



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO 598 OF 2017

ALICE WAMBUI GICHURU (*suing as the administrator of*

*the estate of SAMUEL GICHURU GEORGE (deceased).....***PLAINTIFF**

VERSUS

GATHONI CHEGE *as the personal representative of*

*the estate of GEOFFREY CHEGE (deceased).....***1ST DEFENDANT**

THE LAND REGISTRAR THIKA.....**2ND DEFENDANT**

HON.ATTORNEY GENERA.....**3RD DEFENDANT**

JUDGEMENT

By a **Plaint** dated **30th May 2017**, and filed on **13th June 2017**, the Plaintiff **ALICE WAMBUI GICHURU** brought this suit against the **Defendants jointly and severally seeking for the following orders:-**

- a) A declaration that the registration of the 1st Defendant as proprietor of the land is illegal, unconstitutional and void ab initio.**
- b) A declaration that the parcel of land known as KARAI/LUSSIGITTI/T.885, belongs to the Plaintiff herein.**
- c) An order directing the 2nd Defendant to rectify the Land Register by cancelling registration of the 1st Defendant as proprietor of the suit property and registering the same in the name of the Plaintiff as the Administrator of the Estate of SAMUEL GICHURU GEORGE.**
- d) An Order directing the 2nd Defendant to issue the Plaintiff with the requisite title documents to the parcel of land known as KARAI/LUSSIGITTI/T.885.**
- e) A permanent injunction to restrain the Defendants either by themselves, their agents, servants, employees or representatives from interfering with the Plaintiff's ownership, peaceful occupation and use of the suit property.**
- f) An order of damages against the Defendants jointly and severally.**
- g) Costs of the suit.**

In her statement of claim, the Plaintiff averred that she is a legally appointed representative of the estate of **SAMUEL GICHURU GEORGE** (deceased), who died on the **13th July 2006**, and the suit property belonged to the estate of **SAMUEL GICHURU GEORGE**(deceased) having been allocated by the County Council of Kiambu in **1975**. She further averred that it came to her knowledge that the 1st Defendant had fraudulently and in unclear circumstances caused the suit property to be registered in her husband's name; one **GEOFFREY CHEGE MUTURI** (deceased). On **25th October 2011**, she wrote to the County Council of Kiambu requesting for confirmation of the details pertaining to the suit property and in reply, the County Council of Kiambu confirmed that the suit property was allotted to her deceased husband, and he was identified as the genuine allottee of the suit property. Further, the County Council of Kiambu indicated that they had established that under unclear circumstances, the title document to the suit property had been issued to another person unknown to them and the unknown person is the 1st Defendant herein. That her deceased husband is the rightful and legal owner of the suit

property and thus the subsequent registration of the 1st Defendant as the proprietor of the suit property was obtained **fraudulently, illegally** and **without any basis** in law. She particularized fraud on the part of the 1st Defendant as follows;

- a) *Causing the suit property to be illegally registered in the name of GEOFFREY CHEGE MUTURI.*
- b) *Obtaining registration and title documents to the suit property without following the prescribed procedures of registration.*
- c) *Obtaining registration without clear transparent and/or regularly documented consent, permission and/or knowledge of the Commissioner of Lands.*
- d) *Defrauding the Plaintiff of rightful ownership by illegally, fraudulently and unprocedurally causing registration to be effected in the name of GEOFFREY CHEGE MUTURI without the Plaintiff's consent and knowledge, and without any regard to the Plaintiff's rightful ownership.*
- e) *Occupying the suit property without the Plaintiff's knowledge and/or consent.*
- f) *Failing to surrender the fraudulently obtained title documents and surrender possession of the suit property to the Plaintiff despite demands made by the Plaintiff and despite knowledge that the suit property legally and rightfully belongs to the Plaintiff.*

She also particularized fraud on the part of the 2nd and 3rd Defendants as follows;

- I. *Effecting registration of the suit property in the name of GEOFFREY CHEGE MUTURI without following the prescribed procedure.*
- II. *Effecting registration of the suit property in the name of GEOFFREY CHEGE MUTURI, without any regard to the rights of the Plaintiff as the rightful owner of the suit property and despite knowledge of the same.*
- III. *Illegally, fraudulently and unprocedurally issuing title documents of the suit property to the 1st Defendant without any regard to the laid procedures of doing the same.*

The 2nd and 3rd Defendants herein entered appearance through the OFFICE OF THE ATTORNEY GENERAL and denied all the allegations raised in the Plaint and did put the Plaintiff to strict proof. The 1st Defendant never entered appearance and neither did she file any documents with regards to the suit.

PLAINTIFF'S CASE

The Plaintiff, PW1 Alice Wambui Gichuru stated that she had balloted for the suit land since 1970 and the land belonged to her late husband who acquired the title deed for the parcel of land. She further stated that the search certificate is in the name of the 1st Defendant husband and produced a search certificate as Exhibit 1. That she wrote a demand letter to the 1st Defendant (demand letter Exhibit 2) and the County Council of Kiambu wrote a letter to her (letter by County Council of Kiambu marked as Exhibit 3) and wrote a letter to the AG to confirm that the land belonged to her (AG's notice marked as Exhibit 4). That she has a grant of letter of administration to the said parcel of land (Grant of letters of administration marked as Exhibit 5) and the rectification of the allocation of land marked as Exhibit 6. She also produced Receipts as exhibit 7 for payments made on the plot. She further produced regularization of the plots minutes as Exhibit 8. She finally requested the court to cancel the 1st Defendant's title and have it registered in her name. There was no cross examination therefore, the Plaintiff closed her case.

DEFENCE CASE

DW 1 JOHN MATHEKA, the Land Registrar Kiambu stated that he drew a response to the Plaintiff's claim together with his witness statement dated 14th March 2019, and filed a list of documents i.e. a copy of the Green Card of the said parcel of land and produced it as exhibit in court. He testified that the current registered owner is GEOFFREY CHEGE MUTURI and was registered on 15th December 1988. Before him was STANLEY MUNGAI WAWERU, who had been registered on 17th September 1987. That he relied on the parcel file where there is a transfer of land from STANLEY MUNGAI WAWERU to GEOFFREY CHEGE MUTURI, the said transfer is dated 17th September 1987, and registered on 15th December 1988. He further testified that there is another transfer related to the registered owner entry No.1-3 that is the County Council of Kiambu to STANLEY MUNGAI WAWERU and that there were documents showing how the procedure was done. His witness statement was adopted and list of documents as Exhibit 1. He was not cross examined therefore, the defence closed its case.

Parties were directed to file written submissions and the Plaintiff through the Law Firm of WAWERU KIRAGU & ASSOCIATES ADVOCATES filed her submissions on 16th September 2020, while the 2nd and 3rd Defendants filed their submissions on 28th September 2020 through the OFFICE OF THE ATTORNEY GENERAL. The Court has now carefully read and considered the said Written Submissions together with the cited authorities and the relevant provisions of law, and the available evidence. The issue for determination is whether the **Plaintiff is entitled to the orders sought.**

The Court has also considered the pleadings, evidence adduced and the exhibits thereto and renders itself as follows; though the 1st Defendant was duly served, she did not enter appearance nor defend the suit. The Plaintiff has to show how **SAMUEL GICHURU GEORGE** (deceased) acquired the property known as **KARAI/LUSSIGITTI/T.885 Plaintiff is the one who alleged and therefore she**

had an obligation to give evidence on the procedure and processes that were used to acquire the suit land. See the case of **Hubert L. Martin & 2 Others v 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.”

Interest in land is conferred by registration of a person as the proprietor of the land as per **Section 27** of the **Registered Land Act Cap 300 (repealed)** and which provisions have been imported in **Section 24** of the **Land Registration Act** which provides;

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

However, this registration is not absolute as a person must prove that the said registration was one that was in accordance with the law and the laid down procedures. **Section 26(1)** of the **Land Registration Act** provides;

“The Certificate of title issued by the Registrar upon registration, 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 the 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.

This Court holds and finds that the Plaintiff produced a grant of letters of administration giving her authority of the estate of the late **SAMUEL GICHURU GEORGE**. The Plaintiff has also provided a sequence of how the deceased used to make payments for the suit land. However the Defendants have on the other hand provided documentation in terms of Green Card and transfers of the suit property known as **KARAI/LUSSIGITTI/T.885** and on how the County Council of Kiambu transferred the said property to **STANLEY MUNGAI WAWERU** and how **STANLEY MUNGAI WAWERU** transferred the suit property to one **GEOFFREY CHEGE MUTURI**. However, the Defence witness failed to table more evidence on how the transactions took place and the necessary steps that led to creation of transfers.

Section 107(1) of the **Evidence Act (Chapter 80 of the Laws of Kenya)** provides:

“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.”

The Plaintiff has contended that a letter emanating from the County Council of Kiambu confirms that **SAMUEL GICHURU GEORGE** (deceased) is the rightful owner of the suit property and further produced a letter dated **20th November 1992**, allocating $\frac{1}{4}$ acre plot to **SAMUEL GICHURU GEORGE** (deceased). The said letter was never challenged by all the Defendants and no evidence was adduced by the Defendants to rebut the same at the trial.

It is not clear to this court how **STANLEY MUNGAI WAWERU** transferred the suit property to one **GEOFFREY CHEGE MUTURI** and how the property in question exchanged hands. The **2nd** and **3rd** Defendants only produced a copy of the Green Card, but never explained to this court the root and exchange of the title satisfactorily. The Plaintiff has further produced payment receipts and a confirmation letter from the County Council of Kiambu evidencing payments made and ownership in respect of the suit land which belonged to the said **SAMUEL GICHURU GEORGE**(deceased) From the above flow of documentation, the root as to the proprietorship by the Plaintiff, has satisfactorily been explained to this Court.

The court noted earlier on that the **1st** Defendant never participated in the matter. If she did, she would have shed more light on how she acquired the title to the suit property The fact that the suit has not been defended by the **1st** Defendant, who alleges ownership, means that the Plaintiff’s evidence remained unchallenged and uncontroverted by the **1st** Defendant.

The Plaintiff further alleged that the Defendants acquired the title to the suit property through fraud. It is trite that fraud must be specifically pleaded and proved. As the definition of frauds include misrepresentation of facts, **Section 24(a) of the Land Registration Act** provides that:-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together

with all rights and privileges belonging or appurtenant thereto; and;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

However, the said Registration is not absolute and can be impugned if it was acquired through fraud or misrepresentation as provided by **Section 26(1)(a) and (b)** of the **Land Registration Act**; being that certificate and title of the 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.

It is therefore very clear from the above that the law protects title to land, but there are two instances wherein such title can be challenged. The first is where the title is obtained by **fraud** or **misrepresentation** to which the person must be proved to be a party. The second is where the certificate of title has been acquired **illegally, un-procedurally** or **through a corrupt scheme**. The Court of Appeal in 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.”

Also see the case of **Dr. Joseph Arap Ngok ...V...Justice Moijo ole Keiwua & 5 others, Civil Appeal No.Nai.60 of**

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

No appearance for the Plaintiff

No appearance for the 1st Defendant

M/s Ndundu for the 2nd and 3rd Defendant

L. GACHERU

JUDGE

22/4/2021