



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 537 OF 2017

MARY MUKAMI MBACHIA.....PLAINTIFF

VERSUS

THE LAND REGISTRAR, THIKA.....1ST DEFENDANT

THE MINISTRY OF LANDS HOUSING

AND URBAN DEVELOPMENT.....2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

OBADIAH MWANGI MBUTHIA.....4TH DEFENDANT

MARY WANJIKU WANDUTU.....5TH DEFENDANT

EUNICE NYOKABI RUKWARO

(Sued as an administratrix of the estate of the

late JOSEPH KIMANI GICHUKI – Deceased).....6TH DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....7TH DEFENDANT

THE NATIONAL LAND COMMISSION.....8TH DEFENDANT

JUDGMENT

1. Vide a plaint filed in court on 31.10.2014, the plaintiff claims that she has at all material times been the registered owner of land parcel no. **Ruiru East/Block 5/105** (the suit land) situated at Kahawa Wendani. On 29.5.2012, she discovered that the title to the suit land had changed hands to the 4th defendant on 11.10.1997, to the 5th defendant on 16.7.2004 with a further re-issuing of the title on 18.1.2006, to the 6th defendant on 6.7.2009 and that the land was charged to 7th defendant. She blames the defendants for the alleged fraudulent transfers of the suit land and prays for the following orders:

(a) That a permanent mandatory injunction do issue restraining all the defendants their agents, servants or employees or anyone acting through them or on their behalf from in any way accessing, using, entering, transferring, disposing, developing, alienating, charging, trespassing or in any other manner whatsoever dealing with the property known as Ruiru East Block 5/105.

(b) A declaration that the proprietorship entry numbers 3, 4, 5, 6, 7, 8, 9, 10 and 11 and encumbrance entry numbers 1 and 2 in the register of land for the property known as Ruiru East Block 5/105 are all fraudulent.

(c) That the transfer and or proprietorship entries numbers 3, 4, 5, 6, 7, 8, 9, 10 and 11 and the charge under encumbrances entries numbers 1 and 2 in the register of land on the suit plot number Ruiru East Block 5/105 be annulled and cancelled forthwith.

(d) A declaration that the plaintiff is the rightful and sole owner of the property known as Ruiru East Block 5/105 and all entries made on and after 11.10.1997 and thereafter are null and void and are hereby ordered cancelled forthwith.

(e) An order directing cancellation of title number Ruiru East Block 5/105 as issued to the 6th Defendant and his successors in title and the register of land do reflect the plaintiff as the registered proprietor of all that parcel of land known as RUIRU EAST BLOCK 5/105.

(f) An eviction order against the 6th defendant his servants and or agents from the property known as Ruiru East Block 5/105 to be overseen by the officer commanding station (O.C.S) Kasarani police station.

(g) Possession of her property known as Ruiru East Block 5/105.

(h) General damages arising from the 6th defendant's acts of trespass at a rate of Kshs.10,000 per month until possession of the property is delivered up.

(i) Costs and interest of this suit.

(j) Any other further relief that this honourable court may deem just in the circumstances

2. The 1st to 3rd defendants filed a statement of defence dated 4.3.2015 denying the plaintiff's claim.

3. The 6th defendant filed a statement of defence on 23.7.2015 but the same was amended on 28.3.2019 where a counter claim was included. The 6th defendant is the wife and administratrix of the estate of one Joseph Kimani Gichuki. She has pleaded that the suit land was lawfully transferred to her husband on 3.7.2009. She therefore seeks the following orders in her counter claim:

(a) A declaration be issued to declare that Joseph Kimani Gichuki was lawfully registered as the proprietor of L.R No. Ruiru East/Block 5/105 on 3rd July, 2009.

(b) A declaration be issued to declare that the 1st defendant has no lawful claim to the suit property against the plaintiff.

(c) A declaration be issued to declare that within the meaning of Article 40 of the constitution and Section 25 of the Land Registration Act, 2012, the plaintiff is the lawful proprietor of the suit property namely Ruiru East/Block 5/105.

(d) As an alternative to prayer (c) above the plaintiff seeks a declaration that the 2nd defendant should compensate her for the market value of the suit property and premises thereon in the event of this honourable court annulling her title to the suit property.

(e) General damages for the fraud occasioned, aided and abetted by the 2nd defendant.

(f) Costs of the suit.

4. The 7th defendant, the Kenya Commercial Bank filed its statement of defence on 10.3.2015, averring that it advanced a loan to Joseph Kimani Gichuki (deceased) where the suit land was the security. The loan was fully paid and the bank has no interest in the suit land.

5. The 4th, 5th and 8th defendants did not enter appearance or file statements of defence.

Case for the plaintiff

6. PW 1, Mary Mukami Mbachia (plaintiff) adopted her statements filed on 31.10.2014 and 23.4.2019 as her evidence. She also produced the 39 documents in her list filed on 31.10.2014 as P-exhibit 1-39 and the 2 documents in her list filed on 25.11.2019 as P-exhibits 40-41 respectively. She also showed the court the original title to the suit land as well as a certified copy of the green card during the trial.

7. Plaintiff avers that on or about the year 1975, she became a share holder of a land buying company known as Kiambu Wendani Women Investors Limited. She duly paid the membership fee. On diverse dates in 1975 – 1978, she made various payments for the purchase of her share of which she was eventually allotted the suit land. On 12.1.1988 she was issued with a title deed to the suit land which she possesses to date. In the same year, she visited the land with her son.

8. It was within her belief that the land was still intact up to and until the time she visited the land and found it was occupied. She did a search on 29.5.2012 and found that the land had fraudulently been transferred from her names as follows:

(a) By changing details of her correct postal address.

(b) By fraudulent issuance of another title deed for the subject plot on 11th October 1997 to the 4th defendant for a purported consideration of Kshs.390,000/=.

(c) By a further fraudulent issuance of a title on 16th July 2004 to the 5th defendant.

(d) By a further fraudulent re-issuing a title on 18th January 2006 purportedly through Kenya Gazette No. 8601.

(e) Then a further fraudulent issuance of a title on 6th July 2009 to the 6th defendant.

(f) By having the subject plot charged to savings and loans limited and transferring the said charge to the 7th defendant on 8.6.2010.

9. PW1 denies ever having sold the suit land to the 4th defendant, she never signed any transfer forms to that effect, she doesn't know the 4th defendant and hence the 4th defendant did not lawfully acquire title to the suit land. She further contends that the 1st defendant must have colluded with the 4th defendant to purportedly effect the illegal transfer using forged documents. PW 1 therefore states that all the other subsequent transactions appertaining to the suit land are also tainted with fraudulent activities as she is the real genuine owner of the suit land and deserves protection by the law. She terms the 6th defendant as a trespasser on her land. She admitted that in 2012 when she went to the suit land, she found buildup premises.

10. PW2 Samwel Ngethe is a son of the plaintiff. He adopted his statement recorded on 30.10.2018 as his evidence which is more or less similar to that of his mother in so far as the events of 1988 to date are concerned. He added that under the instructions of his mother, he engaged a valuer who visited the suit land and compiled a report (P-exhibit 40). The report describes the plot as a free hold property measuring 0.0696ha. where a multi-dwelling residential building containing 5 storeyed blocks has been erected. The property has been valued at shs.16,000,000 without the improvements.

11. PW 2 stated that they visited the suit land in 1988 and the next time they visited the land was on 29.5.2012 when they found that the suit land had been developed. They never fenced the suit land, nor did they take possession of the same. He further stated that they had reported the issue of fraud at Kasarani Police station but he didn't have details to that effect.

12. PW 3, Michael Mbugua Kinyanjui is the one who compiled the valuation report (P. exhibit 40).

Plaintiff's submissions

13. It was submitted that plaintiff was the initial legally registered owner of the suit land and that she never sold the land to the 4th defendant or to anyone else. Citing the provisions of **Section 6 (1) and 33 of the Registered Land Act (repealed)**, the plaintiff submitted that the parcel file containing the instruments of transfer ought to have been available with all the relevant documents. However, in the instant case, the parcel file for the suit land did not contain the instruments of transfer of the land from the plaintiff to 4th defendant and from the 4th defendant to the 5th defendant. Plaintiff avers that the logical conclusion to make is that there was fraud in the aforementioned transactions and the purported transfer of the land from the plaintiff to 4th defendant was illegal, unprocedural and it was done through a corrupt scheme.

14. It is further submitted that there is no evidence as to how the 4th and 5th defendants became the registered owners of the suit land. What more, the date of 11.10. 1997 (the 4th entry in the green card which captures the registration of the land into the name of 4th defendant) was a Saturday which day is a weekend and Government offices are officially closed.

15. It is also submitted that the 6th defendant did not conduct due diligence as he ought to have made inquiries into how the 5th defendant acquired the land, taking into account the fact that a title had been re-issued to the 5th defendant.

16. It is also submitted that there are discrepancies and inconsistencies regarding the transfer of the land from 5th defendant to 6th defendant. That it is not clear as to whether the property was gifted to Joseph Kimani or whether the latter purchased the same. To this end, the plaintiff submitted that some documents like the transfer of land dated 6.6.2009 had the name of Beatrice Wandia cancelled while on the execution part has the thumb print of Beatrice Wandia Gichuki and signature of Joseph Kimani Gichuki. The application for consent to transfer the land dated 24.5.2006 has the thumb print of Beatrice Wandia Gichuki but has the name of Joseph Gichuki indicated as the purchaser.

17. Further the letter of consent had the date of completion as 7.6.2006, yet the transfer was done on 6.6.2009. The plaintiff therefore contends that pursuant to Section 8 of the Land Control Act Cap 302, the consent is only valid for a period of 6 months of which at its expiry a fresh application has to be made.

18. Another discrepancy pointed out by the plaintiff is that the consideration for the sale of land to 6th defendant is indicated as Kshs.1,200,000 in the transfer while in the sale agreement the figure indicated is Shs.1,850,000. The plaintiff therefore submits that the transfer of the land from 5th defendant to 6th defendant was invalid and that 6th defendant was not an innocent purchaser.

19. Citing the provisions of **Section 25 and 26 of the Land Registration Act**, the plaintiff submits that the tainted and irregular transactions should be cancelled. Further, plaintiff has termed the 6th defendant as a trespasser of which she claims a monthly sum of Kshs.10,000 as general damages until the plaintiff is given possession of the property.

20. In support of her case, the plaintiff has relied on the following authorities; **Lawrence Mukiri Mungai vs Attorney General & 6 others (2019) eKLR, MWK vs SKK & 5 others (2018) eKLR, Samuel Kamere vs The land Registrar (2015) eKLR, Gitway Investment Limited vs Tajmal Limited & 3 others (2008) eKLR, Esther Ndege Njiru & Another vs. Leonard Gatei (2014) eKLR, Maria Rosita (suing through her appointed agent Masai Mara Sopa Lodge Limited) vs Robert Kibagendi Otach & another (2017) eKLR, George Wachira Mbiti vs George Muhoho Wanjiru & another (2020) eKLR and Kabiro Wagoro Makumi vs Francis Nduati Macharia & Another (2018) eKLR.**

Case for 1st, 2nd and 3rd defendants

21. The case for these defendants was advanced by one Robert Mugendi Mbura (DW1) a Land Registrar stationed at Ruiru land registry. He relied on the statement of his colleague B.K Leitch recorded on 24.8.2017 as his evidence. He also produced the 6 documents in their list dated 24.8.2017 as their exhibits 1-6. He also availed a copy of the updated green card as exhibit 7.

22. It is averred that the suit land was first registered on 12.1.1988 in the name of the Government of Kenya, and on the same date it was transferred to Mary Mukami Mbachia (the plaintiff). That on 11th October 1997, the suit land was transferred to Obadia Mwangi Mbuthia for a consideration of Ksh. 390 000 and a title deed was issued on the same day. That on 16th July 2004, a transfer to Mary Wanjiku Wandutu was registered and a title deed issued on the same date and vide a gazette notice no. 8601 of 28th October 2005 a new title deed was re-issued on 18th January 2006.

23. The 1st, 2nd and 3rd defendants further state that the suit land was transferred to Joseph Kimani Gichuki on 3rd July 2009 for a consideration of Ksh. 1 200 000 and a title deed was issued on the same date. The suit land was then charged on 26th October 2009 to savings and loan Kenya Limited to secure a sum of Ksh. 1 900 000, of which the said loan was transferred to Kenya commercial bank limited and a charge registered accordingly on 8th June 2010.

24. The current status of the land is that the same is now registered in the name of Eunice Nyokabi Rukwaro and Cynthia Wandia who are holding the property in trust for themselves and Vincent Gichuki Kimani, Christine Wairimu Kimani, Stacy Waruguru Kimani and Trevor Rukwaro Kimani of which they got a title deed on 29.9.2017.

25. DW 1 stated that their office is the custodian of all land records appertaining to the suit property and the documents they ought to have include:

- All transfer documents.
- Consent of land control board.
- Stamp duty receipts.
- Application for consent.
- Copies of identity card of the parties.

26. DW 1 was aware of the notice to produce issued to their office dated 13.12.2017 requesting for the original title issued on 12.1.1988, the original green card for the suit parcel listed as item no. 10 in plaintiff's list of documents, as well as all transfer documents which purportedly transferred the suit land from plaintiff to the 4th defendant and from the 4th defendant to 5th defendant. DW 1 stated that documents can go missing if they are not filed or if they are misfiled. He had the transfer documents appertaining to the transfer of the suit land from the 5th defendant to the 6th defendant. He contended that a sale agreement is not a requirement to register a transfer.

Submissions of the 1st 2nd 3rd defendants

27. In their submissions, the 1st – 3rd defendants stated that a transfer cannot be effected without surrender of the original title deed. However, in the instant case, the Land Register could not confirm if the title in possession of the plaintiff was genuine or not and that such confirmation could only be done by the government printers. It was also submitted that the evidence of surrender of the original title is the entry on the green card hence the Land Registrar must have seen and was satisfied that the original title was attached to the transfer documents and met the threshold for registration. The 1st – 3rd defendants therefore contend that the transfer of the suit land from plaintiff to 4th defendant was proper hence the plaintiff cannot claim that registration did not take place for the reason that she still has the original title.

28. The 1st-3rd defendants stated that it looked suspicious for the plaintiff to have gotten the title deed in 1988, never took possession of the land including even putting up a fence for 24 years, and then conveniently comes back after an apartment has been put up and after the registered owner dies. Even after the discovery that the land was occupied by another person, the plaintiff took a whole year to write demand letters to the persons involved. Further, it was submitted that plaintiff did not make a complaint with the police or the CID for investigations on the whereabouts of the 4th defendant since the land was first transferred to the said defendant. After all, the CID department is the one which has capacity to investigate the alleged fraud in the transfer and trace the 4th defendant to record a statement. Therefore, the plaintiff's claim, if any, should be against the 4th defendant and should the court find in favour of the plaintiff, all liability should be borne by the 4th defendant.

29. On the issue of compensation and damages, it was submitted that the 6th defendant has not adduced any evidence to support this claim. In particular the 1st -3rd defendants contend that the allegations of fraud levelled against them by the 6th defendants have not been proved.

30. The 1st 3rd defendants have relied on the following authorities:

- **Antoine Kubondo Murunga vs Attorney General & 3 others (2017) eKLR.**
- **Martin F. Kangara Kimani vs Samuel Macharia Kimani (2019) eKLR and**

Case for the 6th defendant

31. DW 3 one Eunice Nyokabi Rukwaro is the 6th defendant. She is the wife and the administratrix of the estate of the late Joseph Kimani Gichuki. She adopted the contents in her two statements recorded on 20.7.2017 and 26.8.2019 as her evidence. She also produced the 3 documents in her list of 20.7.2017 as well as the one document in her supplementary list of 27.8.2019 9 as her exhibits.

32. PW 1's evidence is that by a sale agreement made on 6.6.2006, between Mary Wanjiru Wandutu (vendor) and Beatrice Wandia Gichuki (purchaser), the vendor agreed to sell the suit land for a consideration of Kshs.1,850,000. That Beatrice Wandia Gichuki is the mother of DW3's late husband-Joseph Kimani Gichuki. At the time of execution of the said sale agreement the suit property was registered in the name of Mary Wanjiru Wandutu, the 5th defendant and this fact was confirmed by a certificate of official search issued prior to execution of the sale agreement. Subsequent to the execution of the said sale agreement, the vendor and the purchaser obtained the requisite consent to transfer the suit property and in the end, Joseph Kimani Gichuki was issued with a title deed on 6th July, 2009. Thus the transfer of the suit property to and registration in the name of Joseph Kimani Gichuki was in conformity with all the applicable legal provisions and procedures.

33. DW3 avers that after the sale of the suit land by 5th defendant, they took possession of the property where her husband embarked on constructing a block of apartments from year 2007 which were completed in 2010 and were occupied by tenants. DW3's husband died on 31.1.2011 and by then no one had emerged to claim the property. It was only after the demise of Joseph Gichuki that plaintiff emerged to claim the land.

34. DW3 therefore contends that her husband was a bonafide purchaser for value of the suit land in good faith for a consideration and without notice of any defect or encumbrances on the title.

35. She further states that the first time the plaintiff came to claim the property was in the year 2012, whereby she had gone to the offices of the suit land saying they were aware of the death of DW3's husband and they also inquired about water bills. In 2013, DW 3 received the demand letter addressed to her husband yet plaintiff was aware that her husband was dead.

36. DW3 avers that after her husband's death, she filed a succession case and acquired a grant in respect of her husband's estate. She is also aware that her husband had charged the suit property to Kenya commercial bank to the tune of 9.9 Million. They took the loan so as to develop the land. They were able to pay the whole loan and the title was discharged.

37. DW 4, Beatrice Wandia Gichuki adopted her recorded statement as her evidence. She identifies the 6th defendant as her daughter in law. She avers that she bought the suit land from 5th defendant in the year 2006 as per the sale agreement which is their D. Exhibit 4. She then gifted the land to her son Joseph Kimani Gichuki who is deceased. The purchase price was Shs.1,850,000. She avers that her son took a loan with the Kenya commercial Bank to enable him put up the building block.

Submissions of the 6th defendant

38. The 6th defendant submitted that she is now the registered owner of the suit land pursuant to the registration and transmission of the title vide the order in high court succession case no. 2338 of 2011. She therefore contends that her title is protected in line with the provisions of Section 24, 25 and 26 of the Land Registration Act. She avers that there are only two instances where a title can be challenged that is if there was fraud or the title was acquired through corrupt schemes.

39. In so far as the suit land is concerned, DW 3's husband acquired the suit land as a bonafide purchaser for value. DW3's husband conducted due diligence and obtained a search which showed that the 5th defendant was the registered owner of the suit land.

40. It is submitted that the plaintiff did not tender any evidence to proof that there was fraud or corrupt schemes in the transactions concerning 4th, 5th and 6th defendants. In particular plaintiff did not list the particulars of fraud committed by the 6th defendant in her pleadings.

41. The 6th defendant therefore contends that she is entitled to her prayers set out in the counter claim.

42. In support of her arguments, the 6th defendants relied on the following authorities:

- **Elizabeth Wambui Githinji & 29 others vs Kenya Urban Roads Authority & 4 others (2019) eKLR**
- **Eunice Grace Njambi Kamau & another vs Attorney General & 5 others (2013) eKLR,**
- **Gichinga Kibutha vs. Caroline Nduku (2018)eKLR,**
- **Dennis Noel Mukhulo Ochwada & another vs Elizabeth Murungari Njoroge & another Civil appeal no. 293 of 2013,**
- **Kenya National Highway authority vs Shalien Masood Mughal & 5 others civil appeal no. 327 of 2014**
- **Dr. Joseph Arap Ngok vs Justice Moiwo Ole Keiwua & 5 others, civil appeal no. Nai 60 of 1997.**

- **Katende vs Haridar & Company Limited (2008) 2 E.A 173**
- **Insurance company of East Africa vs the Attorney General & 3 others HCC No. 135 of 1988.**
- **Arthi Highway Developers Limited vs West End Butchery Limited and others (2015) eKLR.**

Case for 7th defendant

43. The case of Kenya commercial bank was advanced by James Odwako (DW 2) who adopted his statement dated 27.7.2017 as his evidence. He avers that in year 2009, James Kimani Gichuki was advanced a loan of Kshs.9,900,000 where the security was the suit land. The loan was fully paid and the charge was discharged on 29.9.2017, hence the bank has no interest in the suit land.

Submissions of 7th defendant

44. It is submitted by the 7th defendant that the plaintiff did not prove any fraud or illegality as against the 7th defendant. That the updated copy of the green card showed that the property was registered in the name of Joseph Kimani Gichuki on 3.7.2009, hence the 7th defendant did not commit any wrong in advancing a loan to the title holder. The 7th defendant has relied on the case of **Kuria Kiarie and 2 others vs Sammy Magera (2018) eKLR.**

Determination

45. The uncontroverted issues are that DW3 (6th defendant) and DW4 (Beatrice Wanjiru Gichuki) are the wife and mother of Joseph Kimani Gichuki (deceased) respectively. PW1, the plaintiff is the mother to PW2 (Samwel Ngethe). It is also not in dispute that Joseph Kimani Gichuki had taken a loan with the 7th defendant using the suit land as security and that the title has since been discharged.

46. Further, the copy of green card obtained on 18.7.2012 availed by plaintiff as exhibit 10 contains similar content to that availed by the Land Registrar as their exhibit 1 and 7 save that the latter documents are updated. The registration records up to year 2012 indicate that the first registration of the suit land was in the name of the Kenya Government on 12.1.1988 and on the same date, it was registered in the name of the plaintiff. On 11.10.1997, the suit land was registered in the name of Obadiah Mwangi Mbutia, 4th defendant. On 16.7.2004, it was registered in the name of Mary Wanjiru Wandutu, the 5th defendant and another title was re-issued to her vide a Kenya gazette No.8601 on 18.1.2006. On 3.7.2009, the land was registered in the name of Joseph Kimani Gichuki and was charged on 26.10.2009 in favour of savings and loans Kenya limited.

47. The plaintiff claims that she never sold the suit land to Obadiah Mwangi Mbutia as captured in entry number 4 of the green card. On the other hand the 6th defendant claims that she is now the registered owner of the land as per the latest (updated) records in the green card. Both the plaintiff and the 6th defendant cite the provisions of Section 24, 25 and 26 of the Land registration Act to buttress their claim of proprietorship to the suit land.

48. In light of the foregoing, I find it expedient to frame the issues for determination as follows:

- (i) *Whether there was fraud in the registration of the suit land from plaintiff to Obadiah Mwangi Mbutia and also whether there was fraud in the subsequent dispositions.*
- (ii) *Whether Joseph Kimani Gichuki (Deceased) was a bonafide purchaser for value in so far as the suit land is concerned.*
- (iii) *What relief should this court give?*

Fraud

49. **Section 26 of the Land Registration Act** provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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”.

50. Both the plaintiff and the 6th defendant have aptly captured the definition of fraud in the Black’s law dictionary as follows;

“Fraud consist of some deceitful practice or wilful device resorted to with intent to deprive another of his right or in some manner to do him an injury...”

51. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the court stated that;

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt”.

Also see **Kuria Kiarie and 2 Others vs Sammy Magera (2018) eKLR**, **David Mwangi Murathi v Samuel Mbuthia Thuo [2018] eKLR**, **Dennis Noel Mukhulo Ochwada & another vs Elizabeth Murungari Njoroge & another (2018) eKLR**.

52. **Section 107 of the Evidence Act** provides that:

“ (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

53. In the case of **Jeniffer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR** , the Court of Appeal stated thus;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent.....

Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side”.

54. Thus in the instant case, it was incumbent upon the plaintiff to adduce concrete evidence to support her claim that she never sold the land to one Obadiah Mwangi Mbuthia. Plaintiff’s claim is basically anchored on her averment that she still has the original title to the suit land and that no evidence has been adduced to show that she sold the said land. She contends that the land registrar is the custodian of the transfer documents of which no such documents are in the parcel file save for the transfer from 5th defendant to 6th defendant.

55. The first point of concern is with regard to the alleged title document in custody of the plaintiff. The plaintiff apparently discovered the fraud in 2012. However there is no evidence to show that the plaintiff took deliberate steps to have her claim of possessing the original title verified by the relevant authorities like the land registrar or the police department. The notable and initial manner in which the plaintiff addressed the Land Registrar is through the demand letter produced as P. exhibit 1 where plaintiff stated as follows:

“We hereby give a notice of intention to institute civil proceedings by the said Mary Mukami Mbachia against the Land Registrar Thika.....

All the foregoing entries are fraudulent, illegal, unlawful null and void as they were done without our client’s knowledge or consent as she still has the original title with herself”.

56. The aforementioned title is the one PW 1 presented to court during the trial, but was never presented to the Land Registrar before then for investigations and verification. PW 2 had testified that;

“we did report the matter to the Kasaran police but don’t have the details...”.

57. It is not fathomable that the plaintiff made a discovery of such great magnitude but did not find it serious enough to warrant the input of the investigatory agencies.

58. DW 1, the Land Registrar saw the title held by plaintiff for the first time in court and this was his comment:

“I don’t know whether this title is genuine or not until it is subjected to government printers to confirm that it is genuine and was issued by Kiambu registry...”.

59. The record in the green cards is consistent in so far as the alienation of the suit land is concerned. DW 1 explained that the records in a parcel file can go missing for various reasons including misfiling and not filing. He however stated that the Registrar who was making the records in the green card must have been satisfied that the transfer instruments were there.

60. What resonates from the above analysis is that it was not sufficient for the plaintiff to claim that she still held the original title to the suit land and then shift the burden of proof upon the defendants.

61. The second point of concern is the element of laches. When the hearing of this suit commenced before me on 1.9.2020, an application was made by plaintiff’s counsel to amend the statement of PW 1 to reflect the year of her visit to the land as 1988. Indeed PW1’s son stated that since 1988, the next time they visited the suit land was year 2012. However, during cross examination by counsel for 6th defendant, PW 1 had stated that;

“All the years since the parcel of land is on the road, I could set my eyes on the land. I used to visit the land and at some point I stopped”.

62. As rightly submitted by the 1st – 3rd defendants, it is rather suspicious that plaintiff got the title deed in 1988, never took possession, never fenced and never visited the land for the next 24 years only to emerge after the building apartments had been put up on the land, yet in her own words the suit land can be seen from the road, and she used to set her eyes on it.

63. Equity aids the vigilant and not the indolent. The plaintiff is guilty of acquiescence as she waited a period of 24 years to assert her claim on the suit land. By then, there were drastic change of circumstances. To start with, the suit land had changed hands severally and eventually when Joseph Kimani Gichuki was registered as the owner of the land on 3.7.2009, he took a loan to build the apartments thereon.

64. The delay by the plaintiff in asserting her legal rights within a reasonable time is certainly prejudicial to the 6th defendant. To this end, I find that plaintiff's claim has been caught up by the doctrine of laches.

65. Finally, I find that the plaintiff has not set out the acts of omissions or commissions committed by the defendants which can be termed as fraudulent. As stated by the Land Registrar, none of the entries in the green card can be termed as unlawful. In the circumstances, I find that plaintiff has failed to establish fraud in the manner the suit property was alienated over the years.

Bonafide purchaser

66. The defendants term the man known as Joseph Kimani Gichuki as a bonafide purchaser while plaintiff disputes this averment. The plaintiff submitted at length as to how the registration of the suit land into the name of Joseph Kimani Gichuki was shrouded in a lot of discrepancies, i.e that the transfer of land document dated 6.6.2009 had the name of Beatrice Wandia cancelled while on the execution part, it had the thumb print of Beatrice Wandia Gichuki and the signature of Joseph Kimani Gichuki, that the application for consent to transfer dated 24.5.2006 has the thumb print of Beatrice Wandia Gichuki but bears the name of Joseph Kimani Gichuki who is indicated as the purchaser and that the letter of consent dated 6.6.2006 has the stamp of 2.6.2009. Counsel for the plaintiff also laid much emphasize on the aforementioned issues during the cross examination upon DW 3 (6th defendant).

67. However, these are not the particulars of fraud attributed to 6th defendant in the pleadings. Paragraph 10 (i) of the plaint is where the plaintiff has discredited the title deed by Joseph Kimani Gichuki as follows:

“Transferring the subject plot to the 6th defendant on 3.7.2009 for a purported consideration of Kshs.1,200,000 and issuing a title deed thereof on 6.7.2009 without plaintiff's knowledge, consent or authority and whilst the plaintiff still had the original valid title in her possession”.

68. Nothing remotely connects Joseph Kimani Gichuki to any fraud or illegality as pleaded in the plaint. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment – See **Samson Emuru vs Suswa Farm Ltd (2006) eKLR, Galaxy paints company Ltd vs Falcon Guards Ltd (2000) eKLR.**

69. In the case of **Dennis Noel Mukhulo Ochwada & another vs Elizabeth Murungari Njoroge & another (2018) eKLR**, the court made reference to the case of **Mohamed Fugicha v. Methodist Church in Kenya, CA No. 22 of 2015** where it was stated that;

“We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer.”

70. The allegations being leveled against Joseph Kimani Gichuki appertaining to the transfer documents and the consent of the land control board are not anchored in the plaintiff's pleadings and cannot stand. The plaintiff is therefore estopped from claiming that Joseph Kimani Gichuki was not a bonafide purchaser on the bases of the discrepancies.

71. It is not lost to this court that plaintiff commenced the pursuit of the suit land shortly after the death of Joseph Kimani. Now she is discrediting the manner in which Kimani acquired the land. I find that the Latin phrase **“MORTUS NON MORDENT”** which means **“dead men don't tell tales, dead men don't bite”** is very much applicable in this situation.

72. In any event, both DW 3 and 4 have given a plausible and consistent account of how Joseph Kimani Gichuki came to be the registered owner of the land. DW 4 stated that it is even her son (Joseph Kimani) who scouted for the suit plot and he introduced her to 5th defendant. Though DW 4 set out to buy the land and entered into the agreement with 5th defendant, she eventually gifted the same to her son before its registration. The introductory part of the sale agreement between 5th defendant and DW4 produced by the 6th defendant states as follows;

“This sale agreement is made this 6th day of June 2006 between Mary Wanjiru Wandutu.....of the one part and Beatrice Wandia Gichuki.....hereinafter called the purchaser the expression which whenever the context so admits shall include her legal heirs, assigns and successors of the other part”.

73. Thus the agreement had made provision for the buyer and seller to extend the transactions to their heirs, assignees and successors. DW 4 also clarified that **“Regarding how we bought the land, it is an issue of a son and mother”**. Indeed there is nothing wrong in that averment.

74. In the final analysis, I find no tangible reason to question the transaction between 5th defendant on one hand and DW 4 and her son Joseph Kimani Gichuki on the other hand.

75. Another point of consideration is with regard to the utilization of the land. Both plaintiff and her son state that they never developed the

land. They confirm that when they went to the suit land in year 2012, they found a multi-storied building erected thereon. It is without a doubt that Joseph Kimani Gichuki and his family (read DW 3) are the ones who constructed the building, and completed it within a period of 3 years (up to 2010) without interference from any one. Such an undertaking certainly depicts an owner who actually had good faith in the manner he acquired the land. It is therefore a mark of suspicion that the plaintiff made her appearance just after the death of Joseph Kimani Gichuki.

76. Finally, I find that the registration records, as captured in all the green cards indicate that the land was lawfully registered in the name of 5th defendant by the time a transfer was effected in the name of Joseph Kimani Gichuki. Further, I find that there is nothing untoward suspicious in the manner the 4th, 5th and 6th defendants acquired the land. For instance when Obadiah bought the land allegedly from the plaintiff in 1997, he stayed with it for many years (7 years to be precise) until 2004 when he sold it to 5th defendant. The 5th defendant sold the land slowly from year 2006 when the sale agreement was made to the time of actual transfer in year 2009. A hasty maneuver to dispose off a piece of land usually sends a red flag. Not so in this case.

77. In the case of **Ibrahim vs Hassan & Charles Kimenyi Macharia Interested party (2019) eKLR**, the court cited the Ugandan Court of Appeal case of **Katende vs Haridas & Company Ltd (2008) 2 EA 174** where a bonafide purchaser was defined as follows:

“A bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine he must prove the following: He holds a certificate of title, he purchased the property in good faith; he has no knowledge of fraud; He purchased for valuable consideration; the vendors have apparent good title; He purchased without notice of any fraud; he was not party to any fraud”.

78. There is no evidence of Joseph Kimani Gichuki’s involvement with illegalities in acquisition of the suit property, and he therefore fits the definition of a bonafide purchaser for value without notice of any alleged fraud or irregularities. The title held by the 6th defendant in respect of the suit land is therefore protected under the law.

Relief

79. In light of the foregoing analysis, I proceed to give orders as follows:

(1) Plaintiff’s claim is hereby dismissed.

(2) The counter claim of 6th defendant is allowed in the following terms:

(i) It is hereby declared that Joseph Kimani Gichuki was the lawful registered proprietor of land parcel No. L.R Ruiru East/Block 5/105 on 3.7.2009.

(ii) It is hereby declared that the plaintiff Mary Mukami Mbachia has no lawful claim to the suit property as against Eunice Nyokabi Rukwaro, the 6th defendant.

3. As to costs, this court has taken into account that the plaintiff is a very elderly woman aged 98 or so years. As such, I desist from condemning her to pay costs. I therefore direct that each party bears their own costs of the suit (main claim and counter claim).

DATED AND SIGNED AT MERU THIS 4TH DAY OF MARCH, 2021

HON. LUCY N. MBUGUA

ELC JUDGE - MERU

DELIVERED AT THIKA THIS 18TH DAY OF MARCH 2021

HON. LUCY GACHERU

ELC JUDGE - THIKA