



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 1647 OF 2002**

**JOHN NG'ANG'A GATHEGI..... PLAINTIFF**

**VERSUS**

**CHIEF LAND REGISTRAR..... 1ST DEFENDANT**

**DR. PARESH PATEL..... 2ND DEFENDANT**

**JUDGMENT**

The Plaintiff herein, John Ng'ang'a Gathegi, a resident of the United States of America filed this suit against the Chief Land Registrar and Dr. Parekh Patel seeking the following reliefs.

- 1. That the Certificate of Lease over Land Parcel Number Nairobi/Block/94/29 issued to the 2nd Defendant upon presentation of a transfer purportedly signed by the Plaintiff on or about 11th June 1995 be declared null and void and be revoked, nullified and cancelled.**
- 2. That the Certificate of Lease issued to the Plaintiff on 10th December 1987 over Titles Number Nairobi/Block 94/29 be restored.**
- 3. That the 1st Defendant be ordered to rectify the register in respect to Title No Nairobi/Block 94/29 by canceling the transfer in favour of the 2nd Defendant and restoring the Plaintiff's title.**
- 4. Costs of this suit with interest at Court rates.**

Before embarking on the judgment the Court wishes to put it on record that the delay in delivering this judgment was caused by administrative hitches whereby the file was not brought up among others for the allocation of a date during the Easter term as anticipated. The same is regretted while at the same time appreciating the patience and understanding demonstrated by the Counsel on record and the respective parties.

The facts of this case are fairly simple. The Plaintiff's case, as set out in his Complaint filed herein on 1st November 2002 and supported by his oral evidence adduced herein, as well as documents submitted in evidence, is that: The Plaintiff purchased the subject premises, namely Nairobi/Block 94/29 Nyari Estate in 1987 and was registered as proprietor thereof on 10th December 1987. To prove this he produced in evidence Certificate of Lease and Lease both dated 10th December 1987 issued in his name. The same were marked "Ex P.1" and "Ex.P.2" respectively. The Plaintiff has told the Court that whilst trying to sell

the subject property in June 1995 he discovered that the same was no longer registered in his name but that of the 2nd Defendant. After investigations lodged by his then advocates M/S Mwaura & Mukuria Advocates, it was discovered that the property had been transferred using documentation forged by two persons, known as James Muoki Wambua and Stephen Kimondo Njeru. The two were charged and convicted in a Criminal Case No. 3484 of 1996 of the offences of forging

**“a certain transfer of lease document purporting it to be genuine transfer of lease document signed by John Ng’ang’a Gathegi for the transfer of Title No. Nairobi/Block 94/29 to Parekh Patel.”**

**and forging**

**“a certain I.D. Card No.1203266/3108340/66 purporting it to be a genuine Identity Card issued to John Gathegi by the Registrar of Persons.”**

**and**

**“uttering a false document contrary to Section 353 of the Penal Code in that on the 11th July 1995 at Ardhi House, knowingly and fraudulently uttered a forced transfer of Title Number Nairobi/Block 94/29 to Veronica Ngina Kamali, a Land Registrar purporting it to be a genuine transfer of Lease signed by John Ng’ang’a Gathegi for the transfer of the said property to Dr. Parekh Patel.”**

The above is confirmed by a copy of the judgment passed in the Criminal Case, produced herein and marked “Ex.P.5”. Having been unsuccessful in his attempts to have the situation reversed so that the fraudulent transfer be cancelled and the title fraudulently issued to the 2nd Defendant be cancelled and that of the Plaintiff reinstated, into the register, the Plaintiff then filed this suit.

The 2nd Defendant filed his defence on 7th January 2003 denying any knowledge or involvement in the fraud committed concerning the property, admitting that the transfer to himself was fraudulent but claiming a refund of the Stamp Duty and fees paid to the Government in relation to the transaction. Specifically the 2nd Defendant admitted paragraphs 9 and 10 of the Plaintiff which read as follows:

**“9. The Plaintiff states that the transfer registered in favour of the 2nd Defendant is fraudulent, void ab initio and the title document issued in favour of the 2nd Defendant passed no proprietary rights to the 2nd Defendant (himself). and**

**10. The 2nd Defendant never took possession of the suit premises and the Plaintiff retains possession.”**

The 2nd Defendant did not adduce any evidence at the trial. However in his written submissions through counsel he claims his being sued to have been a misjoinder since he has nothing to do with the registration of dealings in land.

There was an interesting turn in these proceedings in that whilst the suit was partly heard, the 1st Defendant entered appearance for the first time, filed a defence but was thereafter dropped out of the proceedings when a consent order was recorded in the following terms:

**“ BY CONSENT**

**1. The Plaintiff’s suit against the 1st Defendant be and is hereby withdrawn with no order as to costs.**

**2. Prayer (c) to the Plaintiff be amended to read “that the Chief Land Registrar be ordered to rectify the register in respect to Title Number Nairobi/Block 94/29 by canceling the transfer in favour of the 2nd Defendant and restoring the Plaintiff’s title.”**

**3. The 2nd Defendant's claim against the 1st Defendant be and is hereby marked as withdrawn with no order as costs.**

**4. The suit proceeds to hearing without the calling of further evidence.**

**5. Mention on 8.2.2005.”**

In her written submissions on behalf of the Plaintiff Mrs. Mbugua has relied entirely on the provisions of Section 143 of the Registered Land Act which states that:

**“143 (1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such 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 his act, neglect or default.”**

The Plaintiff has proved his ownership of the suit premises. The fraud, the consequence of which the second Defendant came to be registered as proprietor to the Plaintiff's land is admitted by both Defendants herein and is clearly proven through the evidence adduced before me. It is not clear why the fraudsters were not enjoined as parties to the suit yet the particulars of fraud as framed in paragraph 7 of the Plaint relate to their individual and/or collective acts not those of the parties sued. It is also not clear why the Chief Land Registrar was removed from the proceedings at the last minute yet at the same time the prayer for rectification of Title was amended to substitute the words “the 1st Defendant” with “the Chief Land Registrar”. The reasoning behind this withdrawal of the suit against the Chief Land Registrar and the substitution of his name in the prayers was not given. I note that despite having been party to the consent order in which the withdrawal and amendment were recorded, the 2nd Defendant, in his submissions through counsel takes the position that the same has had the effect of depriving the Plaintiff of his only cause of action, that is, an order for rectification of title by the 1st Defendant who alone can do that. He submits that the 1st Defendant having been dropped from the proceedings then orders sought cannot issue and that his title cannot therefore be cancelled. He claims to be himself a victim of the false registration. As much as the latter is true, I am afraid to say that the same does not avail the 2nd Defendant any protection in law. As is clearly evident from the provisions of Section 143 (1) and (2) his defence would lie only if his was a first registration, or if he is in possession of the property having acquired the same for valuable consideration without notice of the fraud, omission or mistake the consequence for which he obtained his title. He has indeed conceded that the Plaintiff was defrauded of his Title and that he, the 2nd Defendant is not in possession.

This is a case where gross injustice has been occasioned to an owner of a piece of land in a democratic society, where his interests are secured firstly under the constitution and secondly under the statute governing the acquisition, registration and ownership of his land. His right to deal with the land has been impeded by reason of fraud committed behind his back. I do not think it is material that the Chief Land Registrar is no longer a party. In my view he need not be made a party since he can rectify the register even in the absence of a Court order under Section 142 of the Act. I find that even in the presence of the apparent procedural deficiencies in his pleading as they stand now, the Plaintiff should not be denied his rights when all parties are in agreement that the same were illegally misappropriated. As a custodian of justice and restorer of rights this Court has a legal duty to see to it that the Plaintiff's title is restored to him, much as one would sympathize with the 2nd Defendant herein.

I find that the Plaintiff has proven his case on the balance of probabilities and relying on the applicable principles of law as upheld in the case of CHAUHAN –vs- OMAGWA 1985 KLR 656 I find that the suit

succeeds. I allow the same and enter judgment for the Plaintiff as follows:

**(a) The Certificate of Lease over Title Number Nairobi/Block 94/29 issued to DR PAREKH PATEL pursuant to the registration of a transfer purportedly executed by JOHN NG'ANG'A GATHEGI is hereby declared null and void and must be revoked annulled and cancelled.**

**(b) The Certificate of Lease issued to JOHN NG'ANG'A GATHEGI on 10th December 1987 is hereby declared the only valid Title document and should be restored to the register.**

**(c) The Chief Land Registrar is hereby ordered and/or directed to rectify the register in respect of Title Number Nairobi/Block 94/29 by cancelling the transfer in favour of DR. PAREKH PATEL and restoring the title of JOHN NG'ANG'A GATHEGI.**

The 2nd Defendant having not been proved to have participated in or knowledgeable of the fraud committed herein and the culprits having not been made parties to the suit herein, the Court makes no order as to costs.

Dated and Delivered at Nairobi this 10th day of June 2005

**M.G. Mugo**

**Judge**

**In the presence of**

***Ms Kigwatha : For Plaintiff***

***N/A: For Defendants***