



REPUBLIC OF KENYA

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IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 31 OF 2019

(FORMERLY NRB ELC NO. 1194 OF 2013)

ESTHER WANGUI NDEGWA.....PLAINTIFF

VERSUS

HELLEN WAMBUI MERIA.....1ST DEFENDANT

DOUGLAS MURAYA KARUIRU.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR SUED ON

BEHALF OF THE LAND REGISTRAR THIKA.....3RD DEFENDANT

THE REGISTRAR OF TITLES.....4TH DEFENDANT

THE NATIONAL LAND COMMISSION.....5TH DEFENDANT

JUDGMENT

By a Plaint dated 3rd October 2013, the Plaintiff sought Judgment against the Defendants jointly and severally for the following orders that:-

a) A Declaration that the proceedings before the Thika Lands Disputes Tribunal Culminating in an award adopted in Thika Chief Magistrates D.O Case Number 63 of 2006 were illegal null and void.

b) A Declaration that any sale of the suit property by the 1st Defendant to the 2nd Defendant is illegal, null and void.

c) A Declaration that the Defendants hold land parcel Number Ruiru /Kiu Block 2 (Githunguri) 4308 in trust for the Plaintiff and the Plaintiff therefore prays for an order directing the Thika Land Registrar to rectify the register of land parcel Number Ruiru /Kiu Block 2 (Githunguri) 4308 by deleting the names of the 1st and 2nd Defendants from the register and in their place enter the Plaintiff's name as the sole and absolute proprietor of the suit land.

d) A Permanent Injunction restraining the 1st and 2nd Defendants from trespassing into, subdividing, transferring, wasting, alienating or otherwise dealing with or parting with possessing of the suit property namely Ruiru/Kiu Block 2 (Githunguri) 4308.

e) Costs of the suit.

f) Any other or further relief that the Honourable Court may deem fit and just to grant.

The Plaintiff had averred that on 2nd June 1968, her late husband **Ndegwa Thiongo** and herself purchased shares from **Githunguri Constituency Ranching Company Limited-Ruiru** as per share certificate **No. 2440**. They were allocated ballot **No. 1243**, for land parcel **No. 4308** measuring **1.25 acres**, and the Plaintiff entered into possession and caused the survey of her parcel of land **No. 4308**, as shown to her by **Githunguri Constituency Ranching Company Limited**. That a title deed was processed being **Ruiru/Kiu Block**

2(Githunguri) 4308, and issued on 26th August 1996.

That in **January 2008**, the Plaintiff was informed that there were proceedings at Thika Law Courts, where the 1st Defendant had initiated a process to dispossess her off the suit property. That on **4th February 2008**, the Plaintiff attended **Thika Law Courts** and discovered that the 1st Defendant had initiated proceedings at **Thika Land Disputes Tribunal**, who heard the matter without her knowledge and participation and made an **award** in favour of the 1st Defendant by ordering the transfer of the suit property into the names of the 1st Defendant. That upon perusal of Civil Suit to wit **Thika Chief Magistrates Court D.O Case No. 63 of 2006 Hellen Wambua Meria ... Vs... Esther Wangui Ndegwa**, the Plaintiff duly made representations on subsequent dates, but the court adopted the award on **20th August 2008**.

Further that on **9th April 2008**, the 3rd and 4th Defendants duly complied with the Court order in **Thika Chief Magistrates, D.O Case No. 63 of 2006**, and cancelled the Plaintiff's title and issued a new title to the 1st Defendant for the suit property. That the Plaintiff then duly registered restrictions on the said title to protect her interests with the 3rd and 4th Defendants at Thika Lands Registry and also sought intervention and arbitration with the registered officials of **Githunguri Constituency Ranching Company Limited – Ruiru**, who stated that the suit property as per their records belongs to her as parcel **No. 4308** and the 1st Defendant's land is parcel **no. 493**, which is different and not in the same locality. That upon conducting an official search, the Plaintiff discovered that the 1st Defendant had sold and transferred the suit property to the 2nd Defendant.

It was the Plaintiff's contention that the **1st to 4th Defendants** have acted **fraudulently** and **illegally**. The plaintiff particularized **fraud** and **illegality** as initiating legal proceedings at Thika Land Disputes Tribunal, hearing the same and making an award without notifying the Plaintiff or **Githunguri Constituency Ranching Company Ltd-Ruiru**, being a first registration, the Thika Land Disputes Tribunal had no jurisdiction to hear and determine the same, alienating the land during the subsistence of a Caveat / restriction lodged over it, purporting to sell the Plaintiff's interest in the suit land yet records and statements by **Githunguri Ranching Company limited** confirmed the suit property belonged to the Plaintiff. Registering and issuing a new title deed to the parcel of land to other persons other than the ones prescribed by law, bribing Police officers at Thika and Ruiru Police Stations.

The Plaintiff contended that having fulfilled all the conditions for the purchase of the suit property from **Githunguri Constituency Ranching Company**, and a title deed issued to her, the Defendants must be presumed to hold the suit property in trust for her as she had possession to date

The suit is contested and the 2nd Defendant filed a Defence dated **30th October 2013**, and denied all the allegations made in the Plaintiff. He averred that the suit was bad in law as it had been determined by a Court of competent jurisdiction vide **D.O Case No. 63 of 2006**. That the Court coram shows that the Plaintiff was in Court on **29th October 2007**, and further that the Court adopted the award on **20th August 2008**. The 2nd Defendant further averred that as per the due diligence conducted before the sale, all government records indicated that the 1st Defendant was the legal owner of the suit property and that the proper legal process was followed during the sale and transfer of the suit property to the 2nd Defendant. Further that he was an innocent purchaser for value and as per the government record, the 1st Defendant was the legal registered owner of the suit property, which vested the 1st Defendant with right to dispose of the property.

Further that the 2nd Defendant is the current legal registered owner and has been in possession of the suit property. That the Plaintiff's possible course of action is either Judicial Review or an Appeal, and not institution of another legal suit. Further that the cause of action is barred by Limitation of time. That the suit is **Res judicata** since the same issues were determined by a competent Court. The Court was urged to dismiss the suit since the Plaintiff has no cause of action.

The 1st Defendant filed a statement of Defence dated **25th March 2014** and denied all the allegations made in the Plaintiff and averred that the parties were invited by the then District Officer on **22nd February 2005**, together with a 3rd person not a party to the suit over the suit property. That the Plaintiff failed to appear after several invitations. That the plaintiff fully participated in the **Thika Chief Magistrates Court D.O Case No. 63 of 2006**, and the award was adopted on merits. That despite a gazette Notice informing anyone with objection to lodge their complaints, the Plaintiff never lodged any complaint or objection. That the 2nd Defendant is the owner of the suit property and the 1st Defendant is still in possession. That the matter raised in the suit are **Res Judicata** since the same were determined and concluded. The Court was urged to dismiss the Plaintiff's suit against the 1st Defendant with costs.

After close of pleadings, the matter proceeded by way of viva voce evidence on **22nd July 2020** wherein the Plaintiff testified for herself and closed her case. Despite being served with the hearing Notice, the Defendants did not attend Court for hearing and therefore the matter proceeded without their participation.

PLAINTIFF'S CASE

PW1 Esther Wangui Ndegwa adopted her witness statement dated **3rd October 2013**, as part of her evidence. She produced the list of documents as Exhibits 1 to 12. She testified that she bought the land from **Githunguri Constituency Ranching Company Limited**. That she had receipts for payment for the suit property and that the Chairman confirmed that the land belongs to her and she was the one in possession of the suit property. That though the 1st and 2nd Defendants entered into her land, she had demolished the structures that they had put thereon. That she conducted a search and noticed that the land had been changed into the name of the 1st and 2nd Defendants. That they balloted for the parcel of land and she got hers. It was her evidence that Hellen's title was different from hers. She urged the Court to allow her claim with costs.

The Court directed the Plaintiff to file written submissions and in compliance with the said directive, she filed the said written submissions

though the **Law Firm of Magare Musundi** on 19th August 2020, which the Court has carefully read and considered.

The issue for determination is *whether the Plaintiff is entitled to the orders sought.*

Though the Defendants filed their respective Defences, they did not adduce any evidence in support of their claim and therefore all the averments in their Defence remains just mere allegations as averments in pleadings are not evidence. Therefore, the Plaintiff's evidence remained uncontroverted and in the case of *Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, where the Court cited the case of Janet Kaphiphe Ouma & Ano....Vs...Marie Stopes International (Kenya), Kisumu HCC No.68 of 2007*, the Court held that:-

“In this matter apart from filing its statement of Defence the defendant did not adduce any evidence in support of assertions made therein . The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations....Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same.”

However, the Plaintiff still has an obligation to prove her case as uncontroverted evidence is not automatic evidence.

The Plaintiff has laid claim to the suit property and averred that her husband and herself had bought the suit property from **Githunguri Constituency Ranching Company Limited**. It is not in doubt that the 1st Defendant in his Defence had also laid claim to the suit property and as per the proceedings in the **Land Disputes Tribunal**, the tribunal held that 2nd Defendant was the legal owner of the suit property. The said proceedings were adopted by the **Chief Magistrates Court** as the order of the Court.

In her Plaintiff, the Plaintiff had sought for the Court's Declaration that the proceedings before the **Thika Lands Disputes Tribunal**, culminating in an award adopted in **Thika D.O Case No. 63 of 2006**, were **illegal, null and void**. The Court having gone through the proceedings in this Court notes that vide a Ruling dated **24th October 2014**, the **Hon. Justice Mutungi** held that the said proceedings were illegal. There is no indication that the said orders were ever varied or set aside and therefore this Court finds that the said prayer is merited.

The Plaintiff has also sought for a declaration that the sale of the suit property to the 1st Defendant by the 2nd Defendant was illegal. It is not in doubt that the 2nd Defendant sold the suit property to the 1st Defendant on the strength of the proceedings which have since be declared a nullity. Be that as it may, the 1st Defendant without having the cancellation of the suit property, is the registered owner of the suit property. It is trite that when a persons title over a property is called into question, then that person must be able to provide for the root of their title. See the case of *Munyu Maina...Vs.. Hiram Gathiha Maina [2013] eKLR*, held as follows:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

In this instant, it became imperative that the 1st Defendant shows the root of his title. As the Court has noted above, the Defendants did not testify in Court, Therefore, they have been unable to show the root of their title.

The Plaintiff on the other hand averred that she bought the suit property from **Githunguri Constituency Ranching Company**. To collaborate her evidence, the Plaintiff produced in evidence a ballot card for shamba No. **4308**. The Plaintiff further produced in evidence various receipts evidencing payments made to the said Company . The Plaintiff further produced in evidence a clearance certificate from **Githunguri Constituency Ranching Company** indicating that she bought **shamba 4308**, ballot **1243** and a certified Copy of the extract from the original Register confirming that the Plaintiff parcel of land was **4308**. The Plaintiff also produced in evidence a letter from **Githunguri Constituency Ranching Company** dated **25th June 2010** confirming that as per their records , the Plaintiff was the owner of the suit property.

It is not in doubt that the suit property, initially belonged to the **Githunguri Constituency Ranching Company Limited** as the 2nd Defendant also claimed to have acquired proprietorship from them. Further as the Company has confirmed that the plaintiff is the owner as per their records coupled with the Plaintiff producing in evidence documents to prove the root of her title, the Court finds and holds that the Plaintiff has proved the root of her title.. See the case of *Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others[2016] eKLR*, where the Court held that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

The Plaintiff having satisfactorily explained the root of her title and the Defendants having failed to explain the root of their title, the Court finds that the 1st Defendant's Certificate of title must be impeached . See the case of *Alice Chemutai Too ...Vs... Nickson Kipkurui Korir & 2 Others [2015] eKLR*, where the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

The Plaintiff has sought for a declaration that the sale of the suit property was illegal, As already noted, the Defendants did not prove the root of their title. The Court has further gone ahead to impeach the title held by the 1st Defendant and subsequently by the 2nd Defendant. Therefore, the Court finds and holds that the said prayer is merited.

The Plaintiff has also sought for a declaration that the Defendants were holding the property in trust for her. In the case of **Juletabi African Adventure Limited & another ...Vs...Christopher Michael Lockley [2017] eKLR** the Court relied on the case of **Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggah Ahmed Al-Heidy & Others [2015] eKLR**, where the same Court of Appeal held that;

“According to the Black’s Law Dictionary, 9th Edition; a trust is defined as

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell’s Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor’s intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell’s Equity at p.177) (supra).” Emphasis added”

The Court having made a finding that the title held by the 1st Defendant was illegal and therefore held by wrong doing, it would not hesitate to further hold that the Defendants then held the suit property in trust for the Plaintiff. Further **Section 143** of the **Registered Land Act Cap 300 (repealed)** and which has been reproduced in **section 80** of the **Land Registration Act, 2012** gives this Court the powers to cancel any title that has been acquired unlawfully and order for rectification of the Register. The Court finds the said prayer seeking for cancellation merited

Finally the Plaintiff has sought for an order of Permanent injunction. Being the owner for the suit property, she is entitled to all the rights and privileges that appertain to the suit property including a right to peaceful and quiet possession of the suit property as provided by **sections 27 and 28** of **Cap 300 (repealed)** and now in **section 24** and **25** of the **Land Registration Act**. The Court therefore finds and holds that the said prayer is merited.

Having now carefully read and considered the pleadings by the parties, the evidence adduced in support of and the written submissions, the Court finds and holds that the Plaintiff has proved her case on the required standard of balance of probabilities. Consequently, the Court enters judgment for the Plaintiff against the Defendants herein jointly and severally as prayed in the Plaint dated **3rd October 2013**, in terms of prayers No. **(a) (b) (c)** and **(d)** together with costs thereon.

It is so ordered.

Dated, signed and delivered at Thika this 4th Day of March 2021

L. GACHERU

JUDGE

4/3/2021

Lucy - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Miss Sirima for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant

No appearance for the 4th Defendant

No appearance for the 5th Defendant

L. GACHERU

JUDGE

4/3/2021