



**Mohamud v Gathua & 3 others (Environment & Land Case
E207 of 2020) [2022] KEELC 3553 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3553 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E207 OF 2020**

OA ANGOTE, J

MAY 12, 2022

BETWEEN

MOHAMED ALI MOHAMUD PLAINTIFF

AND

MICHAEL KIARIE GATHUA 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

COUNTY GOVERNMENT OF NAIROBI 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. Vide a Plaint dated October 28, 2020, the plaintiff instituted this suit against the defendants seeking for the following reliefs;
 - i. A declaration that the Plaintiff is the sole and lawfully registered proprietor of L.R No 36/VII/323(Original No. 70/7) Eastleigh, Nairobi.
 - ii. A declaration that the Indenture in favour of the 1st Defendant dated the February 5, 2019, purportedly registered on the June 30, 2020 as presentation No: 2039 Volume N138 Folio 70/4 File 12838 is fraudulent, illegal, unlawful, irregular and void ab initio.
 - iii. A permanent injunction to restrain the 1st Defendant whether by himself, his agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever from presenting, offering, and/or projecting the Indenture dated the February 5, 2019 and purportedly registered on June 30, 2020 as Presentation No. 2039 Volume N138 Folio 70/4 File 12838(or any copy thereof), as a valid document of title relating to the property known as L.R No. 36/VII/323 (Original No. 70/7) Eastleigh, Nairobi, registered in the name of Mohamed Ali Mohamud.



- iv. An order directing the 1st Defendant to surrender to this Honourable Court for purposes of destruction, all original documents relating to the suit property including but not limited to the original document of Indenture dated February 5, 2019, and purportedly registered on June 30, 2020 as presentation No: 2039 Volume N138 Folio 70/4 File 12838, and any copies thereof in the possession of the 1st Defendant, his agents(s) and/or servant(s).
 - v. An order directing the 2nd Defendant and 3rd Defendant to rectify the relevant registers/ records/documents, and cancel and/or expunge any entry(ies) that may have been affected substituting the Plaintiffs' name as the legitimate owner of the property known as L.R No 36/ VII/323(Original No. 70/7) Eastleigh, Nairobi.
 - vi. A permanent injunction to restrain the 1st Defendant whether by himself, his agents, employees, assigns, advocates, servants or otherwise howsoever any persons whatsoever from offering for sale, advertising for sale, selling, disposing off, charging, sub-dividing, processing sub-titles or leases, pledging, dealing, interfering with and/or intermeddling in any manner whatsoever with all property known as L.R 36/VII/323 located Eastleigh, Nairobi, registered in the name of Mohamed Ali Mohamud.
 - vii. A permanent injunction to restrain the Defendants whether by themselves, their agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever from altering, changing and/or interfering with documents of ownership of the property known as L.R No 36/VII/323 located in Eastleigh, Nairobi registered in the name of Mohamed Ali Mohamud.
 - viii. Any other relief that this Honourable Court may deem fit to grant.
 - ix. Costs and Interests of the suit
2. The plaintiff averred in the plaint that he is and was at all material times the registered proprietor of L.R No 36/VII/323(hereinafter the suit property) vide a Deed of Indenture dated 24th November, 2014 having purchased the same from Dawajir (K) Limited for the sum of Kshs Twenty Eight Million(Kshs 28,000,000) and that on or about 14th October, 2020, while in the process of paying land rates at the 3rd Defendants' offices, it came to his attention that the 1st Defendant had in collusion with the 3rd defendant altered the documents relating to the suit property from the plaintiff's name to that of the 1st defendant.
 3. The plaintiff averred that it has come to his attention that the 1st Defendant has in his possession an Indenture dated February 5, 2019 purportedly registered by the 2nd defendant on 30th June, 2020 indicating that the 1st Defendant purchased the suit property from one Lucy Nyambura Muraya at the price of Kshs 10,000,000.
 4. According to the plaintiff, sometime in the year 2017, he sought the 3rd defendant to change the particulars of ownership in its records which were promptly effected; that the 3rd defendant has without his consent purported to replace his name with that of the 1st defendant; that any such registration and/or alteration of records in favour of the 1st defendant is fraudulent and illegal and that the 1st Defendant on the premise of the illegal documents aforesaid has commissioned the firm of Wathumbi Ngurumi & Co Advocates to scout for buyers with the intent of illegally disposing of the suit property.
 5. The plaintiff lastly averred that although the 1st defendant purports to have registered a Deed of Indenture, the current search of the 2nd Defendant's records dated 16th October, 2020, shows that the suit property is registered in the names of the plaintiff and that save for ELC E104 of 2020: Michael



Kiarie Gathua vs Mohamed Ali Mohamud which was allegedly transferred to the Chief Magistrates Court, there is no other pending suit between himself and the defendants.

6. Despite service, the 1st Defendant did not enter appearance nor file a Defence. The 2nd and 4th Defendants filed a statement of Defence wherein they denied the averments set out in the Plaint stating that vide an Indenture dated November 24, 2014, the suit property was transferred by Wadajir (K) Limited to Mohamed Ali Mohamud for a consideration of Kshs 28,000,000 and registered under presentation No 308 Vol.N.87, Folio 42/13 File 12838.
7. The 2nd and 4th Defendants averred that the Indenture dated February 5, 2019 in possession of the 1st Defendant does not emanate from the Ministry of Lands & Physical Planning and the same is a forgery; that Lucy Nyambura Muraya and Michael Kiarie Gathua have never been registered as proprietors of the suit property and any documents bearing their names in respect of the suit property are false and that the Plaintiff is the only registered owner of the suit property.
8. The 3rd Defendant filed a Defence on the May 21, 2021 and denied the averments as set out in the Plaint and in particular that officers of the 3rd Defendant colluded with the 1st Defendant to change and/or alter documents relating to the suit property. The 3rd Defendant denied the allegations of fraud and/or illegality against it.

Hearing & Evidence

9. The matter proceeded for hearing on November 11, 2021. The Plaintiff, PW1, adopted his witness statement dated October 28, 2020 as his evidence in chief and produced the documents of the same date as [PEXHB1]. PW1 stated that he carried out an official search before purchasing the suit property; that the suit property was valued at Kshs 50,000,000; that he has a title document for the suit property and that when he went to pay rates to the city council, he found the 1st Defendant's name as the registered proprietor of the land.
10. PW1 stated that prior to the changes effected in the 3rd Defendant's register in respect to the suit property, the register showed that the property was in his name; that he purchased the suit property in 2014 for Kshs 28,000,000 whereas the 1st Defendant purports to have purchased the property in 2019 for Kshs 10,000,000; that when he went to pay the land rates, another name came up and that the lands registry confirmed that he is the owner of the suit property.

The Defence case

11. The Chief Lands Registration Officer, DW1, informed the court that from the records held by the 2nd Defendant, the suit property is currently registered in the names of Mohamed Ali Mohamed, the Plaintiff herein and that the root of the title held by the Plaintiff is clear and backed by the records held by the Ministry of Lands & Physical Planning.
12. It was the evidence of DW1 that there is no evidence of the suit property having been conveyed to any other party and that the purported Indenture dated February 5, 2019 between Michael Kiarie Gathua & Lucy Nyambura Muraya is not part of the records held by the Ministry of Lands and Physical Planning and the same is a forgery.

Submissions

13. The Plaintiff's counsel submitted that the Plaintiff's proprietorship of the suit property by virtue of the Indenture dated November 24, 2014, registered on 2nd December, 2014 and acquired from Wadajir (K) Ltd for the consideration of Kshs Twenty-Eight Million is not disputed by the 2nd & 4th Defendants.



14. It was submitted by counsel that the Indenture dated February 5, 2019 allegedly registered on 30th June, 2020 which the 1st Defendant claims ownership of the suit property has been declared a forgery by the 2nd Defendant; that after the Plaintiff acquired the suit property, records held by the 3rd Defendant were changed to reflect his name and that the 3rd Defendant in 2015 granted approvals to the Plaintiff to undertake construction on the land.
15. The Plaintiff's counsel submitted that in 2017, the 2nd Defendant wrote to the 3rd Defendant affirming that the Plaintiff is the registered proprietor of the suit property and subsequently, the alteration by the 3rd Defendant of the records relating to the suit property to reflect the names of the 1st Defendant constitutes blatant fraud committed by officers of the 3rd Defendant in collusion with the 1st Defendant.
16. According to counsel, the title document adduced by the Plaintiff has not been disputed nor contradicted and is conclusive proof of ownership as affirmed by the Court in *Vekariya Investments Limited vs Kenya Airports Authority & 2 Others* [2014] eKLR and that the Plaintiff is subsequently entitled to protection pursuant to Section 26 of the *Land Registration Act*. Reliance in this regard was placed on the cases of *Esther Ndegi Njiru & Another vs Leonard Gatei* [2014] eKLR and *Gitwany Investment Limited vs Tajmal Limited & 3 Others* [2006] eKLR.
17. It was submitted that the 1st Defendant's claim over the suit property is fraudulent and cannot disposes the Plaintiff of his rightful ownership. To buttress this position, counsel cited the case of *Artbi Highway Developers Limited vs West End Butcherv Limited & 6 others* [2015] eKLR where the Court of Appeal upheld the decision of the High Court that cancelled all titles and ordered the land to revert back to the original owner who had lost his land to fraudsters.
18. The 4th Defendant, on its own behalf and on behalf of the 2nd Defendant submitted that the Plaintiff has clearly demonstrated that he possesses legitimate proprietary rights over the suit property and is as such entitled to protection under section 26 of the *Land Registration Act*.
19. It was submitted that the 2nd Defendant is not party to any alleged fraud on the part of the 2nd Defendant and has faithfully discharged its mandate of keeping the records safe and that the Plaintiff has merely alleged but not proven any fraud on the part of the 2nd Defendant. Reliance was placed on the Court of Appeal case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR.

Analysis and Determination

20. Having carefully considered the pleadings, the evidence and submissions herein, the issues that arise for determination are:
 - i. Whether the Plaintiff has proven the allegations of fraud as against the Defendants?
 - ii. Whether the Plaintiff is entitled to the orders sought?
21. The Plaintiffs' case is that he is the lawful and duly registered owner of the suit property having purchased it for valuable consideration; that on or about the October 14, 2020, while in the process of paying land rates at the 3rd Defendant's offices, he realized that the records held by the 3rd Defendant indicated that the suit property was registered in the 1st Defendant's name.
22. It is the Plaintiff's case that it has further come to his attention that the 1st Defendant has in his possession an Indenture dated 5th February, 2019 purportedly registered by the 2nd Defendant on 30th June, 2020 indicating that the 1st Defendant purchased the suit property from one Lucy Nyambura Muraya.



23. The Plaintiff testified and produced documentary evidence to show that he was registered as the owner of the suit property pursuant to a conveyance dated November 24, 2014, registered as Presentation No. 308 in Vol. N87 Folio 42/13 File No. 12838. This conveyance was from Wadajir (K) Ltd.
24. The Plaintiff also produced certificates of postal search indicating that as at January 17, 2017 and as at 16th October, 2020, the Plaintiff was the sole registered proprietor of the suit property, which property was free from any encumbrances.
25. Despite being served, the 1st Defendant opted not to participate in the suit, while the 3rd Defendant, other than filing a Defence contesting the Plaintiff's averments, did not adduce any evidence. It therefore follows that the allegations as against the 1st and 3rd Defendants remain uncontroverted.
26. The 2nd and 4th Defendants vide their witnesses' testimony confirmed the Plaintiff's proprietorship of the suit property while denying any allegations of fraud levied against them. DW1, an officer of the 2nd Defendant, testified that according to the records held by the 2nd Defendant, the Plaintiff is the sole registered proprietor of the suit property and affirmed that the root of the title as held by the Plaintiff was backed up by their records.
27. DW1 adduced in evidence the records held by the 2nd Defendant including a copy of the GLA File Cover and the GLA Folio Register for 12838; Indentures showing conveyance of the property from Wadajir K Limited to the Plaintiff dated 24th November, 2014; Indenture dated February 10, 2011 showing conveyance from Albert Sambut Kiboi to Wadajir K Limited; Indenture dated 29th April, 1991 showing conveyance from Naomi Njeri Mungai to Alfred Sambut Kiboi; copies of postal searches and payment receipts all of which affirmed the Plaintiff's title and history thereof.
28. The totality of the evidence adduced by the Plaintiff and corroborated by the 2nd Defendant leaves no doubt that the Plaintiff is the lawful registered proprietor of the suit property. Having been so registered in 2014, the applicable law is the *Land Registration Act*, 2012. The provisions of Section 24 (a) and 25 (1) of the Act outlines the interests and rights of a registered proprietor as follows:
29. Section 24 (a) provides as follows:

“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;”
30. Section 25 (1) of the Act under the heading rights of a proprietor provides as follows:

“(1) The rights of a proprietor, whether acquired on first 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-”
31. With respect to instances under which the title held by a proprietor is liable to be challenged, Section 26(1) of the *Land Registration Act* is instructive and provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 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.”

32. As can be deduced from the above provisions, whereas title to land is protected, the same can be impeached if it is proved to have been procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme. None of the Defendants adduced any evidence nor indeed alleged that the Plaintiff acquired the title to the suit land fraudulently, illegally, un-procedurally or through a corrupt scheme.
33. In view of the foregoing and relying on section 26(1) of the *Land Registration Act*, the court finds that the Plaintiff has indeed proved on a balance of probabilities that he is the proprietor of the suit property and hence has absolute ownership including all rights and privileges appurtenant to it.
34. Save for the allegations of fraud as against the 2nd and 3rd Defendant which have not been proved, the court finds that the Plaintiff has proved his case on a balance of probabilities and proceeds to enter Judgment in the following terms;
 - a. A declaration be and is hereby issued that the Plaintiff is the sole and lawfully registered proprietor of L.R No 36/VII/323 (Original No. 70/7) Eastleigh Nairobi.
 - b. A declaration be and is hereby issued that the Indenture in favour of the 1st Defendant dated the February 5, 2019, purportedly registered on June 30, 2020 as presentation No: 2039 Volume N138 Folio 70/4 File 12838 is fraudulent, illegal, unlawful, irregular and void ab initio.
 - c. A permanent injunction be and is hereby issued restraining the 1st Defendant whether by himself, his agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever from presenting, offering, and/or projecting the indenture dated February 5, 2019 and purportedly registered on June 30, 2020 as presentation No. 2039 Volume N138 Folio 70/4 File 12838(or any copy thereof), as a valid document of title relating to the property known as L.R No. 36/VII/323 (Original No. 70/7) Eastleigh, Nairobi, registered in the name of Mohamed Ali Mohamud.
 - d. An order be and is hereby issued directing the 2nd Defendant and 3rd Defendant to rectify the relevant registers and records, and cancel any entry(ies) that may have been affected substituting the Plaintiff's name as the legitimate owner of the property known as L.R No 36/VII/323(Original No. 70/7) Eastleigh, Nairobi.
 - e. A permanent injunction be and is hereby issued to restrain the 1st Defendant whether by himself, his agents, employees, assigns, advocates, servants or otherwise howsoever any persons whatsoever from offering for sale, advertising for sale, selling, disposing off, charging, sub-dividing, processing sub-titles or leases, pledging, dealing, interfering with and/or intermeddling in any manner whatsoever with all property known as L.R 36/VII/323 located Eastleigh, Nairobi, registered in the name of Mohamed Ali Mohamud.
 - f. A permanent injunction be and is hereby issued to restrain the 1st Defendant whether by himself, his agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever from altering, changing and/or interfering with documents of ownership



of the property known as L.R No 36/VII/323 located in Eastleigh, Nairobi registered in the name of Mohamed Ali Mohamud.

g. Costs of the suit to be paid by the 1st Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF MAY, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Ms. Wangui for Muchoki for the Plaintiff

Mr. Allan Kamau for the 2nd and 4th Defendants

No appearance for 1st and 3rd Defendants.

Court Assistant: John Okumu

