the averments made in the

Plaint are true and within his knowledge. The Plaintiff also swore a Statement reiterating in detail the contents of the Plaintiff, and annexed a List of Documents he intended to rely on.

The Plaintiff obtained an order for inhibition from this Court (Kimondo, J.) pending the hearing of the suit *inter-partes*. The Plaintiff also obtained an order for substituted service under Order 5 of the Civil Procedure Rules for reasons that the Defendant is unknown to the Plaintiff and therefore the Plaintiff would not be in a position to trace the Defendant. The Court ordered that the substituted service be done by way of advertisement in the Standard Newspaper on any day of the week. The advertisement was done on Monday 26<sup>th</sup> November 2012 and an affidavit of service sworn by Geoffrey Kamande annexing a copy of the relevant page of the newspaper was filed in Court on 10<sup>th</sup> December 2012. Despite such service, the Defendant failed to either enter an appearance or appear in Court to defend herself in the matter. Consequently, the matter proceeded for formal proof.

The Plaintiff testified that he currently lives in Kitale and that he did not know the Defendant. He testified that he purchased the suit property from one Edward Gatiba Mbugua in March 1996. The Plaintiff stated that he charged the property to Barclays Bank where he obtained the funds to purchase the property, and that the said charge was registered in the title. The Plaintiff testified further that his title documents were transferred to Thika Lands Registry when Kiambu District was split into Kiambu and Thika Districts. It was his evidence that the property, subject matter of this suit is situated in Ruiru which falls under the jurisdiction of the Lands Registry of Thika. The Plaintiff testified that he conducted a search at the said registry, when he desired to sell his property, only to realize that the suit property was registered in the name of the Defendant. It was the Plaintiff's evidence that the Land Registrar Thika advised him to place a caution over the property and proceed to court to rectify the anomaly. The Plaintiff stated that the Defendant had never occupied the suit property as the same is still vacant and further that he has never transferred the same to any person. The Plaintiff prayed that the Court does grant the orders as sought in the Plaintiff.

In support of his case, the Plaintiff produced a copy of the Title Deed marked P.Ex1. The title is in respect to Ruiru/Ruiru East Block 2/4834 and dated 20<sup>th</sup> March 1996. There is an entry in the encumbrance section of a charge to Barclays bank to secure Kshs. 400,000/- and the date of the entry is 20<sup>th</sup> March 1996. The Plaintiff also produced an original copy of an official search conducted on 13<sup>th</sup> June 1996 which captured the contents of the Title Deed marked P.Ex2. The said search is signed by the Land Registrar and sealed. The Plaintiff also produced a copy of the original Charge Document between himself and Barclays Bank executed on 20<sup>th</sup> March 1996 marked P.Ex3. The Plaintiff produced an original copy of an official search conducted on 23<sup>rd</sup> August 2000 marked P.Ex4. The second search revealed that the suit property is registered in the name of Jane Njambi and that the Title Deed was issued to her on 26<sup>th</sup> August 1988. This second search is also signed by the Land Registrar Thika and sealed. The Plaintiff produced a certified copy of the green card marked P.Ex5. The Property Section of the green card details the registered owners of the suit property as follows:

- 8<sup>th</sup> May 1992 – Government of Kenya
- 8<sup>th</sup> May 1992 – Lucy Wanjiku Karanja
- 6<sup>th</sup> November 1992 – Edward Gatiba Mbugua
- 20<sup>th</sup> March 1996 – Daniel Waothi Mburu

The encumbrance section also captures the charge to Barclays Bank by the Plaintiff.

### **Determination**

The Defendant is unknown to the Plaintiff and hence personal service of the pleadings and the hearing notices would lead to naught. The Defendant was thus served by way of substituted service by Advertisement through the newspaper pursuant to an order of this Court. Despite the service, the Defendant failed to file a pleading or attend Court for hearing. The suit is therefore undefended.

The Plaintiff avers that he is the registered proprietor of the Land Parcel No. Ruiru/Ruiru East Block 2/4834. He produced a copy of his title deed and an official search demonstrating ownership. The Plaintiff also produced a copy of the green card evidencing ownership from the original to the subsequent proprietors. It is his evidence that when he went to conduct an official search sometimes in the year 2000 for purposes of disposing off the property, the search revealed that the suit property is registered in the name of the Defendant. The Plaintiff gave evidence stating that it is inconceivable that the Defendant would be the registered owner of the suit first because the official search reveals that she was issued with a title in 1988, a period when, according to the Plaintiff, Thika Lands Registry was non-existent.

The Court has the powers under Section 80 of the Land Registration Act to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

***80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.***

Sub-section 2 states as follows:

***(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.(emphasis mine)***

It was the Plaintiff's testimony that the Defendant was not in possession of the suit property. He testified that the same remains vacant to date and explains why the Plaintiff had to resort to substituted service. There is no evidence before this court to prove that the Defendant acquired the suit property for valuable consideration. In the absence of this, I find that the Defendant does not fit within the category of proprietors that Section 80(2) has in mind and accordingly, this court is at liberty to rectify the register in such a manner as to affect the title of the Defendant. In my opinion, therefore, it is not necessary to determine whether the Defendant had knowledge of or caused the omission, fraud or mistake.

When I consider that the Plaintiff is indicated as having obtained title to the suit property in March 1996 and yet the Defendant is stated to have become the registered proprietor of the suit property in August 1988, I can clearly see that there was a mistake committed in the registration particulars of the suit property when the two new land registries were formed and documents in respect of the suit property transferred to the Thika Land Registry. I am satisfied that the Plaintiff has established his case that he was, indeed, all along, the registered proprietor of the suit property. Therefore, in exercise of the powers conferred upon me by the above cited Section 80(1) of the Land Registration Act, I hereby enter judgment in favour of the Plaintiff. I make no order as to costs.

**SIGNED AND DELIVERED AT NAIROBI**

**ON THE 20<sup>TH</sup> DAY OF SEPTEMBER 2013.**

**MARY M. GITUMBI**

**JUDGE**