



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 868 OF 2017

PAULINE NYAMBURA KARIUKI(suing for and on behalf

of the estate of SAMSON KARIUKI MANGAE)PLAINTIFF

VERSUS

KARURA UMOJA INVESTMENT COMPANY LIMITED.....DEFENDANT

JUDGEMENT

By a Plaint dated 19th December 2017, the Plaintiff sought for Judgment against the Defendant for the following orders:-

- a. A declaration that the estate of the deceased is the beneficial owner of plots Nos.342 and 372, purportedly referred to by the Defendant as Plots Nos.346 and 370.*
- b. A Permanent Injunction to restrain the Defendant whether by itself, its agents or servants or employees or any other party that it may claim through or otherwise from trespassing, entering, invading, developing, constructing, occupying, being present or in any other manner interfering with the Plaintiff's quiet possession, use and enjoyment of plots Nos.342 and 372, purportedly referred to by the Defendant as Plots Nos.346 and 370.*
- c. A Permanent Injunction to restrain the Defendant whether by itself, its agents, employees or any other party that it may claim through or otherwise from claiming ownership or any other rights howsoever over plots Nos.342 and 372, purportedly referred to by the Defendant as Plots Nos.346 and 370.*
- d. A Permanent Injunction to restrain the Defendant whether by itself, its agents, servants, employees or any person claiming under it from advertising, selling, alienating, disposing of and/or otherwise dealing howsoever in plots Nos.342 and 372, purportedly referred to by the Defendant as Plot Nos.346 and 370.*
- e. The Divisional Criminal Investigation Officer Juja Police Station do ensure compliance with the orders of the Court and do provide security to the Plaintiff, her employees, agents, servants, nominees, assignees and any other party or person acting on the instructions of the Plaintiff in respect of the subject plots herein.*
- f. An order compelling the Defendant to, forthwith, issue the Plaintiff with Certificates of Ownership in respect of plots Nos.342 and 372.*
- g. Costs of this Suit.*
- h. Any other Order that the Court may be pleased to issue to serve the interests of Justice.*

In her statement of claim, the Plaintiff averred that as the wife of the deceased, she is still the beneficial owner of all those adjoining plots known as plots Nos.342 and 372, being portions of LR.NO.10821/8 (Original No.10821/2/2), registered in the name of the Defendant. That vide an Agreement for Sale dated 26/03/1993, the deceased purchased the said plots Nos. 342 and 372, from one Iguta Mbugua Kimani, for a consideration of Kshs.40,000/= and became a shareholder in the Defendant's Company in place of Mr. Iguta Mbugua Kimani, with 14 paid up shares, in respect of each plot vide Share Certificate No.K/24310, in respect of Plot No.342 and K/07131 in respect of Plot No. 372.

She averred that the deceased had not transferred Share Certificates No.K/24310 in respect of Plot No.342 and K/07131 in respect of Plot No. 372, in his favor before his demise. That she has embarked on the process by making several payments to the Defendant which were duly received by the Defendant and the Defendants issued receipts in respect of Plots No.346 and Plot No.370, instead of plots Nos.342 and 372.

Further, in or about year 2015, a stranger claimed ownership of the said plots, a matter which she brought to the attention of the Defendant and the Defendant sided with the stranger, and took the position that her plots were Nos.346 and Plot No.370, instead of plots Nos.342 and 372. And on 9/11/2017, the Defendant revoked Certificates of Ownership in respect of plots Nos.342 and 372.

She particularized fraud by the Defendant as; receiving monies from the Plaintiff on account of registration, transfer and certificate fees in respect of Plots Nos.342 and 372, but issuing receipts of different plots purportedly referred to by the Defendant as Plots Nos.346 and 370; demanding sum of Kshs.51,000/= and Kshs.15,246/= in November 2015, and February 2016, purporting the same to be plots rent since 1983 over plots Nos.342 and 372; selling plots Nos.342 and 372, to another party, knowing that the same has been sold and possession taken; receiving monies from strangers in consideration for the purchase of plots Nos.342 and 372; knowing that the plots were no longer available for disposal; purporting to revoke Certificates of Ownership and demanding vacant possession from the Plaintiff over plots Nos. 342 and 372; purportedly referred to by the Defendant as Plots Nos.346 and 370.

The Defendant filed its Defence and Counterclaim dated 6th February 2019, and avers that it was not privy to any contractual agreement between Iguta Mbugua Kimani and the said Iguta Mbugua Kimani, was not their shareholder. That the title documents would never issue since the Plaintiff's documents were found fraudulent after thorough scrutiny by the Defendant's Director. Further that Plots Nos. 342 and 370 do not exist and the same are a road reserve.

The Defendant particularized Fraud by the Plaintiff and one Iguta Mbugua Kimani as; forging the Directors signature and the Share Certificates by one Iguta Mbugua Kimani; Plaintiff and one Iguta Mbugua Kimani purporting to be members of the Defendant without following laid down rules, procedures and directions; the Plaintiff and her agents taking possession of the Company's land without being members; refusing to heed to the Defendant's call to vacate the land, by occupying a road reserve and refusing calls to vacate therefrom.

The Plaintiff filed a Reply to the Defendant's Defence and Counterclaim dated 10th April 2019, and reiterated the contents of her Plaint.

The matter proceeded by way of Viva Voce Evidence on 3rd December 2019.

PLAINTIFF'S CASE

PW1, Pauline Nyambura Kariuki, adopted her witness statement dated 19th December 2017, and further adopted her list of documents and produced it as Exhibit 1.

On cross examination, she testified that she did not know where **Iguta** got the land from and that it was **Karura Umoja Investment Company Limited**, which sold the suit property. She further stated that she did not know if **Iguta** was a member of **Karura Umoja Investment Company Limited**. Further, she testified that the Defendant wanted to take her to a water logged land, but she rejected the said land.

On re-examination, she stated that she was asked to pay some money and has receipts for payments made.

PW2, Grace Wahu Kariuki adopted her witness statement dated 19th November 2019. She stated that the Plaintiff is her mother.

On Cross examination, it was her testimony that the plot belonged to **Samson Kariuki**, who was her father and that the documents do not state parcel number, but states the plots are **342 and 372**, owned by **Karura Umoja Investment Company Limited and signed by the Directors**. She further testified that on Plot No. 372, there is a caretaker, her father's grave and a perimeter wall and in Plot No. 342, there is a temporary structure and a live fence. She further contended that instead of Plot No.342, they were given Plot No. 346 and their plot No. 342 was allocated to somebody else. That their Plots were not on the road reserve and she doesn't know when the survey was conducted.

On Re-examination, she reiterated that the person who knew where the plots were was **Iguta Mbugua**, and the land was bought in 1993 and occupied it in 2015. She stated that she was arrested and taken to **Juja Police Station**. That her mother had never been given Share Certificate by **Karura Umoja**.

PW3, Joseph Gitee Waweru, adopted his witness statement dated 20th November 2018. He testified that he is an Advocate of the High Court. Parties appeared before him and he prepared a Sale Agreement. He asked the Court to rely on the said Agreement as part of evidence and Exhibit.

DEFENCE CASE

DW1, Stephen Njami Gichuche adopted his witness statement as part of his evidence. He testified that he is one of the Directors of **Karura Umoja Investment Company Limited**. He also produced his list of documents as Exhibits 1, 2 and 3 in Court.

He further testified that the receipts were issued to the Plaintiff for Plots Nos.370 and 340 and not the ones claimed by the Plaintiff. It was his testimony that they revoked the Share Certificates because the Plaintiff refused the plots and the person who sold the plots to Pauline was not a member of **Karura Umoja Investment Company Limited**.

On cross examination, he stated that the Plaintiff's father was buried on Plot No.370, and they did not object to his burial. He further stated they gave documents for Plot No.370, that the Plaintiff wanted Plot No.372 and there is a road reserve between the two

plots.

On re-exam he stated that the Plots Nos.370, 372 and 346 were for Karura Umoja Investment Company Limited. That the Plaintiff's husband was buried on Plot No. 370, which belongs to Karura Umoja Investment Company Limited and that the Access Road is on Plot No. 370.

DW2, Mikidad Wandaka Caragu adopted his witness statement dated 12th February 2019. He testified that he is the founder of Karura Umoja Investment Company Limited, and the Plaintiff did not buy the said plots from Karura Umoja. He further testified that he did not issue the Share Certificates and the signature on the Share Certificate is not his.

On cross examination, he stated that the signatures are not his and that the Plaintiff buried her father on Plot No.370. It was his testimony that he left Karura Umoja in 1984, and he came back in 2008 to verify the signatures.

Parties were directed to file written submissions. The Plaintiff through the Law Firm of Nyachae & Ashitiva Advocates, filed her submissions on 22nd March 2021, and Supplementary Submissions filed on 12th May 2021. The Defendant filed its Submissions through the Law Firm of Kanyi Kiruchi & Co. Advocates on 14th April 2021 to which the Court has now carefully read and considered together with the Pleadings and the documents produced in evidence. The issues for determination are:-

I. Whether the deceased Samson Kariuki Mangae had legally acquired ownership of Plots Nos.342 and 372 from one Iguta Mbugua Kimani and became Defendant's shareholder.

II. Whether the Plaintiff obtained registration of Plots No.342 and 372, fraudulently and did forge Directors' signatures on share certificates.

III. Whether the Defendant had authority to revoke Plaintiff's Certificates of ownership over Plots Nos.342 and 372.

IV. Whether the Plaintiff is entitled to orders sought.

V. Whether the deceased Samson Kariuki Mangae had legally acquired ownership of Plots Nos.342 and 372 from one Iguta Mbugua Kimani and became Defendants shareholder.

The Defendant in its Statement of Defence and Counterclaim on paragraph 5 alleged that the said Iguta Mbugua Kimani was not their shareholder and therefore had nothing to sell or pass to the Plaintiff. The Plaintiff on the other hand alleged that vide an Agreement for Sale dated 26/03/1993, the deceased Samson Kariuki Mangae, purchased the said plots Nos.342 and 372 from one Iguta Mbugua Kimani, for a consideration of Kshs.40,000/= and became a shareholder in the Defendant's Company in place of Mr. Iguta Mbugua Kimani, with 14 paid up shares in respect of each plot vide share Certificate No.K/24310, in respect of Plots No.342 and K/07131 in respect of Plot No. 372.

The Defendant however did not produce extracts of its records of members as at the time of purchase of the suit property that is from the year 1993 to convince this Court that Iguta Mbugua Kimani, was not its member.

The Plaintiff produced a Sale Agreement dated 26/03/1993, wherein Samson Kariuki Mangae (deceased), purchased the said Plots Nos.342 and 372, from one Iguta Mbugua Kimani to prove purchase. She further produced Receipt No.816, evidencing payment of the legal fee charges of Kshs.1000/= to J G Waweru Advocates, a Share Certificate No.K/24310, belonging to Iguta Mbugua dated 4th July 1982, Share Certificate No K/17131 dated 2nd March 1982. The Plaintiff also produced Limited Grant to signify administration of deceased's estate.

Without evidence to controvert these documentations, the Court finds that indeed the deceased, Samson Kariuki Mangae had legally acquired ownership of Plots Nos.342 and 372, from one Iguta Mbugua Kimani. There was no evidence availed by the Defendant to prove the contrary by way of documentation or testimony See the case of Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009, where the Appeal Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

For this Court to determine who between the two, that is the Plaintiff and Defendant has a valid claim over the suit property, the Court is required to examine who between the two has established the root of his/her title. See 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 Court has found that the Plaintiff has established the root of Plots Nos. 342 and 372, which ownership can be traced. Being the registered owner of the suit property, the Plaintiff is deemed to be the **absolute** and **indefeasible** owner of this suit property having acquired it from **Samson Kariuki Mangae (deceased) and having the authority to administer the same. To that extend**, Plaintiff's evidence remained unchallenged and uncontroverted.

VI. Whether the Plaintiff obtained registration of Plot No.342 and 372 fraudulently and did forge Directors signatures on share certificates.

DW2 testified that he did not issue the Share Certificates and the signature on the Share Certificate is not his. The Defendant on its further list of documents produced a report by a forensic document examiner dated 28th February 2019, which found that the questioned signatures were made by a different author. However, the document examiner was not called as a witness and it was the burden of the Defendant to satisfy the Court on that issue. It is trite that parties are bound by their pleadings and a Court is barred from making a decision on a matter that is not well canvassed. It is also bound by the parties' pleadings as held in **Civil Appeal No. 168 of 2011 – Dakiana Distributors (K) Ltd -vs- Kenya Seed Company Ltd 2015 eKLR.**

As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of **section 107(1)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, which provides:-

107. (1) 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.

It was the Defendant's burden to call the expert witness to prove the fact that the signatures were inconsistent. Further, tampering of official documents is termed as a criminal offence **Section 345 of the Penal Code defines forgery** as follows:-

"Forgery is the making of a false document with intent to defraud or deceive."

The Defendant has not produced any form of evidence to show that the Plaintiff has been charged in a Criminal Case or an OB Extract to portray reporting of forgery. As it stands, the Court is not convinced that there was tampering of signatures.

Did the Plaintiff obtain registration of Plots Nos.342 and 372 fraudulently? **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."

In the case of **Dhalla...Vs...Meralli (1995-1998) 2EA 84 (SCU)**, the Court held that:-

"Fraud must be pleaded and strictly proved, the burden being heavier than on a balance of probabilities generally applied in Civil matters".

It is also trite that the person alleging Fraud has the burden of proving it and the burden is a strict one and heavier than the balance of preponderance of probabilities. The Defendant has alleged that **one Iguta Mbugua Kimani forged the Directors' signatures on the Share Certificates and purported to transfer the same to Samson Kariuki Mangae (deceased)**

The Defendant has further contended that the Share Certificates held by the Plaintiff are tainted with illegality due to fraud. The only document placed before this Court to allege fraud is the document examiner's report which as earlier stated, has no probative value without the maker being availed as a witness.

A party alleging Fraud cannot simply expect the Court to infer fraud from the facts. The Defendant has neither demonstrated Fraud or misrepresentation or proven that the Plaintiff is party to any fraud or misrepresentation nor shown that the Plaintiff's title was acquired illegally, unprocedurally or through a corrupt scheme. In those circumstances, the Defendant has not proved any form of fraud as to the acquisition of Share Certificates of Plots Nos.342 and 372, held by the Plaintiff.

The Defendant avers that Plots Nos. 342 and 370, do not exist and the same are on a road reserve. No evidence of either the County Surveyor or a Government officer to justify the same averments on encroachment on a Road Reserve.

II. Whether the Defendant had authority to revoke Plaintiff's Certificates of ownership over Plots Nos.342 and 372.

This Court has already found and held that the manner in which Plots Nos. 342 and 372, being transferred to the Plaintiff was proper. Therefore, it was incumbent upon the Defendant not to have revoked the said Plot numbers held by the Plaintiff as it is now, and as the Court has rightly found for the Plaintiff. The Defendant had no authority whatsoever to revoke Plaintiff's share certificates over **Plots Nos.342 and 372**, as the Plaintiff has established the root of her title.

III. Whether the Plaintiff is entitled to the Orders sought.

From the above analysis, the Court has already held that the Plaintiff is the lawful and the absolute and indefeasible owner of

the suit property. Therefore, it follows that she holds all the rights and interests over the suit property. Having held above that the Defendant's action of revoking the Share Certificates of Plots Nos.342 and 372, is illegal, the Court is satisfied that the Plaintiff is entitled to the Orders sought in the Plaint.

Further, having found that the Plaintiff herein is the absolute and indefeasible owner of the suit property being Plots **Nos. 342 and 372**, she is entitled to all the reliefs sought.

Having carefully considered the available evidence herein, the Court finds that the Plaintiff has proved her claim on the required standard of balance of probabilities.

Consequently, the Court finds the Plaintiff's claim is **merited** and Judgment is entered in favour of the Plaintiff against the Defendant as per the Plaint dated **19th December 2017**, in terms of prayers no. **a, b, c, d, e, f and g**.

It is so ordered.

Dated, signed and Delivered at Thika this 1ST day of July 2021.

L. GACHERU

JUDGE

Court Assistant –

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 **Ruling** 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

..... **for the Plaintiff**

.....**for the Defendant**

L. GACHERU

JUDGE