



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 457 OF 2018

GABRIEL KETHI GATHUMBI.....PLAINTIFF

VERSUS

NGAMAU MUNGAI MUIGAI.....1ST DEFENDANT

CHIEF LAND REGISTRAR NAIROBI.....2ND DEFENDANT

JUDGMENT

1. Vide a plaint dated **22.10.2018**, the Plaintiff contends that he was the registered owner of the **Land Parcel Dagoretti/Riruta/S.238** having bought the same in year 2008 from one **Reuben Kigathi Kimani**. He was issued with a title deed on 18.11.2008 of which he holds the original title to date. However, he came to learn that the suit land was transferred to 1st Defendant on **19.9.2017**. He therefore seeks the following orders:

- a) A declaration that the transfer registered on 19th September, 2017 in respect of Title No. Dagoretti/Riruta/S.238 and purportedly executed in favour of the first Defendant by the Plaintiff is illegal, fraudulent, null and void ab initio.*
- b) A permanent injunction restraining the first Defendant whether by himself, his agents, employees, servants or otherwise whatsoever any person claiming under him howsoever from selling, disposing, pledging, alienating from taking possession or in any other manner dealing with the property known as Title No. Dagoretti/Riruta/S.238 or any part thereof that could interfere with the Plaintiff's ownership.*
- c) A permanent injunction restraining the first Defendant whether by himself, his agents, employees, servants or otherwise whatsoever any person claiming under him howsoever from effecting any changes or alterations whatsoever to the state and/or condition of the suit property known as Title No. Dagoretti/Riruta/S.238 or any part thereof.*
- d) An order directed to the second Defendant for cancellation and removal of the first Defendant as the registered proprietor of the property known as Title No. Dagoretti/Riruta/S.238.*
- e) An order directed to the second Defendant for rectification of the Register in respect of the Title Number Dagoretti/Riruta/S.238 and restore the name of the Plaintiff as the registered proprietor of the suit property;*
- f) An order for the removal of the fence erected on the suit property by the first Defendant at the first Defendant's costs.*
- g) An award of damages against the Defendants jointly and severally for loss and deprivation of property.*
- h) Costs of the suit together with interest.*
- i) Any other relief that the court may deem justifiable in the circumstances.*

2. The 1st Defendant filed an application dated **17.6.2020** seeking leave to be allowed to file a defence and counter-claim of which the said application was not opposed and was allowed on **15.2.2021**. The court gave directions for the 1st Defendant to file and serve their statement of defence and counter-claim along with the trial bundle within 14 days. However, there was no compliance with the said direction.

3. As for the 2nd Defendant, they were duly represented in court on **7.7.2020**, **29.10.2020** and **15.2.2021**. On that day of 15.2.2021 Mr. Motari for 2nd Defendant was also not opposing the application by 1st Defendant to file a defence. However, he did not seek any leave to file their own statement of defence. Nevertheless, the orders given by the court on that day on issue of filing defence and trial bundle

referred to all the Defendants in general.

4. The 2nd Defendant did not file any pleadings and they did not turn up for the trial on 23.11.2021.

5. Against this background, I find that Plaintiff's case proceeded as an undefended claim.

6. During the trial, Plaintiff testified as PW1. He adopted his witness statement of **22.10.2021** as his evidence. Therein, he states that he bought the suit land from **Reuben Kigathi** vide a sale agreement dated **11.9.2008**. The previous owner had secured a loan from National Bank using the land as security but a discharge of charge was issued. The land was then transferred to him vide the registration of title dated **18.11.2008**.

7. In November 2017, his caretaker informed him that someone was claiming to have purchased the suit land. PW1 then promptly requested 2nd Defendant to get a verification on the suit land. he then did a search which showed that the suit land was registered in the name of the 1st Defendant yet the Plaintiff has never sold the land to anyone.

8. He also reported the matter to the Department of Criminal Investigation (DCI) on **27.2.2018** requesting for investigations to be carried out.,

9. PW1 further discovered that there was a **Gazette Notice No. 7785** of **18.8.2017** indicating that the suit land title was lost and hence a new one was being applied for and 30 days thereafter, another title was issued. Then a new title was registered in favour of 1st Defendant only one day after the issuance of the new title deed.

10. PW1 contends that the new title was issued prematurely and the subsequent transfer to the 1st Defendant was fraudulent when one takes into account the following steps required in land transfer transactions:

a) Application for Land Control Board Consent to Transfer, which requires the Original Title to be availed;

b) Valuation by Government Values for the purposes of assessing the Stamp Duty payable;

c) Capital Gains Tax assessment and payment;

d) iTax e-slip generation;

e) Assessment and payment of Stamp Duty

f) Endorsement on the Transfer document with the paid stamp Duty;

g) Registration of the Transfer and issuance of a new Title.

11. PW 1 states that 1st Defendant had started to fence the land.

12. PW1 also displayed to the court and to 1st Defendant's counsel his original title to the Land which is still in his custody.

13. In support of his case, PW1 produced 16 documents in his list dated **22.10.2018** as his exhibits. These include:

1. Certificate of Freehold Title dated 8th March 1965 in the name of Kigathi Kimani.

2. Agreement for sale dated 11th September, 2008.

3. Application and letter of consent to transfer from the Land Control Board dated 10th September, 2008.

4. Transfer of Land dated 26th September, 2008 from Kigathi Kimani to the Plaintiff together with the payment receipt.

5. Certificate of Official search dated 31st October, 2008.

6. Discharge of charge dated 7th November, 2008 from National Bank of Kenya Limited.

7. Rates clearance certificate dated 14th November, 2008.

8. Title dated 18th November, 2008 in the name of the Plaintiff.

9. Certificate of Official Search dated 22nd October 2009.

10. *Gazette Notice No. 7785 dated 18th August, 2017.*

11. *Letter dated 2nd December, 2017 to the Chief Land Registrar.*

12. *Rates payment receipts for the period 2008-2017*

13. *Search Certificate/copy of Register (Green Card) obtained from the Lands office.*

14. *Official search dated 19th February 2018.*

15. *Letter dated 27th February, 2018 from the Plaintiff to the Director of Criminal Investigations.*

16. *Photographs evidencing the fence put up by the 1st Defendant.*

14. The court gave directions for Plaintiff to file submission by 7.12.2021 while Defendants was to file by 21.12.2021. None could be traced in the court's CTS as at the given dates.

Determination

15. I discern that Plaintiff has an original title to the land, and so does the 1st Defendant who is currently the registered owner of the suit land. The singular question for determination is “**who is the rightful owner of the land**”?

16. The provisions of **Section 26** of the **Land Registration Act** provides that;

“1) The certificate of title issued by the Registrar upon registration, or 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 that 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.”

17. In the case of **Elijah Makeri Nyangwara vs. Stephen Mungai Njuguna & Another (2013) eKLR** it was held that:

“the law is extremely protective of title and provides only two instances for the challenge of title. 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 title has been acquired illegally, unprocedurally or through corrupt scheme.”

18. Also see **Esther Ndegi Njiru and Another vs. Leonard Gatei (2014) eKLR**.

19. The Plaintiff has given a chronology of how he came to be registered as the owner of the suit land. That he entered into a sale agreement with Reuben Kigathi Kimani on **11.9.2008**, they obtained consent from Land Control Board on **10.9.2008** and the transfer documents were executed on **18.11.2008**. He was thereafter issued with a title on 18.11.2008 of which he holds the original title to date. The document on page 30 of his bundle shows that the previous owner, (**Seller - Kigathi Kimani**) had held this previous title as from **8.3.1965**. On page 38, of his bundle, PW1 has availed the Gazette Notice of **18.8.2017** indicating that PW1 was applying for a new title as the previous one was lost.

20. PW 1 avers that after the publication of the loss, a new title was issued within 30 days and a day thereafter, another title was issued in the name of 1st Defendant!

21. The narrative given by PW1 has not been challenged in anyway. It also depicts a situation whereby an application for the loss of PW1's title was made to perpetuate and effect a fraudulent transaction in which the 1st Defendant acquired a new title.

22. In the case of **Amos Kibata Githeka v Loise Gachiku Kinuthia (2021)eKLR**; I cited the case of **Richard K Bunei & 8 Others t/a Estate Development Services v Lorien Ranching Company Limited & 799 others (2017)eKLR** where the court had this to say on matters fraud:

“ A court of law once informed of such fraud and properly moved by evidence, cannot shirk its responsibility to strike the resultant orders and decrees with infirmity and nullification...”

23. I have no doubt in my mind that the title held by the 1st Defendant was acquired fraudulently and through illegalities.

24. In that regard, I find that Plaintiff has proved his case on a balance of probabilities. The Plaintiff's claim is allowed as drawn in the Plaintiff with costs to be borne by the 1st Defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

IN THE PRESENCE OF:-

GATHUMBI HOLDING BRIEF FOR MR. GACHANJA FOR THE PLAINTIFF

M/S NGOCHI FOR THE 1ST DEFENDANT

COURT ASSISTANT: EDDEL BARASA