



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 30 OF 2019

JAMES NJOROGE KARIUKI.....PLAINTIFF

VERSUS

MBUGUA MBURYATHE.....DEFENDANT

JUDGEMENT

By a Plaint dated 20th January 2015, the Plaintiff herein **JAMES NJOROGE KARIUKI**, sought for Judgment against the Defendant **MBUGUA MBURYATHE** for;

- a) A permanent injunction to restrain the defendant by himself, servants and or assigns from entering into, interfering or in any manner dealing with the suit premises, title No. **RUIRU KIU BLOCK 2/2738**, and the subdivision that have issued therefrom being title numbers **RUIRU KIU BLOCK 2/8835, RUIRU KIU BLOCK 2/8834, RUIRU KIU BLOCK 2/8829, RUIRU KIU BLOCK 2/8839, RUIRU KIU BLOCK 2/8828, RUIRU KIU BLOCK 2/8836, RUIRU KIU BLOCK 2/8837, RUIRU/KIU BLOCK 2/8838**.*
- b) A declaration that the suit premises title no. **RUIRU/KIU BLOCK 2/2738**, is the lawful property of the plaintiff.*
- c) General damages.*
- d) Costs*

In his statement of claim, the Plaintiff averred that he was the owner of title No. **RUIRU KIU BLOCK 2/2738**, which was originally plot no. 2738, contained in ballot No. 2492, designated for the holder of share certificate No. B3937, issued by **Githunguri Ranching Company Limited**. He further averred that he purchased the said parcel from one **STEPHEN GITAU UIRU**, who was the original allottee under Share Certificate No. B2267 and ballot No. 2492, of **Githunguri Ranching Company Limited**. He stated that the **Githunguri Ranching Company Limited** issued him with a clearance certificate advising the District Land Registrar to issue him with a title deed of the suit premises and he was issued with a title deed being title No. **RUIRU KIU BLOCK 2/2738**. Further that upon issuance of the said title, he caused the same to be subdivided into 12 parcels which have been sold to third parties and titles issued as follows;

- I. RUIRU KIU BLOCK 2/8838 registered in the name of SIMON GATHINYE KARIUKI.**
- II. RUIRU KIU BLOCK 2/8834 registered in the name of ALICE NJOKI & SIMON GICHUKI WAMBUGU.**
- III. RUIRU KIU BLOCK 2/8829 registered in the name of ALICE WANGARI MACHARIA.**
- IV. RUIRU KIU BLOCK 2/8839 registered in the name of CHARLES KAMAU MAINA.**
- V. RUIRU KIU BLOCK 2/8828, 8836 & 8837 registered in the name of JOHNSTONE KAMAU KARIUKI.**
- VI. RUIRU KIU BLOCK 2/8838 registered in the name of EDWIN MUTHIGO MAINA.**

The Plaintiff stated that the Defendant procured his documents by way of fraud and particularized fraud on the part of the Defendant as follows;

a) Issuing and /or procuring falsified/ irregular documents on the suit property purporting to have been issued from the Githunguri Constituency Ranching Company Limited.

b) Unlawfully purporting to be proprietor of the suit premises.

c) Making of parallel registration documents to procure issuance of title documents in the defendants' name.

The Defendant herein entered appearance through the Law Firm of MBURU MACHUA & CO ADVOCATES, but never filed any Defence or any other documents in response to the suit. The court observed that the Defendant was well served as per the Affidavit of Service on record and allowed the hearing to proceed in his absence.

The Plaintiff, James Njoroge Kariuki appeared as PW1 and stated that land parcel No. RUIRU KIU BLOCK 2/2738, was allocated to him by Githunguri Ranching Company Limited. He adopted his witness statement and list of documents as exhibit No.1. He testified that the suit property has been subdivided into 12 plots as per the details in the Plaintiff. He urged the court to issue a permanent injunction against the Defendant, damages and a declaration that the suit property is lawfully his property. He also prays for costs of the suit. It was his further testimony that he was in occupation of the suit land and the Defendant is no longer in the suit property since 2014.

The Plaintiff through the Law Firm of MUCHOKI KANGATA NJENGA & CO ADVOCATES filed his Written Submissions on 10th December 2020.

ANALYSIS AND DETERMINATION

The court has considered the matter in general and submissions filed and renders itself as follows;- Sections 107 and 108 of the Evidence Act are very clear that he who alleges must prove. Further, this Court can only rely on the evidence that has been produced before it and it cannot be seen to speculate on issues. The fact that the suit has not been defended means that the Plaintiff's evidence remained unchallenged and uncontroverted.

However, the Court will not just enter Judgment without interrogating the veracity of the evidence placed before it by the Plaintiff, as the Plaintiff is still required to prove his case on the required standard of balance of probabilities. See the case of Shaneebal Limited ...Vs... County Government of Machakos (2018)eKLR, where the Court cited the case of Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988, and held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaintiff and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

The fact that the evidence is not challenged does not entirely mean that the Court will not interrogate the evidence tendered by the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with logical conclusion as exparte evidence is not automatic prove of a case on the required standard. The Plaintiff has to discharge the burden of proof. See the case of Kenya Power & Lighting Company Limited ... Vs ... Nathan Karanja Gachoka & another [2016] eKLR, the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further the case of Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

Having considered the available evidence, the Court finds the issue for determination is whether the **Plaintiff is entitled to the orders sought.**

The Plaintiff has urged the Court to declare him as the legal proprietor of the suit land known as **RUIRU KIU BLOCK 2/2738**. To prove his ownership, the Plaintiff produced a **Sale Agreement** which evidenced that he bought the suit land from one **STEPHEN GITAU UIRU**, who was the original allottee under share Certificate No. **B2267** and ballot No. **2492** of the **Githunguri Ranching Company Limited**. The Plaintiff further produced a title deed that proves his ownership of the suit property and later subdivided the suit property into 12 portions. Therefore *prima-faciely*, the Plaintiff is the owner of the suit property.

Without any evidence from the Defendant to controvert the same, this Court finds and holds that the Plaintiff is indeed the legal owner of the suit property. This is so as registration of a person over a suit property gives that person the rights and privileges over the said property. Further the registration of a person as a proprietor of the property is a prima facie evidence that the person is the owner of the suit property. Without any evidence to controvert it, then this Court finds and holds that the Plaintiff is the legal proprietor of the suit property herein.

The Plaintiff has also alleged that the Defendant fraudulently forged documents purported to transfer the same from **Githunguri Constituency Ranching Company Limited**. Once again it is important to note that these allegations by the Plaintiff have not been

controverted. This Court has seen documents from **Githunguri Constituency Ranching Company Limited** indicating that the plaintiff is the registered owner of land parcel No. **RUIRU KIU BLOCK 2/2738**.

It is trite that when Certificate of title granted to someone has been called into question, then it becomes the burden of that person to explain the root of the title. In this instant case, by failing to attend court and defend the suit, the Defendant has failed to explain the root of his title and given that the root of the title and the process through which the title was acquired cannot be explained, then that can only mean that the suit property was acquired by the Defendant fraudulently. Further the Plaintiff still held the title over the suit property and in no way could there be two titles over the same property. Further there was no way that the suit could have been transferred without the Plaintiff relinquishing its title.

Was the suit land therefore transferred fraudulently to the Defendant? **'Fraud'** has been defined in ***Blacks Laws Dictionary*** as;

"Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury."

Further ***Black's Law Dictionary Ninth Edition at Page 731*** also defines 'fraud' as:-

"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

With the definition of fraud in mind and having held that the process that was used to transfer the suit property to the Defendant was not explained, then this Court finds that there were deceitful acts of providing documentation that are not genuine or not explained and that amounts to fraud.

There is no evidence availed in Court to show that the Plaintiff's registration has been revoked or challenged as per the exceptions in **Section 26(1)(a) and (b) of the Land Registration Act**. Thus the Plaintiff herein is the absolute and indefeasible owner of the suit property. See the case of ***Salim Seif Ambunya Andanje & Another ...Vs... Alex Jepkoeh Yano & Another [2019]eKLR***, where the Court held that;

"The Respondents provided titles and proof that the proprietary rights legally vest in the Respondents. The correct legal position in the absence of the Judgment in the Eldoret Environment and Land Court Case No.608 of 2012 being overturned or appealed is that the Respondents have the right to the property and the same should be protected as per Article 40 of the Constitution."

Having now carefully read and considered the pleadings, the exhibits before Court and the written submissions by the Plaintiff, the Court finds that the Plaintiff has proved his case on the required standard of balance

of probabilities.

Consequently, the Court enters Judgment for the Plaintiff against the Defendant as prayed in the Plaint dated **20th January 2015** in terms of **prayer No. 1 and 2** with costs to the Plaintiff.

It is so ordered.

Dated, signed and Delivered at *Thika* this 22nd day of April 2021.

L. GACHERU

JUDGE

22/4/2021

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 **15th 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

M/s Mwangi for the Plaintiff

No appearance for the Defendant

L. GACHERU

JUDGE

22/4/2021