



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO.293 OF 2018**

**(FORMERLY NRB MILIMANI ELC 120 OF 2015)**

**CROTON INVESTMENT LIMITED.....PLAINTIFF**

**VERSUS**

**LUCY NJOKI MAINA.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR, RUIRU.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff herein **Croton Investment Limited** commenced this suit vide a Plaint dated **9<sup>th</sup> February 2015**, and sought for the following orders as against the Defendants;

- a) A Declaration that the Plaintiff is the lawful owner of the property known as Ruiru Kiu Block 2/3456.*
- b) A Permanent Injunction restraining the 1<sup>st</sup> Defendant from trespassing , interfering, encroaching or in any way possessing the property known as Ruiru Kiu Block 2/3456.*
- c) An order compelling the 2<sup>nd</sup> Defendant to immediately remove , withdraw and/or cancel the caution placed upon the suit property.*
- d) An order for the eviction of the 1<sup>st</sup> Defendant , her servants and /or agents from the suit property known as Ruiru Kiu Block 2/3456, and everybody claiming through them and under them be bound by the said order.*
- e) In the alternative to prayer (d) above, an order for delivery up if vacant possession to the Plaintiff of the property known as Ruiru Kiu Block 2/3456, or the portion thereof occupied by the Plaintiff, by herself and or her servants and/or agents and everybody claiming through her or under her be bound by the said order*
- f) Mesne profits to the date and or granting of vacant possession*
- g) General Damages for trespass*
- h) Interest on (e) and (f) above at Court rates from the date of filing suit until*

In its statement of Claim, the Plaintiff averred that it is the registered owner of the suit property. However, the 1<sup>st</sup> Defendant has trespassed onto the suit property and the Plaintiff is unable to peacefully enjoy and carry on its business thereby causing it loss. That the 1<sup>st</sup> Defendant has laid an illegal claim over the suit property and has registered a caution. It is the Plaintiff's contention that the 1<sup>st</sup> Defendant has fraudulently and irregularly obtained an alleged Title in respect of the suit land. It particularized fraud by the 1<sup>st</sup> Defendant as;-

- *Attempting to obtain parallel title document,*
- *Purporting to take over and evict the Plaintiff, trespassing,*

- **Registering an encumbrance.**

The Plaintiff further particularized fraud and illegality by the 2<sup>nd</sup> Defendant as:-

- **Allocating the 1<sup>st</sup> Defendant the suit property while there was a prior registration,**
- **Issuing the 1<sup>st</sup> Defendant with a title deed to the suit property,**
- **Attempting to cause issuance of two titles,**
- **Colluding with the 1<sup>st</sup> Defendant to obtain the irregular and illegal Title and to register an encumbrance.**

It was the Plaintiff's contention that the 1<sup>st</sup> Defendant has trespassed and damaged the suit property and it is therefore just that an order of permanent injunction be granted.

The 1<sup>st</sup> Defendant contested the suit and filed her Amended **Defence** and **Counter Claim** dated **8<sup>th</sup> July 2020**, and denied all the allegations made in the Plaint and averred that she is the registered, legal and bonafide owner of **L.R Ruiru/Kiu Block 2(Githunguri)3456**, and thus she is in occupation as the bona fide owner, having been transferred to her by **Githunguri Constituency Ranching Company Limited** and having been issued with a Title Deed in her name in **1992**. Further that in so far as the Plaintiff's Title Number **L.R Ruiru Kiu Block 2/3456** purports to refer to her parcel of land, then the Plaintiff's Title is invalid.

That she bought **ten** shares of **Githunguri Constituency Ranching Company Limited** in the **1970s** and was duly issued with a share Certificate in her maiden name **Lucy Njoki Njoroge**. That she balloted and was allocated plot number **3456**, and two others and took possession upon being shown the land and has been in possession. Further, that she was issued with a **Clearance Certificate** in the year **1992**, and upon making the requisite payments, she was issued with a Title Deed in the year **1992**. That with time, she took a loan and built rental houses and she has never sold the suit property to anyone.

That when she learnt that people were claiming her property, she went to **Githunguri Constituency Ranching Company Limited** and she was informed that the **Company** had not sold nor allocated the suit land. That upon conducting a search, the **green card** could not be found and she later learnt that her green card had been removed and another **green card** with a title Number resembling hers but not the same had been placed showing, thereon that the Plaintiff was the owner. That then she reported the matter to the Police.

That she is the only one with a good title and that the Plaintiff or the person who sold them suit property obtained the title deed **fraudulently**. She particularized fraud and irregularity as;

- **Removal of the green card with her name and unlawfully replacing it with the false one and**
- **Obtaining an illegal title deed.**

She thus contended that the Plaintiff's claim as per the Plaint are unfounded in law as her Title is indefeasible.

In her Counter Claim, she averred that she initially held land via ballot No. **1495**, and share certificate **No.1087**, and she had paid for all of them the requisite fees since **1973**. That no two shareholders of the Company could hold similar ballots or share certificate and hence the Plaintiffs claim is fraudulent. She therefore ought for orders that ;

- That a Declaration be issued that the 1<sup>st</sup> Defendant's Title to land parcel Ruiru/ Kiu Block 2(Githunguri)3456, is the legitimate Title and a construction of the register be ordered forthwith**
- That the 2<sup>nd</sup> Defendant be ordered to cancel or annul the Plaintiff's Title to land parcel No. Ruiru /kiu Block 2(Githunguri)3456 and all entries , green cards in support of the Title**
- That the Plaintiff be ordered to pay costs and interest of the suit**

The matter proceeded by way of **Viva Voce** evidence wherein the Plaintiff called **one** witness and the 1<sup>st</sup> Defendant called two witnesses. The 2<sup>nd</sup> Defendant did not participate in the proceedings, despite being served with the suit papers.

#### **PLAINTIFF'S CASE**

**PW1 Dr, Francis Ngatia Kangema** testified that he is a Director of **Croton Investment Limited** and adopted his witness statement as his evidence in Court. He also produced his list of documents as **Exhibit 1**. He further testified that their Company purchased the suit property in Ruiru from **Francis Mwaura**. That they entered into a **Sale Agreement** and paid the purchase price and the title was shown to them. That before purchase, they did their **due diligence** and the official search revealed that **Francis Mwaura** was the owner of the suit property, though he did not have an original Title Deed. However, the said **Francis Mwaura** organized for it and their Advocate told them it was safe to purchase the suit property as it had been advertised in the Kenya Gazette on the loss of the original Title Deed. He further stated that the suit property was then transferred to their Company, **Croton Investment Ltd** and when they wanted to develop the land **four years** later, they found someone had trespassed on the suit property.

That **Francis Mwaura** was a member of **Githunguri Constituency Ranching Company Limited**, and he held a share or ballot for the plot. That the said **Francis Mwaura** had the share Certificate dated **5<sup>th</sup> June 2001**, being **No. 537**, and ballot paper **No. 1495**. He further testified that the share Certificate was transferred from **2087**, vide a transfer dated **10<sup>th</sup> May 1985**. That the Plaintiff Company acquired their certificate of title in **2009**, and they could not trace the person who sold the land to them as he was Deceased. That a letter from the **Land Registrar** confirmed that **Francis Mwaura Kimani** was the registered owner of the suit property and the land is now registered in the name of the Plaintiff.

## **DEFENCE CASE**

**DW1 Lucy Njoki Maina** adopted her witness statement dated **11<sup>th</sup> May 2015** as her evidence in Chief. She further testified that she balloted for the suit property from **Githunguri Constituency Ranching Company Limited**. That her father **Njoroge** balloted for it and the Title came in the name of **Lucy Njoki Maina** as she was married by then. She produced the list of documents dated **22<sup>nd</sup> August 2019** as Exhibits **1 to 7**. A further list of documents dated **29<sup>th</sup> June 2020** as Exhibits **8 to 13** and the list of documents dated **13<sup>th</sup> October 2020** as Exhibits **14 to 15**. That the land registration Number is **3456**. That she paid for it and she was given receipts. That she obtained a **shamba** and a **plot** and  $\frac{1}{4}$  an acre, and the suit property is **1 $\frac{1}{4}$  acre**. Further that she obtained the Title in **1992**, and she has never sold the suit property to anyone. That the Title is in the name of the Plaintiff and she placed a caution on it. Further, that she balloted in the name of her parents and she got the title deed in the name of **Lucy Njoki Maina**.

**DW2 John Maina Mburu** testified that he is the Chairman of **Githunguri Constituency Ranching Company Limited** from **12<sup>th</sup> September 2009**. He adopted his witness statement dated **23<sup>rd</sup> September 2020** as his evidence in Court. He further testified that the owner of **L.R Ruiru/Kiu Block 2(Githunguri) 3456** is **Lucy Njoki Maina**, and the parcel of land has not been transferred to any other party. That it is held by ballot **1495** and share certificate **No. 2087** dated **19<sup>th</sup> October 1972**. Further that the Clearance Certificate for **Lucy Njoki** was issued on **30<sup>th</sup> April 1992**, and she acquired the Title Deed on **22<sup>nd</sup> June 1992**. That **Francis Mwaura** was not a member of **Githunguri Constituency ranching Company Limited**. That as per the Plaintiff's list of documents, the Share Certificate did not emanate from their Company. Further, that the signatures are imitations of signatures of their former Directors and the **Director** whose signature has been imitated was known as **Mukamba** and died in **1995** and one **Kamunge** resigned in **1996**. That **Lucy Njoki Njoroge** did not transfer the suit property to any other person. He testified that **Lucy's** Certificate is not cancelled and the share certificate is dated **19<sup>th</sup> October 1972**, and not **10<sup>th</sup> May 1985**. That the letter dated **17<sup>th</sup> February 2009**, did not emanate from their offices.

Further that **Francis Karianji Njoroge** was a former Director of the Company between **2003 and 2009** and is a fraudster and he is serving, jail term of 2 years. That when the land was transacted, he was not the Chairman and that he did not know all the, members of **Githunguri Constituency Ranching Company Limited**, individually, but through records. That if a Director signs a letter on behalf of the Company, the Company would be bound if it is a genuine letter. That the Company did not issue any objection to the Kenya Gazette publication as they did not see the said Notice or Publication. That the essence of the receipt issued in the year **2009**, is for taking the owner to the ground to show them the plot.

The parties were directed to file written submissions and in compliance with the said directives, the parties filed their respective written submission which the Court has carefully read and considered and renders itself as follows:-

The Plaintiff and the 1<sup>st</sup> Defendant have both laid claim to the suit property. While the Plaintiff contends that and has produced in evidence a title deed that indicates that it is the registered proprietor of **L.R Ruiru Kiu Block 2/3456**, the 1<sup>st</sup> Defendant has contended and has produced in evidence a title deed that shows that she is the registered owner of **L.R Ruiru/kiu Block 2(Githunguri)3456**. While the Land Reference Numbers would appear different, from the evidence adduced, there is no doubt in the Court's mind that the suit property originated from **Githunguri Constituency Ranching Company Limited**, and that the said property being Land Reference No. **3456** originated from **Ballot No.1495**. The question then would be who is the bonafide owner of the said share certificate and ballot card? This is what this Court must determine.

As both parties hold a title deed over the suit property, the Court is guided by the holding of the Court in 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 through its Director, **PW1** testified that it bought the suit property from **Francis Mwaura Kimani**, who held ballot **No. 1495**, and was issued with a share Certificate **No. 537**, dated **5<sup>th</sup> June 2001**, and that the same was transferred from **2087**. The Court has perused the documents produced in evidence by the Plaintiff and notes that there is a title deed in the Plaintiff's name dated **27<sup>th</sup> August 2009**, a letter dated **17<sup>th</sup> February 2009**, from **Githunguri Constituency Ranching Company Limited**, certifying that **Francis Mwaura Kimani** is the rightful owner of **L.R 2/356**, share Certificate **No. 537** dated **5<sup>th</sup> June 2001**, and a ballot. However, **DW2** who is the Chairman of **Githunguri Constituency Ranching Company Limited**, testified and produced in evidence documents from the Company indicating otherwise and denied that the above documents emanated from their Company.

Together with evidentiary documents, the Defence witness produced, in evidence a letter dated **20<sup>th</sup> February 2020**, from the **Company**

stating that the 1<sup>st</sup> Defendant was the owner of **L.R 3456**, and ballot **No.1495**. An extract of register was further produced which indicated that the 1<sup>st</sup> Defendant was the owner alongside a ballot **No. 1495**, and a Share Certificate **2087**. From the share Certificate dated **5<sup>th</sup> June 2001**, the same having been produced by the Plaintiff indicate that the Share Certificate was a transfer from **2087**.

The 1<sup>st</sup> Defendant is the holder of Share Certificate **2087** and no evidence has been produced to prove otherwise. As **Githunguri Constituency Ranching Company** is the custodian of all documentations as pertaining to the suit property and further as the 1<sup>st</sup> Defendant has produced, in evidence the receipts of payments, Share Certificate **2087**, Ballot **No. 1495** evidencing the root of her title, the Court is satisfied that it is the 1<sup>st</sup> Defendant who has satisfactorily shown or proved the root of her certificate of title.

However, the Plaintiff has failed to show that its Certificate of title has a good foundation and that it was properly passed to. There is no evidence that the said **Francis Mwaure Kimani**, was ever a member of **Githunguri Constituency Company Limited** and hence no evidence of how he acquired the documentation. The 1<sup>st</sup> Defendant being the bearer of Certificate **No. 2087**, has denied ever transferring the same to any other party. The Court therefore finds and holds that the Plaintiff has failed to satisfactorily show the root of its title, whereas the 1<sup>st</sup> Defendant has done so.

Even if the Court was to assume that both parties have valid documentations, from the evidence produced, it is clear that the 1<sup>st</sup> Defendant was the one who had been allotted the land in the year **1970** and her title deed was issued in **1992**, while the documents from the said **Francis Mwaure Kimani**, who allegedly sold the land to the Plaintiff shows that he was issued with a share certificate in **2001**, and the title deed held by the Plaintiff was issued in **2009**. On priority basis on allocation of the suit property, the Court finds and holds that the one held by the 1<sup>st</sup> Defendant must be given priority. See the case of **Gitwany Investment Ltd vs. Tajmal Ltd & 3 Others (2006) eKLR**, where the Court held that:-

*‘...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issued two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’*

Further in the case of **Republic Versus City Council of Nairobi & 3 Others (2014) eKLR**, the Court held that;

*“once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”*

Therefore, this Court finds and holds that the 1<sup>st</sup> Defendant is the bonafide owner of the suit property. The Plaintiff had sought for a permanent injunction and an order for eviction of the 1<sup>st</sup> Defendant, general damages, mesne profits and delivery of vacant possession. However, the Court has found and held that the 1<sup>st</sup> Defendant is the bonafide owner of the suit property is and thus the **absolute** and **indefeasible** owner and entitled to all the rights and privileges appertain to the suit property as provided by **Sections 24 and 25** of the **Land Registration Act 2012**.

Consequently, the Court finds that the prayers sought by the Plaintiff in its claim dated **9<sup>th</sup> February, 2015** are **not merited** and then same are dismissed.

The 1<sup>st</sup> Defendant has sought for a Declaration that her title is the legitimate one and that the 2<sup>nd</sup> Defendant be ordered to **cancel** or **annul** the Plaintiff’s certificate of title.

**Section 26** of the **Land Registration Act**, provides for circumstances under which a certificate of title can be impeached. The Court has found and held that the 1<sup>st</sup> Defendant is the bonafide owner of the suit property and that the certificate of title held by the Plaintiff was acquired unprocedurally. This court hence has no option but to impeach the said certificate of title held by the Plaintiff and order for the rectification of the register. The title held by the Plaintiff was issued in the year **2009**, and thus **Section 143 (1)** of the **Registered Land Act Cap 300** (repealed) comes into play. The provisions of this Section have been repealed in **Section 80(1)** of the **Land Registration Act** which provides;

*“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”*

Flowing from the above provisions of law, the Courts finds and holds that the Plaintiff’s certificate of title is impeachable and thus cancelled. The Counter claim dated **8<sup>th</sup> July 2020**, succeeds.

The Counterclaim dated **8<sup>th</sup> July 2020** is therefore merited.

Having Carefully considered the pleadings by the parties, the evidence adduced and the relevant provision of law, the Court finds and holds that the Plaintiff has failed to prove its case on the required standard of balance of probabilities and therefore its claim dated **9<sup>th</sup> February 2015** is dismissed entirely.

The Court further finds and holds that the 1<sup>st</sup> Defendant has provide her case on the required standard of balance of probabilities in her Counterclaim and thus finds and holds that the said Counter Claim is merited and the same is allowed in the following terms; -

*a) That a Declaration be and is hereby issued that the 1<sup>st</sup> Defendant's Title to land parcel Ruiru/ Kiu Block 2(Githunguri)3456 is the legitimate Title and a rectification of the register be ordered forthwith*

*b) That the 2<sup>nd</sup> Defendant be and is hereby ordered to cancel and or annul the Plaintiff's Title to land parcel No. Ruiru /kiu Block 2(Githunguri)3456, and all entries , green cards in support of the Title*

*c) That each party to bear their own costs of the suit*

**It is so ordered.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 2ND DAY OF FEBRUARY, 2022.**

**L. GACHERU**

**JUDGE**

**Delivered online;**

**In the presence of**

**Mr. Nyachio HB Mr. Muchemi for the Plaintiff**

**Mr. Warutere H/B Kanyi Kiruchi for the 1<sup>st</sup> Defendant**

**N/A for the 2<sup>nd</sup> Defendant**

**Kuiyaki – Court Assistant**

**L. GACHERU**

**JUDGE**