



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC SUIT NO.138 OF 2018**

**JOYCE KANYUA MUGO.....PLAINTIFF**

**VERSUS**

**GEORGE MAINA MICHAEL.....DEFENDANT**

**JUDGMENT**

By a **Plaint** dated **4<sup>th</sup> May 2018**, the **Plaintiff** filed this suit against the **Defendant** and sought for orders that;

- 1. That a permanent injunction restraining the Defendant, his agents, servants and/or employees from entering, developing, selling or in any other way interfering with the plaintiff's possession and use of plot number Thika Municipality Block 14/1216.**
- 2. That the registration of the Defendant as lease holder of the land parcel Thika Municipality Block 14/1216 be cancelled and the Land Registrar Thika do register the Plaintiff as proprietor thereof in place of the Defendant.**
- 3. Costs of the suit and interest thereon.**

In her statement of Claim, the Plaintiff averred that she was allocated plot known as **No. 148** by the then plot allocation committee of the then Municipal Council of Thika, vide a letter dated **9<sup>th</sup> June 1987**. That by a letter dated **22<sup>nd</sup> January 1991**, the Commissioner of Lands formally gave her an allotment letter to the said plot. Further that the Plaintiff accepted the said allotment by a cheque dated **29<sup>th</sup> September 1994**, and a letter dated **30<sup>th</sup> September 1994**, she paid the fees indicated by the Commissioner of Land amounting to **Kshs. 15,000/=**. That she further paid **Kshs.52,644/=** to the Ministry of Lands so that the Lease and the Certificate of Lease can be processed.

That the Plaintiff has been waiting the processing of the Lease and the certificate. That she was informed that some people had been spotted inspecting the area and upon conducting a search she found that her plot now known as **Thika Municipality Block 14/1216, had been registered in the names of the Defendant. That the registration of the Defendant as the proprietor was obtained unlawfully, irregularly and through fraud. She particularized fraud on the part of the Defendant as:-** Getting himself registered as proprietor of the suit property without following the law and procedure;- having himself registered as the leaseholder to the plot without proper and lawful letter of allotment by the relevant institution and registering himself as the proprietor of land knowing very well that the same was lawfully owned by the Plaintiff.

Despite Service via substituted service, the Defendant did not **Enter Appearance** and therefore did not participate in the proceedings. On **28<sup>th</sup> September 2020**, the matter proceeded for **Formal Proof** wherein the Plaintiff testified for herself and closed her case.

**PLAINTIFF'S CASE**

**PW1- Joyce Kanyua Mugo**, adopted her witness statement filed on court on **4<sup>th</sup> May 2018** as her evidence in chief and produced her list of documents as Exhibit 1 and further list of documents as Exhibit 2. It was her testimony that after fraudulent registration, the suit property became **Thika Municipality Block 14/1216. She urged the court to allow the prayers sought in her plaint.**

After Close of viva voce evidence, the Plaintiff filed her written submissions on **9<sup>th</sup> December 2020** through the **Law Firm of Jesse Kariuki & Co. Advocates** and submitted that the registration of a proprietor to the parcel of land can only be defeated as provided under **Section 80(1) of the Land Registration Act 2012**. Since the Plaintiff testified that she has never sold, transferred nor undertaken any transaction in respect of the suit property, therefore any transfer, registration or purported sale or conveyance of the suit property is irregular, fraudulent and therefore null and void.

This Court has now carefully considered the pleadings in general, the available evidence, the written submissions and relevant provisions of law and renders itself as follows:-

The Defendant herein did not enter appearance nor file his Defence and the suit therefore proceeded as an undefended suit. That means that the plaintiffs allegations were not controverted. However, uncontroverted evidence is not automatic proof of a case, as the Plaintiff still had an obligations to prove her claim as *he who asserts or alleges must prove*. See the **Evidence Act Section 107** which states:-

**(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.**

The matter proceeded for hearing through formal proof. What is formal proof? In the case of **Samson S. Maitai & Ano...Vs...African Safari Club Ltd & Ano. (2010) eKLR**, the Court held that:-

**“...I have not seen judicial definition of the phrase ‘formal proof’. ‘Formal’ in its ordinary dictionary meaning refers to being ‘methodical’ according to rules of evidence. On the other hand, according to Halsburys Laws of England, Vol. 17 Paragraph 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption”.**

Therefore, it is evident from the above observation of the Court that in a formal proof hearing, all rules of evidence and procedures are observed and the party to a suit has to adduce evidence sufficient to sustain the suit.

Taking into account the above principles on what entails a formal proof, the Court will juxtapose the same with the available evidence and facts to establish whether the Plaintiff has proved her claim.

The Court finds that the issue for determination is ***whether the Plaintiff is deserving of the orders sought***.

It is the Plaintiff’s evidence that she is the registered owner of the suit property. That vide a letter dated **9<sup>th</sup> June 1987**, from the Municipal Council of Thika, she was notified of her of plot allocation **No.148** which letter she produced in evidence. Further on **22<sup>nd</sup> January 1991**, she was issued with an allotment letter for **Plot 148**, with a condition that she pays **Kshs. 52,644/=**. The Court has seen letter dated **30<sup>th</sup> September 1994**, evidencing that the Plaintiff made payments and a further letter dated **3<sup>rd</sup> August 2016**, by the Secretary of Lands acknowledging that the Plaintiff had made the requisite fees. Therefore, this Court is thus satisfied that upon making the said payments, the Plaintiff became an allottee of **Plot 148**, and the same could not be allocated to anyone else. Further in the absence of any evidence that any other person was allocated the said plot previously, the Court finds and holds that the Plaintiff is indeed the owner of **Plot 148**.

However, the Court has not been satisfied as to the nexus between **Plot 148** and **L.R Thika /Municipality/Block 14/1216**. While the documents produced in evidence in terms of allotment are in relation to Plot 148, the Plaintiff is laying claim to **L.R 14/1216**, which she claims was initially Plot 148. While this evidence had not been controverted, the plaintiff had the obligation to prove the same. The Plaintiff has produced in evidence a Copy of the Registry Index Map for Block 14, and a copy of Map subdivision of the same. The Plaintiff has not produced in evidence the relation between **Plot 148** and **Block 14** or how **Plot 148** became **Block 14/1216**.

This Court having carefully examined the two maps, notes that indeed there exists **Block 14/1216**, in the notes in the subdivision scheme it is indicated Amendments and the under **Entry 27**, the old parcel No. has been left blank while the new parcel No. has been indicated as 1215-1222.

The Plaintiff has not shown the direct and or clear indication that **Plot 148** is indeed **Block 14/1216**. In the absence of such evidence, this Court cannot not make a finding that the two relate to the same property . The Search produced in evidence by the Plaintiff relates to **Block 14/1216**. The Plaintiff has not indicated to this Court why she did a search of the same or how she knew that **Plot 148** was **Block 14/1216** and therefore the Court finds and holds that without any evidence of the nexus that is clear and unequivocal that indeed **Plot No. 148 is Block 14/1216**, it cannot hold that the Plaintiff is the owner of **Block 14/1216**.

For the above reasons, the Court finds and holds that it cannot issue a permanent injunction nor can it cancel the Defendant’s registration without the unequivocal proof that **Plot no. 148** is now **Block 14/1216**. Therefore, the Plaintiff is not entitled to the orders sought having failed to prove her ownership of the suit property.

The Upshot of the foregoing is that the Plaintiff has failed to prove her case on the required standard of proof being on a balance of probabilities. Consequently her claim dated **4<sup>th</sup> May 2018** is **not merited** and the same is dismissed entirely with no orders as to costs.

**It is so ordered.**

**DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF APRIL 2021.**

**L. GACHERU**

**JUDGE**

**29/4/2021**

**Court Assistant – Phyllis**

**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 His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. 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**

**Mr. Jesse Kariuki for the Plaintiff**

**No appearance for the Defendant**

**L. GACHERU**

**JUDGE**

**29/4/2021**