



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 1406 OF 2013**

**REBECAH NJERI KARIUKI.....PLAINTIFF**

**=VERSUS=**

**ELIZABETH NG'ENDO.....1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF LANDS, THIKA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff brought this suit against the defendants on 19<sup>th</sup> November, 2013 seeking the following reliefs:

- (i) A declaration that the plaintiff was the true registered owner of all that parcel of land known as Ruiru East/Juja East Block 2/4243 (“the suit property”).
- (ii) An injunction restraining the defendants from subdividing, selling, excavating, trespassing, gifting, leasing, transferring or in any other way dealing with the suit property.
- (iii) An injunction restraining the 2<sup>nd</sup> defendant from registering any dealings with the suit property.
- (iv) An order cancelling the title over the suit property held by the 1<sup>st</sup> defendant or any other person other than the plaintiff.
- (v) An order confirming that the plaintiff was the holder of a true and genuine title in respect of the suit property and in the alternative an order that the plaintiff be issued with a new title deed by the 2<sup>nd</sup> defendant.
- (vi) An order compelling the 2<sup>nd</sup> defendant to supply all the information including documents relating to all the transactions involving the suit property.
- (vii) The costs of the suit.

In her plaint, the plaintiff averred that she acquired the suit property through a land buying company known as Juja Farm in 1970s and was registered as the owner thereof and issued with a title deed on 17<sup>th</sup> November, 1989. The plaintiff averred that apart from the suit property she was also allocated a town plot at the same time known as Ruiru/Ruiru East Block 4/T.702 (“the town plot”). The plaintiff averred that on a routine visit to the suit property, she discovered that new beacons had been placed on the suit property and upon carrying out investigations, she discovered that unknown persons had purported to sell the suit property to the 1<sup>st</sup> defendant. The plaintiff averred that she reported the matter at Ruiru Police Station and investigation that followed revealed that the 1<sup>st</sup> defendant was holding a fake title in respect of the suit property. The plaintiff averred that she did not sell the suit property and that any transaction that was carried out in respect of the suit property was illegal and fraudulent.

The 1<sup>st</sup> defendant filed a statement of defence and counter-claim on 19<sup>th</sup> December, 2013. The 1<sup>st</sup> defendant denied that the plaintiff was the registered owner of the suit property. The 1<sup>st</sup> defendant admitted that there were two (2) titles in respect of the suit property. The 1<sup>st</sup> defendant averred however that her title was lawfully obtained and that no fraud was involved in the acquisition thereof. The 1<sup>st</sup> defendant averred that she was an innocent purchaser of the suit property and as such the plaintiff’s claim did not lie against her.

In her counter-claim, the 1<sup>st</sup> defendant averred that she purchased the suit property from one, Samuel Kageni Irungu, deceased (“S.K.Irungu”) who was the registered owner thereof. The 1<sup>st</sup> defendant averred that S.K.Irungu had been in possession of the suit property for over 12 years before selling it to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant averred that she held a title deed in respect of the suit property and that it had come to her attention that the plaintiff had fraudulently and illegally caused the suit property to be registered in her name.

The 1<sup>st</sup> defendant sought judgment against the plaintiff for;

- (i) A declaration that the 1<sup>st</sup> defendant was properly registered as the owner of the suit property and as such she was the absolute owner of the property.
- (ii) A declaration that the title deed held by the plaintiff in respect of the suit property was illegally and fraudulently obtained.
- (iii) A permanent injunction restraining the plaintiff from trespassing on, dealing with or in any other way interfering with the suit property.
- (iv) An order that the plaintiff produces the title held by her in respect of the suit property for cancellation.
- (v) An order directing the 2<sup>nd</sup> defendant to cancel the plaintiff's said title.
- (vi) Any other relief the court shall deem just and right to grant.

The plaintiff filed a reply to defence and defence to counter-claim on 13<sup>th</sup> June, 2019 in which she denied the contents of the 1<sup>st</sup> defendant's defence and counter-claim. The plaintiff reiterated that she held a valid title in respect of the suit property and that the title held by the 1<sup>st</sup> defendant was illegally and fraudulently acquired. The plaintiff averred that since her title to the suit property was earlier in time, it had to prevail over the title held by the 1<sup>st</sup> defendant in respect of the same parcel of land. The plaintiff denied that the 1<sup>st</sup> defendant was a bona fide purchaser of the suit property for value. The plaintiff averred that the 1<sup>st</sup> defendant had failed to carry out due diligence and to take necessary precautions before engaging in a fraudulent transaction involving the plaintiff's land. In her defence to the counter-claim, the plaintiff averred that S.K.Irungu had never owned the suit property or occupied the same. The plaintiff denied the particulars of fraud pleaded against her in the counter-claim. The plaintiff urged the court to dismiss the 1<sup>st</sup> defendant's counter claim and to enter judgment for the plaintiff as prayed in the plaint.

At the trial, the plaintiff told the court how she acquired the suit property from Juja Farm Co. Ltd. The plaintiff told the court that she was a member of Juja Farm Co. Ltd ("Juja Farm") and was assigned member number 4087. She stated that she was issued with a share certificate number 4896. She stated that one (1) share entitled a member to a farmland and a town plot. She stated that on account of her share, Juja Farm allocated to her the suit property and Ruiru/Ruiru East Block 4/T.702 ("the town plot"). The plaintiff produced in court the original title deeds for the suit property and the town plot for perusal and produced copies thereof as exhibits. The plaintiff stated that she had never sold the suit property and that if anyone else had a title for the suit property the same was acquired fraudulently. The plaintiff told the court that the 1<sup>st</sup> defendant was unknown to her and that she had not dealt with her. The plaintiff adopted her witness statement dated 18<sup>th</sup> November, 2013 as part of her evidence in chief and produced the documents attached to her bundle of documents dated 30<sup>th</sup> May, 2019 as exhibits.

The 1<sup>st</sup> defendant gave evidence and called her mother, Grace Wanjiku Njenga (DW1) and the Land Registrar as her witnesses. The 1<sup>st</sup> defendant's mother, Grace Wanjiku Njenga (DW1) adopted her witness statement dated 18<sup>th</sup> December, 2013 as part of her evidence in chief. She told the court that the 1<sup>st</sup> defendant who was her daughter was living out of the country and that she wanted to purchase a parcel of land. She stated that the 1<sup>st</sup> defendant gave her father a power of attorney to act for her in the purchase of land she intended to buy. She stated that she was the one who looked for land on behalf of the 1<sup>st</sup> defendant and got the suit property which they purchased on behalf of the 1<sup>st</sup> defendant from S. K. Irungu. She stated that before purchasing the suit property, they ascertained from the land office that S. K. Irungu was the owner of the suit property. She stated that S. K. Irungu showed them the beacons of the suit property and told them that he had been allocated the land by Juja Farm. DW1 stated that they entered into an agreement of sale with S. K. Irungu that was signed by her husband, Hezron Njenga on behalf of the 1<sup>st</sup> defendant using a power of attorney that had been donated to him by the 1<sup>st</sup> defendant. The suit property was thereafter transferred to the 1<sup>st</sup> defendant and a title deed was issued in favour of the 1<sup>st</sup> defendant on 22<sup>nd</sup> July, 2011. DW1 produced the documents attached to the 1<sup>st</sup> defendant's bundle of documents dated 18<sup>th</sup> December, 2013 and further list of documents dated 1<sup>st</sup> September, 2018 as exhibits.

In her evidence, the 1<sup>st</sup> defendant (DW2) corroborated the evidence of DW1. The 1<sup>st</sup> defendant told the court that she asked her mother and father to look for land on her behalf which she could buy. At that time, she was staying out of the country. She stated that her parents found two parcels of land owned by S. K. Irungu which were adjacent to each other. They then contacted an advocate who conducted a search that confirmed that the said parcels of land were registered in the name of S. K. Irungu. She stated that her parents, the advocate that they had consulted and S. K. Irungu went to the site of the two parcels of land and confirmed the boundaries and the ownership thereof. She stated that after her parents had visited the said parcels of land and made the confirmation aforesaid, she allowed them to enter into an agreement of sale with S. K. Irungu on her behalf using a power of attorney that she had given to her father. The 1<sup>st</sup> defendant stated that the parcels of land that she purchased from S. K. Irungu were the suit property and Ruiru East/Juja East Block 2/4242 ("plot No. 4242"). She stated that plot No. 4242 had no dispute. She stated that she was issued with a title deed for the suit property on 22<sup>nd</sup> July, 2011. She stated that a search she carried on the suit property when she came back to the country showed that the property was registered in her name. DW2 stated that she followed due process in acquiring the suit property. She told the court that she had a title to the suit property and that the plaintiff's claim had no basis. She stated that the plaintiff brought her claim after the death of S. K. Irungu. She urged the court to dismiss the plaintiff's suit and to confirm her as the owner of the suit property.

The last witness was the Land Registrar, Robert Mugendi Mbuba (DW3). He told the court that he was a land registrar based in Ruiru Land Registry. He told the court that from the records held at the Land Registry, there were two registers for the suit property. He stated that the first register was opened on 17<sup>th</sup> November, 1989 in the name of the plaintiff who was registered as the owner of the suit property on the same date. He stated that the second register for the suit property was opened on 15<sup>th</sup> January, 2003 in the name of Samuel Kageni Irungu

(S. K. Irungu) who was also registered as the owner of the suit property on the same date. He stated that according to the second register, S. K. Irungu transferred the suit property to the 1<sup>st</sup> defendant on 20<sup>th</sup> July, 2011 and that she was issued with a title deed on 22<sup>nd</sup> July, 2011. DW3 produced as exhibits certified copies of the two registers for the suit property. In cross-examination by the plaintiff's advocate, DW3 told the court that of the two registers for the suit property, one was fraudulent but he could not say which one. In examination by the court, he stated that the duplication of the register for the suit property was done at the Land Registry on the instructions of the company that allocated the parcel of land concerned. He stated that the Land Registry may have failed to notice that there was already in existence a register for the suit property when they opened the second one. He stated that the register that was opened on 17<sup>th</sup> November, 1989 was opened in Kiambu while the one that was opened on 15<sup>th</sup> January, 2003 was opened at Thika after the Land Registry had been moved from Kiambu to Thika and that both were opened by land registrars who also made the entries therein.

The 2<sup>nd</sup> defendant did not tender evidence. After the close of evidence, the parties were directed to make closing submissions in writing. I have considered the evidence on record and the submissions by the parties. The following in my view are the issues arising for determination in this suit.

- (i) Who is the lawful owner of the suit property as between the plaintiff and the 1<sup>st</sup> defendant?
- (ii) Whether the plaintiff is entitled to the reliefs sought in the plaint.
- (iii) Whether the 1<sup>st</sup> defendant is entitled to the reliefs sought in her counter-claim.
- (iv) Who should bear the costs of the suit?

Who is the lawful owner of the suit property as between the plaintiff and the 1<sup>st</sup> defendant?

I am satisfied from the evidence on record that the plaintiff is the lawful proprietor of the suit property. The plaintiff has given convincing evidence regarding the history of the suit property and how she acquired the same. The plaintiff was registered as the owner of the suit property on 17<sup>th</sup> November, 1989 and was issued with a title deed on the same date. The plaintiff produced before the court her original title deed for the suit property that was issued on 17<sup>th</sup> November, 1989. The register held at the land registry that was opened on 17<sup>th</sup> November, 1989 shows that the plaintiff is still the registered proprietor of the suit property. The 1<sup>st</sup> defendant's claim over the suit property arises from the agreement of sale that she entered into with one S. K. Irungu on 30<sup>th</sup> May, 2011. This means that the root of her title can be traced to the title if any that the said S. K. Irungu held in respect of the suit property. From the evidence on record, the register for the suit property that was the basis of S. K. Irungu's title was opened on 15<sup>th</sup> January, 2003 and S. K. Irungu was registered as the owner of the property on the same date. It is not disputed that as at the time this new register was being opened for the suit property and the property being registered in the name of S. K. Irungu, there was already a register for the property opened 14 years earlier and the property was already registered in the name of the plaintiff. A parcel of land can only have one register and title. I have no hesitation in stating that the register for the suit property that was opened on 15<sup>th</sup> January, 2003 was illegal and fraud on the part of the persons who participated in its creation cannot be ruled out. The registration of S. K. Irungu as the owner of the suit property on 15<sup>th</sup> January, 2003 was similarly illegal. As I have stated earlier, the suit property was already registered in the name of the plaintiff as at 15<sup>th</sup> January, 2003 when the same was purportedly registered in the name of S. K. Irungu. S. K. Irungu did not therefore have a valid title to the suit property. His title to the suit property was illegal, null and void. He therefore had no title that he could transfer to the 1<sup>st</sup> defendant on 20<sup>th</sup> July, 2011. The 1<sup>st</sup> defendant did not therefore acquire a valid title to the suit property. As at the time the property was purportedly transferred to the 1<sup>st</sup> defendant, the property was registered in the name of the plaintiff who held a valid title in respect thereof. The plaintiff's title over the suit property which was first in time must prevail over the title held by the 1<sup>st</sup> defendant however innocently the same was acquired. The doctrine of a bona fide purchaser for value without notice cannot defeat the plaintiff's legal title. For the foregoing reasons, it is my finding that the plaintiff is the lawful owner of the suit property.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

Having held that the plaintiff is the lawful owner the suit property, it follows that the plaintiff has proved her case against the defendants and as such she is entitled to the reliefs sought in the plaint.

Whether the 1<sup>st</sup> defendant is entitled the reliefs sought in her counter-claim:

The 1<sup>st</sup> defendant has not proved her counter-claim against the plaintiff. The 1<sup>st</sup> defendant has not proved that she has a valid and better title to the suit property. The 1<sup>st</sup> defendant is therefore not entitled to the reliefs sought against the plaintiff in the counter-claim.

Who should bear the costs of the suit?

Award of costs is at the discretion of the court. In the circumstances of this case, the 2<sup>nd</sup> defendant is to blame for illegally opening two registers for the suit property which led to the 1<sup>st</sup> defendant being defrauded by S.K Irungu and this suit being brought against her. I would condemn the 2<sup>nd</sup> defendant to pay the costs of the suit.

Conclusion:

In conclusion, I enter judgment for the plaintiff against the defendants for;

1. A declaration that the plaintiff is the lawful registered owner of all that parcel of land known as Ruiru East/Juja East Block 2/4243 (“the suit property”).
2. An injunction restraining the 1<sup>st</sup> defendant from subdividing, selling, excavating, trespassing, gifting, leasing, transferring or in any other way dealing with the suit property.
3. An injunction restraining the 2<sup>nd</sup> defendant from registering any dealings with the suit property save at the instance of the plaintiff.
4. An order cancelling the title held by the 1<sup>st</sup> defendant in respect of the suit property.
5. An order cancelling the duplicate or second register for the suit property that was opened on 15<sup>th</sup> January, 2003 together with all the entries therein.
6. The costs of the suit to be paid by the 2<sup>nd</sup> defendant.

**Delivered and Dated at Nairobi this 28<sup>th</sup> Day of January 2021**

**S. OKONG’O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Mwangi K.M for the Plaintiff

Mr. Orenge h/b for Mr. Kamau for the 1<sup>st</sup> Defendant

Ms. Fatma for the 2<sup>nd</sup> Defendant

Ms. C. Nyokabi-Court Assistant