



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC NO. 323 OF 2014**

**KIPWONY MURIROR..... PLAINTIFF**

**VERSUS**

**DAVID NJOROGE** (*Legal representative of the estate of the late LUCY*

NGENDO NJOROGE (Deceased).....**1<sup>ST</sup> DEFENDANT**

**GRACE WANGARI** (*Legal representative of the estate of*

**JOHN MAINA MUCHERU** (Deceased).....**2<sup>ND</sup> DEFENDANT**

**JOHN GATHUNGU WACHIRA**.....**3<sup>RD</sup> DEFENDANT**

**NAKURU DISTRICT LANDS REGISTRAR**.....**4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL**.....**5<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

1. The plaintiff commenced the instant suit by way of plaint dated 19<sup>th</sup> November 2014 filed in court on 20<sup>th</sup> November 2014. The plaint was amended on 1<sup>st</sup> April 2019 to substitute the 1<sup>st</sup> and 2<sup>nd</sup> defendants with their legal representatives following their death. By the amended plaint the plaintiff prays for the following orders: -

(a) *A declaration that the registration of the suit property Dundori/Mugwathi Block 2/114 (now known as Dundori/Mugwathi Block 2/892, 893, 894 and 895) in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are null and void and should be cancelled.*

(b) *The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants do execute the necessary and relevant conveyance documents to effect registration in favor of plaintiff as the proprietor of parcel of land Dundori/Mugwathi Block 2/114 (now known as Dundori/Mugwathi Block 2/892, 893, 894 and 895 and/or in alternative the deputy registrar do execute the necessary and relevant conveyance document in case the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants decline to execute.*

(c) *An eviction order against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.*

(d) *An order of permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from interfering with the plaintiff's quiet possession of the suit land.*

(e) *Cost of the suit*

2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants though served with summons did not enter appearance or file any defence. The Attorney General appeared and filed a statement of defence dated 20<sup>th</sup> January 2015 on behalf of the 4<sup>th</sup> and 5<sup>th</sup> defendants.

3. The plaintiff's case as pleaded in the plaint was that in the year 1987 he purchased shares from **Cheptum Chepson, Kiptoon Chemjor** and **Komen Rerimoi** who were members of Kalenjin Enterprises Ltd a land buying company, consequent to which he was registered as a shareholder of the company by virtue whereof he became entitled to be allocated land equivalent to 4 ½ acres by the company. The

plaintiff averred that he was allocated land parcel Dundori/Mugwathi Block 2/114 for which he paid title processing fees. However at the time the plaintiff went to collect the title from the offices of the 4<sup>th</sup> defendant he was surprised to be informed that the title had been registered in the 1<sup>st</sup> and 2<sup>nd</sup> defendants names. He averred that the parcel of land was subsequently subdivided to create land parcels **Dundori/Mugwathi Block 2/892, 893, 894 and 895.**

4. The plaintiff contended that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants acted fraudulently in causing the land to be registered in their names and subsequently subdividing the same when they knew and/or ought to have known the land had not been allocated to them. The plaintiff further faulted the 4<sup>th</sup> defendant in causing the registration of land parcel **Dundori/Mugwathi Block 2/114** in the 1<sup>st</sup> and 2<sup>nd</sup> defendants names while it was the plaintiff who had paid the title processing fees.

5. The Attorney General on behalf of the 4<sup>th</sup> and 5<sup>th</sup> defendants vide the statement of defence dated 20<sup>th</sup> January 2015 denied the averments contained in the plaint respecting the 4<sup>th</sup> and 5<sup>th</sup> defendants. In particular, he denied the 4<sup>th</sup> defendant acted fraudulently in any manner stating that all the 4<sup>th</sup> defendant's acts were procedural and within the law.

6. The matter was listed for hearing on 8<sup>th</sup> February 2021 when only the plaintiff attended court. The defendants though served with a hearing notice did not attend court and the hearing proceeded ex parte and the plaintiff testified. The plaintiff in his evidence adopted the witness statement he had recorded on 19<sup>th</sup> November 2014 as his evidence in chief and relied on the bundle of documents he had annexed to the plaint at the time of filing the suit and the further bundle of documents he filed on 15<sup>th</sup> October 2019. He testified that he purchased 3 shares from 3 members of Kalenjin Enterprises Co. Ltd and he became a shareholder of the company holding 3 shares and as each share was entitled to 1 ½ acres he was entitled in aggregate to 4 ½ acres. He stated his 3 shares were combined and he was allocated by the company plot No.114 measuring approximately 4.5 acres representing 3 shares.

6. He stated he paid the title processing fees but when he went to collect his title from the Lands office he was informed one Lucy Ngendo had been issued title to the land. The plaintiff stated that he complained to the chief and the DO but the defendants refused to attend before the chief who referred him back to the company. He stated the D.O referred him to the National Land commission. The plaintiff testified that the defendants were not entitled to the land and were fraudulently and unlawfully issued with title to the parcel of land that belonged to him. He denied that he sold his land to the defendant. He sought the cancellation of the titles in the defendants names and the land to be restored to him and title issued to him. He explained that he resided on a plot that he was allocated by the company on account of the shares he had directly bought from the company. He stated the defendants were occupying his land where they had erected houses. He sought the eviction of the defendants from his land.

7. Although the plaintiff had indicated he wished to call the chairman of the Kalenjin Enterprises Ltd to produce some of the documents emanating from the company, and he was summoned, the chairman was unable to attend court on account of age related ailment. As Ms Cheruiyot State Counsel did not object to the admission of the documents, the documents annexed to the list of documents filed on 15<sup>th</sup> October 2019 were admitted in evidence.

8. Ms Cheruiyot, State Counsel who appeared on behalf of the State indicated that as they had not filed any documents they would offer no evidence and closed the case for the 4<sup>th</sup> and 5<sup>th</sup> defendants.

9. Only the plaintiff filed written submissions following the closure of the trial. Having reviewed the pleadings, the evidence adduced by the plaintiff and submissions of the plaintiff the issues for determination are as follows:-

**(i) Whether the plaintiff was a member of Kalenjin Enterprises and was allocated the suit property?**

**(ii) Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendant obtained registration of title number Dundori/Mugwathi Block 2/114 fraudulently and/or illegally?**

**(iii) Whether the plaintiff is entitled to the reliefs sought?**

10. The evidence adduced by the plaintiff was not challenged and/or rebutted. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not enter appearance and/or file any defence. As per the affidavit of service filed on 5<sup>th</sup> February 2021, the defendants were served with the hearing notice but did not attend at the hearing. The Attorney General though he had filed a statement of defence on behalf of the 4<sup>th</sup> and 5<sup>th</sup> defendants did not tender any evidence. The statement of defence by the 4<sup>th</sup> and 5<sup>th</sup> the defendants therefore remains mere unproven assertions.

11. On the part of the plaintiff he tendered in evidence documents in form of copies of share certificates issued by Kalenjin Enterprises to Cheptum Chepson, Kiptoon Chemjor and Komen Kerimoi. These are the shares that he stated in his evidence that he purchased from these members. The plaintiff further exhibited copies of the sale agreements he entered with the 3 members of the company. On the evidence, I am satisfied that the plaintiff indeed purchased 3 shares from members of the Kalenjin Enterprises Company Ltd.

12. The plaintiff testified that on account of the three shares he bought from the members he was allocated plot Number 114 which was registered fraudulently in the name of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as Title Dundori/Mugwathi Block 2/114 (now subdivided into parcel number 892,893,894 and 895). The company issued a confirmation vide a document dated 15<sup>th</sup> August 2014 signed by Elijah K Chelaite who was the Chairman of Kalenjin Enterprises Ltd. The abstract of the register of Kalenjin Enterprises Ltd tendered in evidence by the plaintiff indicated that plot No. 114 was allocated to the plaintiff.

13. The plaintiff additionally tendered in evidence a receipt No. D682898 issued to him by the Department of Lands dated 25<sup>th</sup> August 1997 for Kshs1,375/= on account of registration, search fees, opening of register, attestation, and stamp duty in respect of title

No.Ndundori/Mugwathi Block 2/114. Rift Valley Enterprises the successors of Kalenjin Enterprises Ltd on 24<sup>th</sup> August 1997 issued the plaintiff with the members clearance certificate No.852 for plot No. Dundori/Mugwathi Block 2/114 (Koilel) to enable the plaintiff to pay for processing of the title which he did the very next day. On the basis of the foregoing evidence I am satisfied that indeed the plaintiff was allocated plot number Dundori/Mugwathi Block 2/114. The clearance certificate issued to the plaintiff was duly signed by the directors of the company and it carried an endorsement that- **“ No title deed will be issued for out seven farms without the production of this certificate whatsoever”.**

14. The plaintiff exhibited a copy of search certificate for land parcel Dundori/Mugwathi Block 2/114 issued on 17<sup>th</sup> December 1998 which showed the 1<sup>st</sup> and 2<sup>nd</sup> defendants were registered as owners on 18<sup>th</sup> November 1993 and a title deed issued to them on 6<sup>th</sup> August 1997. An abstract of title for the parcel of land shows the Government of Kenya was registered as owner on 19<sup>th</sup> July 1985 as the 1<sup>st</sup> registered owner and the 1<sup>st</sup> and 2<sup>nd</sup> defendants were registered on 18<sup>th</sup> November 1993. On 29<sup>th</sup> September 1998 a restriction was placed under Entry No.4 prohibiting any dealings with the parcel of land until the ownership was determined by the court of law. On 28<sup>th</sup> January 2000 the restriction was removed by the Land Registrar and on the same date the title was closed on subdivision into parcel 892 to 895. There was no evidence to demonstrate on what basis the 1<sup>st</sup> and 2<sup>nd</sup> defendants got to be registered but there is evidence that the ownership dispute between the 1<sup>st</sup> defendant and the plaintiff has been running since 1998. The dispute was subject of criminal proceedings vide Nakuru CMC case No.2443 of 2003 where persons said to have fraudulently sold land parcel Dundori/Mugwathi Block 2/114 to Lucy Ng'endo and Sally Nyambura were acquitted of the charge.

15. Upon a careful evaluation of the evidence adduced by the plaintiff, I have no doubt that the plaintiff was lawfully and validly allocated land parcel Dundori/Mugwathi Block 2/114. He properly paid for the processing of the title for the land and should have been issued with title to the specific parcel of land. There is no evidence as to how the 1<sup>st</sup> and 2<sup>nd</sup> defendants got to be registered as the owners of the land. The records of Rift Valley Enterprises Ltd (Kalenjin Enterprises Ltd) who were the owners of the land show that the suit property was allocated to the plaintiffs as shown in abstract of their register and the clearance certificate issued to the plaintiff. In the absence of any evidence to rebut the evidence adduced by the plaintiff, the court is left with no alternative but to hold the plaintiff's evidence as correct and truthful. The defendants did not bother to respond to the suit to show how they acquired their titles.

16. In the case of *Munyu Maina -vs- Hiran Gathiha Maina (2013) eKLR* the court of Appeal held that where the title was under challenge it was incumbent on the title holder to demonstrate the root of the title. The court stated thus: -

*“We state that when registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and 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.”*

17. In the instant matter it is the titles that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants hold that are under challenge. The plaintiff having demonstrated that he was the person who was allocated the suit property and was therefore the one who was entitled to be registered as the owner, it follows that the 1<sup>st</sup> and 2<sup>nd</sup> defendants registration as the owners was either illegally or fraudulently obtained and no good title passed to them and they could hence not lawfully transact with the land. They could not pass any good title to any third party in any dealing.

18. The upshot is that I find and hold the plaintiff has proved his case on balance of probabilities and is therefore entitled to judgment. I accordingly enter judgment in favour of the plaintiff and make the following final orders.

**1. That the plaintiff is hereby declared to be the valid and lawful owner of land parcel Dundori/Mugwathi Block 2/114 (now subdivided into land parcels Dundori/Mugwathi Block 2/892, 893, 894 and 895.**

**2. The registration of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants as the owners of land parcels Dundori/Mugwathi Block 2/892, 893, 894 and 895 being resultant subdivisions from land parcel Dundori/Mugwathi Block 2/114 is hereby declared null and void.**

**3. The Land Registrar is hereby ordered to cancel the registration of land titles Dundori/Mugwathi Block 2/892, 893, 894 and 895 and to restore land title Dundori/Mugwathi Block 2/114 in the register and to register the plaintiff, Kipkwony Muriror as the owner thereof.**

**4. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are ordered to vacate from land parcel Dundori/Mugwathi Block 2/114 (now known as Dundori/Mugwathi Block 2/892, 893, 894 and 895 within sixty (60) days of being served with the decree herein failing which an eviction order to issue on application by the plaintiff.**

**4. The Deputy Registrar of the Court is hereby authorized to execute any necessary and appropriate documents to effectuate this judgment.**

**5. The costs of the suit are awarded to the plaintiff as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.**

**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 4TH DAY OF NOVEMBER 2021**

**J M MUTUNGI**

**JUDGE**