



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 453 OF 2017

(FORMERLY THIKA CMCC NO. 1004 OF 2009/ NAIROBI HC MISC. APPL. NO. 562 OF 2013/ NAIROBI ELC NO. 82 OF 2013)

PAUL KANENE MWANGI PLAINTIFF

VERSUS

PAUL WATHIKA NYOTA.....1ST DEFENDANT

SAMUEL KIHARA MWANGI2ND DEFENDANT

AND

EZEKIEL NYAGA KUNGU.....1ST THIRD PARTY

LAND REGISTRAR THIKA.....2ND THIRD PARTY

JUDGMENT

1. This suit was commenced via a Complaint dated 17th November 2009 in which the Plaintiff sought the following orders:

- a. A declaration that Land Parcel No. Thika Municipality Block 19/813 belongs to the Plaintiff or in the alternative, the Second Defendant be ordered to refund to the Plaintiff the current market price of the plot.
- b. General damages for trespass.
- c. Cost of the suit.
- d. Interest on (b) and (c) above at court rates.
- e. Any other relief this court deems fit to grant.

2. The 1st Defendant filed his Defence and Counterclaim dated 11th December 2012 and sought the following orders:

- a. The Plaintiff's case be dismissed with costs.
- b. A declaration that land parcel no. Thika/ Municipality Block 19/813 belongs to the 1st Defendant.
- c. This Honorable court do issue an order directing the Land Registrar Thika to rectify the register by deleting the name of the Plaintiff and inserting that of the 1st Defendant.
- d. A permanent injunction do issue restraining the Plaintiff his agents, employees, servants from interfering with the 1st Defendant's quiet possession of the land aforesaid.
- e. Costs of the suit be borne by the Plaintiff.

3. The 1st Defendant issued Third Party notices to Ezekiel Nyaga Kungu and the Land Registrar Thika. In the 1st Third Party notice against Ezekiel Nyaga Kungu, the 1st Defendant has sought for a declaration that the cancellation of the 1st Defendant as owner of land parcel number Thika/ Municipality Block 19/813 (the suit property) and re-registration of the 1st Third Party, as evidenced by entry number 5 of the green card was/is unlawful, illegal, null and void, and a declaration that the transfer of the suit property to the 2nd Defendant was null and void.

4. In the said Third Party notice, the 1st Defendant has sought in the alternative for damages or refund at the current market value of the suit property. Against the 2nd Third Party, the 1st Defendant has sought for the rectification of the register by deleting the entries of re-registration of the 1st Third Party, transfer to the 2nd defendant, issuance of title deed, and the name of the Plaintiff, and inserting the name of the 1st Defendant as the registered owner. The 1st Defendant also sought for cancellation of the title deed issued to the Plaintiff and the costs of defending this suit.

5. The 1st Third Party filed a preliminary objection against the third-party notice dated 27th February 2018, on the grounds that the notice is incompetent and that the claim was statute barred and time barred. However, the said 1st Third Party did not file a Defence, neither did the 2nd Third Party.

6. In his Complaint, the Plaintiff pleaded that pursuant to an agreement dated 27th June 2008, he purchased land parcel number Thika Municipality Block 19/813 (the suit property) from the 2nd Defendant for Kshs. 500,000 after conducting a search at the Thika Lands Office; that he fully paid the purchase price and the plot was transferred to him after obtaining the consent to transfer the land; that he was issued with a title deed for the land and that he proceeded to connect water and fenced the property with posts and barbed wire.

7. The Plaintiff asserts that on 13th November 2009, the 1st Defendant trespassed on the land by uprooting the fence and digging trenches intending to build a house thereon and that a permanent injunction against the 1st Defendant and general damages should issue.

8. The 1st Defendant filed a Statement of Defence and Counterclaim in which he denied the Plaintiff's averments as raised in his Complaint. In the counterclaim, the 1st Defendant asserted that he was the registered owner of land parcel number Thika Municipality Block 19/813 since 1996; that he purchased the suit property from Ezekiah Nyaga Kung'u, the 1st Third Party and that he was issued with a title deed on 16th December 1996 which has remained in his possession to date.

9. The 1st Defendant averred in his Defence that he has been in possession of the suit property since he purchased it; that he has never sold it to anyone and is thus the legal owner; that in November 2009, he decided to erect a perimeter wall around the suit property but the Plaintiff purported to lay claim over the suit land and that any such title by the Plaintiff was fraudulently obtained by the Plaintiff in collusion with the 2nd Defendant.

10. In his Reply to Defence and Counterclaim dated 3rd July 2013, the Plaintiff stated that he was the bonafide registered owner of the suit land for value without notice and denied the allegations of fraud raised by the 1st Defendant. The Plaintiff averred that he is in possession of the suit land with the full knowledge of the 1st Defendant.

11. The 2nd Defendant filed his Defence and Reply to Counterclaim dated 16th December 2018, in opposition to the Complaint and the 1st Defendant's Counter claim. The 2nd Defendant averred that he bought the suit land from Ezekiah Nyaga Kungu before selling the land to the Plaintiff, in the belief that he was transferring a good title. In his reply to the 1st Defendant's counterclaim, the 2nd Defendant denied knowledge of the 1st Defendant's purchase of the suit land from Mr. Kungu and his possession thereafter. The 2nd Defendant denied the particulars of fraud laid out against him and averred that he was a bona fide purchaser for value before selling the suit land to the Plaintiff.

The Plaintiff's case

12. PW1, the Plaintiff, adopted his witness statement dated 29th October 2018. In his statement, PW1 averred that he bought the suit land from Samuel Kihara Mwangi, the 2nd Defendant, on 27th June 2008. It was his evidence that he bought the suit property from the said Samuel after conducting an official search and that he attended the Thika Land Control Board on 24th July 2008 and was granted the consent to transfer the land.

13. According to PW1, he thereafter presented a signed transfer to the land's office on 10th January 2009 and was issued with a title deed. PW1 informed the court that he took possession of the land, fenced it with barbed wire and connected water to the land. According to PW1, the 1st Defendant however entered the plot, pulled down the fence and put up a perimeter wall claiming ownership of the same.

14. In cross-examination, PW1 testified that while conducting a search on the suit property, he did not obtain a copy of the register; that he was not aware that the 1st Defendant was issued with a title deed over the same land in 1996; that while he could see a restriction in the register registered in 2009, he did not know about it and that no one was in occupation of the suit land when he bought it.

The Defendants' case

15. DW1, the 2nd Defendant, adopted his witness statement filed on 26th October 2018. In his statement, he stated that he purchased the suit land from Ezekiel Nyaga Kinuna, through an agreement dated 7th March 2008 for a consideration of Kshs. 160,000 which he paid in instalments; that he purchased the land after carrying out an official search; that the vendor's name as per his national identity card is Ezekiel

Nyaga Kungu and that the Vendor informed him that Kinuna was his mother's name while Kungu was his father's.

16. According to the 2nd Defendant, the confusion in the names of the vendor stalled the transfer of the land in his favour; that he facilitated the correction of names by the land registrar to Ezekiel Nyaga Kungu and that the suit land was transferred to him one year and three months after purchase. The 2nd Defendant informed the court that he later transferred the land to the Plaintiff who bought it from him in June 2008 for Kshs. 500,000.

17. While the record indicates that the 2nd Defendant was issued with a title deed on 7th May 2008, he stated that he did not receive the title deed on the said date because of the vendor's names, which were corrected on 7th May 2008 as per entry no.5; that the entry of the change of name was done on 7th May 2008 when he was trying to transfer the land and that all the cancellations were done on the same day he was trying to transfer the land, that is on 7th May 2008.

18. It was the evidence of the 2nd Defendant that before the cancellation of the names, the register showed that the title was in the name of Paul Wathika, the 1st Defendant; that he did not have access to the green card then and that he did not have a copy of the title deed that was issued to him. The 2nd Defendant denied taking part in any fraudulent scheme and any knowledge of the Plaintiff's title in respect to the suit property.

19. DW2, the 1st Defendant, adopted his witness statement filed on 11th December 2012. The 1st Defendant stated that he resides in the USA; that he bought the suit property from Ezekia Nyaga Kungu on 30th September 1996 for Kshs. 45,000, which he fully paid for and that the vendor thereafter put him in possession of the land after obtaining the title deed on 16th December 1996, which has remained in his possession to date. It was the evidence of the 1st Defendant that in November 2009, he instructed his brother to erect a stone wall perimeter around the property for security reasons and that the Plaintiff thereafter laid claim to the land and filed this suit.

20. It was the evidence of the 1st Defendant that he conducted investigations at the land's office and found that while he held a title deed to the suit property, the register indicated that in the year 2008, his name was deleted and replaced with that of the 2nd Defendant; that he has never sold the suit land to any person and that he conducted official searches in 1996, 2000 and 2006 and obtained the green card of the suit land on 12th December 2009, which has alterations.

21. In cross-examination, the 1st Defendant stated that the agreement shows that the vendor did not have the original title deed; that there was an affidavit by Ezekiel, the 1st Third Party, showing that the title deed was lost and that the 1st Third Party did not give him the title deed which he acquired after the loss of the initial title deed.

22. DW3 informed the court that he is the Land Registrar at Thika Land Registry. DW 3 produced a list of documents which he relied on in his examination in chief. He averred that the green card in respect to the suit property was opened on 4th January 1989; that the first proprietor of the land was Ezekia Nyaga Kinuna of ID no. 4918724/67 and that a title deed was issued to him on 20th June 1990.

23. According to the Land Registrar, the said Ezekia Nyaga Kinuna (the 1st Third Party) later instructed the Land Registrar, through an affidavit, for re-issuance of a new title for loss or misplacement; that a Gazette notice number 52520 of 6th September 1996 was published announcing the loss of the title deed and that he (the 1st Defendant) was issued with a title deed on 12th December 1996.

24. It was the evidence of the Land Registrar, DW3, that the then Land Registrar duly executed the transfer dated 6th December 1996 in favour of the 2nd Defendant and the consent of the Land Control Board and that stamp duty was also paid. DW3 informed the court that entries no. 5 and 6 were cancelled; that the said entries were cancelled because they were made in error and that he did not know the reason for the cancellation of the 1st Defendant's name.

25. DW3 averred that on 15th March 2008, Ezekia, the 1st Third Party, swore an affidavit stating that he is also known as Ezekiel Nyaga Kung'u; that the 1st Third Party also attached a title deed to the affidavit which was issued to him on 20th June 1990 and that it was possible that this is the title deed that was said to be lost. According to DW3, the title that was re-issued after gazettelement was in his records.

26. In respect of the transfer from the 1st Third Party to the 2nd Defendant, it was the evidence of DW3 that there is a transfer of the title of June 1990 which was accompanied by the transfer document dated 7th March 2008 and registered on 7th May 2008 as entry no. 7; that the 2nd Defendant then transferred the land to the Plaintiff and that they received a request for a restriction on the basis of fraud in respect to entries numbers 5 and 7 which was correction of names and the transfer of the suit property to the 2nd Defendant.

27. DW3 stated that the vendor was using a title deed that was said to have been lost and gazetted to transfer the land; that such a title deed was not valid after it was gazetted as lost and a new one issued and that the valid title deed is the one which was issued after the gazettelement and is the one held by the 1st Defendant. DW3 conceded that the circumstances of the re-transfer of the title to the 1st Third Party on 7th May 2008 are not clear and that the green card shows that the proprietor went to the Registrar and presented a title deed, consent of the Board and application to correct his name in the register, and a new title deed was issued.

28. During re-examination, DW3 stated that the green card did not indicate the reasons for cancellation of entries; that he had no documents to show such reasons and that the application for the change of name is dated 27th February 2008 but that as at that date, the 1st Third Party was not the registered owner. DW1 stated that the first cancellations could not have been done procedurally.

The Submissions

29. The Plaintiff submitted that it is irrefutable that the 2nd Defendant sold him the suit land, thus any error or impropriety of his title should as a corollary be visited upon the 2nd Defendant. The Plaintiff submitted that he is the registered proprietor of the suit property; that the 1st Defendant ought to have sued the Thika Land Registry for cancellation of his title and that having failed to join the land registrar in the suit, the suit should collapse.

30. The Plaintiff submitted that the anomalies in the 1st Defendant's transaction led to the cancellation of his title by the District Land Registry Thika and issuance of the title to him. These anomalies, he argues, are the failure by the 1st Defendant to produce the consent from the Land Control Board; the Vendor's lack of original title when he sold the suit land; lack of a police abstract for such loss of title and for the fraud alleged by the 1st Defendant; lack of gazettelement of such loss of title; lack of proof of full payment of the Kshs 45,000/- by the 1st Defendant; lack of proof of transfer fees and payment of rates, by the 1st Defendant, and failure of the 1st Defendant to enter possession of the suit land.

31. The 2nd Defendant filed Written Submissions dated 29th October 2021. He submitted that he was an innocent purchaser for value without notice of the defect of title; that there was manipulation of the green card by the 2nd Third Party in collusion with the 1st Third Party and that damages should fall on the shoulders of the two third parties.

Analysis and Determination

32. The issue for determination in this suit is whether the suit property belongs to the Plaintiff or the 1st Defendant. The primary question in issue is the proprietorship of Land parcel number Thika Municipality Block 19/813, (the suit property) which is claimed by both the Plaintiff and the 1st Defendant.

33. The 1st Defendant has accused the Plaintiff and the 2nd Defendant of fraud and has sought for rectification of the register by deleting the name of the Plaintiff as the owner of the suit property and reinstating his name. The evidence presented in this court shows that there are two title deeds in respect to the suit property held by the Plaintiff and the 1st Defendant. It is for this court to determine to whom the suit land belongs and the remedies that are available to the parties.

34. The principle of indefeasibility of title is set out in **Section 25 and 26 of the Land Registration Act No. 3 of 2012**. Under Section 26, a certificate of title is conclusive evidence of proprietorship. However, the certificate of title can be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

35. This principle was explained by the Court of Appeal in **Charles Karathe Kiarie & 2 Others vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others (2013) eKLR**, where it observed as follows:-

“The Registration of Titles Act is entirely a product of the Torrens system of registration. The word “Torrens” is derived from Sir Robert Torrens, the third Premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This is a system that emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government, as the keeper of the master record of all land and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of Government compensation.”

36. The Court in **David Peterson Kiengo & 2 Others vs Kariuki Thuo [2012] eKLR** considered the implication of the principle of indefeasibility of title:

“Practically, the principle of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu's fraud, their titles will be secure and guaranteed by the State. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring an action against the State for recovery of damages but not for possession or ownership of the property.”

37. In **Bullen & Leake & Jacobs, Precedent of Pleadings 13th Edition at page 427**, referenced with approval in **Arthi Highway Developers Limited vs West End Butchery Limited & 6 others [2015] eKLR**, it is established that allegations of fraud must be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at

221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 Ch. D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount an averment of fraud of which any court ought to take notice.”

38. In this suit, it is the Plaintiff’s case that he is an innocent purchaser for value without notice of defects in the title of the suit land. The Plaintiff tendered evidence showing that he purchased the subject matter land from the 2nd Defendant vide a sale agreement dated 27th June 2008. According to the Plaintiff, he undertook all reasonable due diligence before buying the suit property by undertaking a search which showed that the 2nd Defendant was the registered landowner.

39. The sale agreement produced by the Plaintiff shows that he purchased the suit property from the 2nd Defendant on 27th June, 2008 at a consideration of Kshs. 400,000. Indeed, the search that was conducted by the Plaintiff on 25th June, 2008 showed the 2nd Defendant as the proprietor of the suit property. The suit property was transferred to the Plaintiff and a title deed was issued to him on 1st September, 2008.

40. The person who sold to the Plaintiff the suit property, the 2nd Defendant, informed the court that he purchased the suit property from Ezekiel Nyaga Kinuna on 7th March, 2008 for Kshs. 160,000. According to the 2nd Defendant, before the said Ezekiel Nyaga Kinuna could transfer the land to him, it was discovered that the vendor’s name appearing on his title deed was different from the name appearing in the national identity card, one being Ezekiel Nyaga Kinuna and the other being Ezekiel Nyaga Kungu respectively.

41. On his part, the 1st Defendant stated that he bought the suit property from Ezekiel Nyaga Kungu on 30th September 1996. Indeed, it was undisputed that Ezekiel Nyaga Kungu alias Ezekiel Nyaga Kanuna was the first registered owner of the suit land, having been registered on 4th June 1990. The 1996 sale agreement between Ezekiel Nyaga Kungu and the 1st Defendant dated 30th September, 1996 states that the vendor was not in possession of the title to the land, as the same was lost. Clause 2 of the agreement state as follows:

“The vendor (Ezekiel Nyaga Kungu) is not in possession of the original title document in respect of the said plot but is in possessed of the affidavit explaining that the same has been lost and cannot be procured.”

42. Evidence of the loss of the title was presented by the Land Registrar, DW3 who testified that entry number 4 in the green card indicated that the title deed was re-issued to Ezekiel Nyaga Kungu, pursuant to a Gazette notice number 52520 of 6th September 1996. The property was then transferred to the 1st Defendant on 16th December, 1996 and a title deed issued in his name on the same day. The search dated 2nd August, 2000 indicating that the 1st Defendant was registered as the proprietor of the land on 16th December, 1996 was produced in evidence. The 1st Defendant also produced in evidence the original title deed in his name dated 16th December, 1996.

43. The evidence produced by the Land Registrar, and in particular the certified copy of the green card, shows that the 1st Defendant was entered in the register as the proprietor of the suit property on 16th December, 1996 (entry number 5). Entry number 6 in the register shows that the Plaintiff was issued with a title deed on the same day.

44. The green card shows that on 7th May, 2008, twelve years after the 1st Defendant had been registered as the owner of the land, Ezekiel Nyaga Kungu was registered as the owner of the land after “correction of name” who then transferred the land to the 2nd Defendant on the same day. According to the green card, the 2nd Defendant transferred the land to the Plaintiff on 24th August, 2009. A title deed was then issued to the Plaintiff on 1st September, 2009.

45. DW3 informed the court that the Land Registrar, on his own motion registered a restriction in respect to the suit property on 12th November, 2009 as entry number 11. The reason indicated on the green card for the said restriction by the same land registrar who facilitated the previous entries reads as follows:

“Entry Nos 5 & 7 suspected to have been obtained through fraud.”

46. The testimony tendered by the land registrar, DW3, is pivotal in deciphering the entries of the green card. He stated that annexed to the 1st Third Party’s affidavit (Ezekiel Nyaga Kungu alias Ezekiel Nyaga Kanuna), which accompanied the application for name correction, was a title deed which was issued on 20th June 1990.

47. I agree with the evidence of DW3 that the title deed that was submitted by Ezekiel Nyaga Kungu alias Ezekiel Nyaga Kanuna on 7th May, 2008 for the “correction of name” and subsequent transfer of the land to the 2nd Defendant was the same title deed that Ezekiel Nyaga Kungu alias Ezekiel Nyaga Kanuna had purportedly lost in 1996. Indeed, following the gazette and re-issue of the title which facilitated the transfer of the land to the 1st Defendant on 16th December, 1996, the 1990 title was no longer valid, yet this was the title that was passed on to the 2nd Defendant on 7th May, 2008.

48. The evidence by DW3 lays to rest the mystery of the origin of the second title that was purportedly passed to the 2nd Defendant by Ezekiel Nyaga Kungu on 7th May, 2008 way after the same land had been transferred to the 1st Defendant by the same man, Ezekiel Nyaga Kungu alias Ezekiel Nyaga Kanuna.

49. The evidence before this court points to a scheme by the 1st Third Party, Ezekiel Nyaga Kungu alias Ezekiel Nyaga Kanuna, who used a purportedly lost title deed to sell the suit property a second time, and the land registrar who facilitated the fraud by cancelling the title that had already been issued to the 1st Defendant, and registering the same land in favour of the 2nd Defendant.

50. Indeed, while canceling the 1st Defendant's title issued on 16th December, 1996, the land registrar was aware, or ought to have been aware that he did not have such powers under the **Registered Land Act** (repealed) and more so before hearing the then registered owner of the land, the 1st Defendant. The illegal and unprocedural cancellation of entries numbers 5 and 6 in the register is an indictment of the office of the land registrar, as a representative of the Government. As held by the Court of Appeal *in Charles Karathe Kiarie & 2 Others vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others (2013) eKLR*, government, as the keeper of the master record of all land and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world.

51. Having found that Ezekiel Nyaga Kungu alias Ezekiel Nyaga Kanuna, the 1st Third Party, did not have a title to pass to the 2nd Defendant, it follows that the 1st Defendant did not also have a valid title deed to pass to the Plaintiff. Indeed, the 1st Defendant still holds a valid title deed that was issued to him on 16th December, 1996. That being so, it is the finding of this court that the 1st Defendant has proved that the suit property was registered in favour of the Plaintiff fraudulently and should be cancelled by this court forthwith. The only remedy for the Plaintiff and the 2nd Defendant is to pursue for the refund of the monies paid for the land.

52. Considering that it is the 1st Third Party, Ezekiel Nyaga Kungu alias Ezekiel Nyaga Kanuna who facilitated the fraudulent transactions in respect to the suit property, he shall bear the costs of the suit and the counter claim. For those reasons, this court dismisses the Plaintiff's claim and allows the 1st Defendant's counter claim as follows:

- a. A declaration be and is hereby issued that parcel of land known as Thika/Municipality Block 19/813 belongs to Paul Wathika Nyota, the 1st Defendant.**
- b. The Thika Land Registrar, be and is hereby directed to rectify the register in respect of parcel of land known as Thika/Municipality Block 19/813 by deleting the name of the Plaintiff, Paul Kanene Mwangi, and inserting the name of the 1st Defendant, Paul Wathika Nyota, as the current registered owner of the land.**
- c. A permanent injunction be and is hereby issued restraining the Plaintiff, his agents, employees, servants and or anyone acting on his behalf from interfering with the 1st Defendant's quiet possession of parcel of land known as Thika/Municipality Block 19/813.**
- d. The costs of this suit and the counter claim to be borne by Ezekiel Nyaga Kungu alias Ezekiel Nyaga Kanuna, the 1st Third Party.**

DATED, SIGNED AND DELIVERED IN MACHAKOS VIRTUALLY THIS 3RD DAY OF FEBRUARY, 2022

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Mboha for the Plaintiff

No appearance for the 1st Defendant

Ms Kenja h/b for Karanja for the 2nd Defendant

No appearance for the Third Parties