



**REPUBLIC OF KENYA**

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

**ELC CASE 74 OF 2018**

**(FORMERLY NAIROBI ELC NO.456 OF 2009)**

**WARSON LIMITED.....PLAINTIFF**

**VERSUS**

**RICHARD MWANGI WACHIRA.....1<sup>ST</sup> DEFENDANT**

**JOSEPHAT MWAURA MBUGUA.....2<sup>ND</sup> DEFENDANT**

**RUTH WAITHERA MWAURA..... 3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL... 4<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....5<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR THIKA..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**The Dispute**

1. The parcel at the center of this dispute is known as L.R Ruiru/Kiu Block 6/252 measuring 0.0392 Hectares (the suit land), which is a lease hold interest situated somewhere in Ruiru. Patrick Kanyari is the managing director of the plaintiff company and he holds a certificate of lease in respect of the suit land. However, 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are a husband and wife also have a certificate of lease in respect of the suit land.

2. Patrick avers that his company bought the land in the year 2001 and they never sold it to anyone to date. They still have the original certificate of lease. On the other hand, 2<sup>nd</sup> and 3<sup>rd</sup> defendants bought the suit land from 1<sup>st</sup> defendant in the year 2007. 1<sup>st</sup> defendant had allegedly bought the land from plaintiff in year 2002.

**The record**

3. This matter commenced on 10.9.2009 by way of a plaint filed contemporaneously with the usual application for injunction by the plaintiff. By then 2<sup>nd</sup> and 3<sup>rd</sup> defendants were on the suit land putting up a foundation. Ex-parte orders of injunction granted a day later on 11.9.09 halted the ongoing construction.

4. 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed an application of their own to be reinstated back to the property. These applications had a lifespan of almost two years in the litigation arena. Finally on 21.6.2011, the court disallowed 2<sup>nd</sup> and 3<sup>rd</sup> defendant's application to re-enter the suit property. Plaintiff was also ordered not to sell the land.

5. Thereafter, the odyssey of the case continued. PW 1 partially testified on 1.7.2015 (4 years after the ruling which put to rest the Applications for injunction and to re-entre the property). I then took over the matter as a visiting judge on service week on 20.3.2017 in Nairobi ELC. This time round PW 1 advanced his testimony and was even cross examined but not re-examined. Case was put off to 17.5.2017 when I dismissed the matter for non-attendance on the part of plaintiff and his advocate.

6. Thereafter, the matter was reinstated at Nairobi ELC court and was then transferred to Thika ELC. This is how I came to handle the file again in Thika ELC during a service week exercise on 15.11.2018.

7. The case proceeded from where the matter had stopped. PW 1 wound up his evidence, while one Robert Mugendi the Chief Land registrar testified for and on behalf of 4<sup>th</sup> – 6<sup>th</sup> defendants. Ruth Mwaura (2<sup>nd</sup> defendant) testified for on behalf of 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

8. The first defendant never participated in these proceedings. Summons to enter appearance against him were effected through substituted service.

9. In the initial plaint filed in court on 10.9.2009, plaintiff had only sued 1-3<sup>rd</sup> defendants. Through the amended plaint filed on 15.4.2010, the Attorney General, the chief land registrar and the land Registrar Thika were brought on board as the 4<sup>th</sup> – 6<sup>th</sup> defendants.

#### **Plaintiff's case**

10. PW 1, Patrick Kinyori testified that him and his wife own the plaintiff company. Their company bought the suit land on 22.8.2001 from Damaris Gathoni Ngunjiri and her son Stephen Ngunjiri who in turn had inherited this land from the husband of Damaris known as Elijah Ngaru Ngunjiri. Thereafter, the company had fenced the land and they also obtained building approval plans as they wanted to develop the land.

11. On 19.8.2009, PW1 learnt that 2<sup>nd</sup> and 3<sup>rd</sup> defendants had trespassed on the land. He found a foundation (trenches) being put on the suit property. Upon inquiries from the person on site, PW 1 was met with hostility so he decided to report the matter to the police.

12. When PW 1 came back to the ground with police there was still hostility. So they went to Thika land registry, but still there was no assistance. The following day PW 1 reported the matter to DCIO who accompanied him back to Thika land registry. That is when they were allowed to peruse the records, which indicated that Richard Wachira, the 1<sup>st</sup> defendant had transferred the suit land to 2<sup>nd</sup> and 3<sup>rd</sup> defendants on 8.6.2007. Pw1 was able to obtain copies of documents in support of that transaction including valuation forms, the cancelled certificate of lease of 1<sup>st</sup> defendant. However, there were no records of how plaintiff's company had transferred the land to 1<sup>st</sup> defendant in year 2002. PW 1 sought legal advice and his lawyer advised him to file a civil suit even as investigations were going on.

13. PW 1 was emphatic that his company has never transferred the suit land to anyone and he still had the original certificate of lease.

14. In support of his case PW 1 produced as exhibits 1-32 (items 1-32) the documents in his list dated 30.4.2012 and also produced as exhibits 33-39 (items 1-7) the documents in his list dated 9.11.2015.

15. PW 1 avers that the purported transfer of the suit land by plaintiff to one Richard Mwangi Wachira and the further transfer of this land by Richard Mwangi Machira to 2<sup>nd</sup> and 3<sup>rd</sup> defendants was fraudulent with collusion of 6<sup>th</sup> defendant. The particulars of fraud are set out in the amended plaint. Plaintiff therefore prays for the following;

**(1) A declaration that registration of 1<sup>st</sup> defendant as proprietor of lease hold interest in land parcel no. Ruiru/Kiu/Block 6/252 and subsequent registration of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as proprietors of the said parcel of land is fraudulent, illegal, null and void.**

**(2) Cancellation of the certificate of leases issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and cancellation of all entries after 24<sup>th</sup> August 2001 in the land register appertaining to land parcel no. Ruiru/Kiu/Block 6/252 in respect of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.**

**(3) Permanent injunction to restrain 2<sup>nd</sup> and 3<sup>rd</sup> defendants by themselves, their employees servants agents or in any other manner howsoever from trespassing, selling, charging, disposing, transferring, building constructing any structure or carrying on any activity of whatever nature on land parcel no. Ruiru/Kiu/Block 6/252.**

**(4) Mandatory injunction against 2<sup>nd</sup>, 3<sup>rd</sup> defendants by themselves, their employees, servants and or agents ordering 2<sup>nd</sup> and 3<sup>rd</sup> defendants to vacate and hand over vacant possession of land parcel RUIRU KIU/BLOCK 6/252 to the plaintiff.**

**(5) A declaration that the purported transfer of the suit land dated 8<sup>th</sup> June 2007 presented by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant to the 6<sup>th</sup> defendant, the District land Registrar Thika is fatally defective, incompetent, incapable of transferring land or leasehold interest in land parcel no. Ruiru/Kiu/Block6/252 and that the said transfer is null, void and of no effect.**

**(6) A declaration that the plaintiff is the lawful proprietor of land parcel no. Ruiru Kiu/Block 6/252.**

**(7) Cost of this suit.**

#### **Case for 2<sup>nd</sup> and 3<sup>rd</sup> defendant**

16. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their statement of defence on 22.6.2010. DW2, Ruth Waithira Mwaura testified on behalf of herself and her husband, the 2<sup>nd</sup> defendant and she also adopted her statement recorded on 26.7.2011 as her evidence. She avers that they came to learn about the property through a newspaper advertisement where a phone contact had been given. They called the number and 1<sup>st</sup> defendant responded as the owner of the suit property. This was in 2007. They proceeded to purchase the land at a cost of shs.900,000. They took possession, fenced the property and commenced construction in 2009.

17. Further, Ruth stated that they had done a search at Thika Land Registry which search indicated that 1<sup>st</sup> defendant was the owner of the land. They followed all the right procedures in acquiring the property and in having it transferred and registered in their names. DW2 contends that they are innocent purchasers and are not tainted with any allegations of fraud. She also avers that they have never colluded with 1<sup>st</sup> defendant or with 4<sup>th</sup> – 6<sup>th</sup> defendants.

18. In support of their case, 2<sup>nd</sup> and 3<sup>rd</sup> defendant have relied on their list of documents dated 1.7.2010 item 1-14 which were produced as 2<sup>nd</sup> and 3<sup>rd</sup> defendant's exhibits 1-14 respectively.

19. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants also filed a notice of claim against 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants dated 23.12.2010. Thereafter on 27.10.2011 the said defendants filed an application for orders that directions be given that the issue of liability between defendants be determined at the trial upon hearing of the main suit. The application was allowed by consent on 24.1.2012. There is however no evidence that this application was served upon 1<sup>st</sup> defendant.

20. 2<sup>nd</sup> and 3<sup>rd</sup> defendants want the suit to be dismissed with costs.

#### **Case for 4<sup>th</sup> – 6<sup>th</sup> defendants**

21. The Attorney General filed a statement of defence on 1.11.2010 on behalf of 4<sup>th</sup> -6<sup>th</sup> defendants. Robert Mugendi Mboba, a current Thika Land registrar testified as DW1. He relied on the statement of his colleague one Bernard K. Leitich dated 11.4.2017. He also produced as evidence the documents in their list dated 11.4.2017 item 1-12 as their exhibit 1-12 respectively. Robert Mugendi stated that those documents are the ones contained in their records which captures the transactions as from when Richard Wachira sold the land to 2<sup>nd</sup> and 3<sup>rd</sup> defendant. He also made reference to the green card which he stated that it is actually known as a white card and it covers the history of registration from time of inception. He is also aware that investigations were being conducted by the Kasarani DCIO but he is not aware of the outcome there of. He further stated that transfer documents are supposed to be contained in the parcel file but in respect of the suit land the transfer documents between plaintiff and 1<sup>st</sup> defendant were not in the parcel file.

#### **Submissions**

##### **Plaintiff's submissions**

22. The summary of plaintiff's submissions is that plaintiff still has the original certificate of lease in respect of the suit property dated 24.8.2001 which he showed the court along with the transfer of lease during the hearing before Judge Mutungi, (this was on 1.7.2015). It is submitted that nowhere in the pleadings of all defendants (2<sup>nd</sup> – 6<sup>th</sup>) have they stated that this document could be a fake one, neither has Bernard Leitich, the land Registrar in his statement has he stated that this document was a false and or that it had been cancelled. Citing the provisions of **section 107 (1) of the Evidence Act**, plaintiff submits that ; ***“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”***.

23. Plaintiff avers that it was upon 6<sup>th</sup> defendant to prove that plaintiff's certificate of lease dated 24.8.2001 was false or fake which he failed to prove. To this end, plaintiff relied on the case of **Eunice Wayua Munyao vs Matillu Beatrice & 3 others Makeni H.C Appeal no. 53 of 2007**.

24. It is also submitted for the plaintiff that due diligence was not done in respect of the sale of the suit property by the 2<sup>nd</sup> & 3<sup>rd</sup> defendants. In particular, it is averred that it was highly irregular for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to have entered into a land sale agreement on 22.5.2007 before carrying out a search on the property. The first search was done on 20.6.2007.

25. It is also submitted that there are discrepancies in the names of 1<sup>st</sup> defendant. The documents which 2<sup>nd</sup> and 3<sup>rd</sup> defendant were given by 1<sup>st</sup> defendant as captured in paragraph 5 of their statement of defence were all in the names of Richard Mwangi Wachira. However, the National ID card of Richard was in the name of Richard Mwangi Machira.

26. It is also averred that the alleged affidavit of Richard Mwangi Wachira was sneaked in the land registry documents. This is because Ruth Waithira doesn't appear to have seen the same until she saw it in court. Further, the land registrar had admitted that the booking form (Attorney General's exhibit D2) doesn't show that the affidavit was one of the documents submitted by the conveyance advocate to effect transfer of land from Richard M. Wachira to 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

27. It is also submitted that there is no evidence of payment of the purchase price by 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

28. Plaintiff has also raised issue with the missing documents. According to the land registrar Robert Mugendi Mboba, every entry in the white card must be supported by document, but he admitted that there were no such supporting documents and or executed transfer to show that the transfer of the suit land from plaintiff to 1<sup>st</sup> defendant and that the only documents taken by the D.C.I.O. Kasarani for investigations, were those between the 1<sup>st</sup> defendant on one hand and 2<sup>nd</sup> and 3<sup>rd</sup> defendant on the other hand. It was submitted that according to the land Registrar (DW1), the transfer documents between plaintiff and 1<sup>st</sup> defendant are not in the parcel file and he attributed this to possible misfiling in their office. According to PW 1, this is an afterthought as Bernard Leitich, the land registrar who recorded a statement never attributed the missing documents to misfiling.

29. It is further submitted by plaintiff that the land registrar colluded with 1<sup>st</sup> defendant and effected the transfer of the suit land to the 1<sup>st</sup> defendant without any supporting documents.

30. Finally it is submitted that 2<sup>nd</sup> and 3<sup>rd</sup> defendants were aware of the fraud in light of the discrepancies in the documents of Richard Mwangi Wachira. To this end, plaintiff has proffered the case of **Arthi Highway Developers limited vs Westend Butchery Ltd and others Nairobi civil appeal no. 246 of 2013.**

### **Submissions 4<sup>th</sup> and 5<sup>th</sup> defendants**

31. These defendants submitted that there was no negligence exhibited by the land Registrar in effecting the transfer and was not a party to the contract entered and executed by the parties before their erstwhile lawyers. Further, it is submitted that the disputed documents were submitted by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant, while the disputed names were supported by the affidavit of correction of names, hence binding on the 2<sup>nd</sup> and 3<sup>rd</sup> defendant and indemnifying the land registrar from all allegations that the purported vendor was different from the one appearing on the record.

32. The 4<sup>th</sup> and 5<sup>th</sup> defendants contend that no evidence of negligence, fraud and collusion was found on the part of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and therefore, the plaint and the cross claim by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants ought to be dismissed with costs.

33. I did not see any submissions of 2<sup>nd</sup> – 3<sup>rd</sup> defendants.

### **Determination**

34. It has emerged that both plaintiff on one hand as well as 2<sup>nd</sup> and 3<sup>rd</sup> defendants hold a certificate of lease in respect of the suit land. This scenario depicts a case of fraud, for there can't be two titles in existence in respect of the same parcel of land. Thus the court will analyze the following issues in the determination of the dispute.

- (i) The transfer of land from plaintiff to 1<sup>st</sup> defendant
- (ii) The transfer of land from 1<sup>st</sup> defendant to 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
- (iii) Role of the land registrar.
- (iv) Which of the two titles is good.
- (v) Notice of indemnity.
- (vi) Final orders.

### **Transfer of land from plaintiff to 1<sup>st</sup> defendant**

35. Plaintiff claims to know nothing about the alleged transfer of the land from the plaintiff company to the 1<sup>st</sup> defendant as the company still holds its original certificate of lease. Plaintiff has given an account of how it bought the suit land via an agreement produced as P exhibit 6 on 22.8.2001 from Damaris Gathoni Ngunjiri and her son Stephen. The two had earlier on gotten the land from Elijah Ngunjiri who is husband of Damaris. So far this evidence tallies with the entries captured in the white card produced as D-Exhibit 12 (b) by for 4<sup>th</sup> – 6<sup>th</sup> defendants. This white card shows that the first registration in respect of the suit land was on 13.3.1991 when the lease certificate was issued to Githurai Tinganga Company Ltd for 99 years with effect from 1.8.1982. The land was then taken over by Elijah Ngano Ngunjiri on same date. Thereafter the registration was effected in favour of Damaris Gathoni and Stephen Ngunjiri and then to plaintiff. Entry no. 7 even shows that plaintiff paid shs.700,000 as consideration. That far, there is no problem.

36. The continuation of the white card is on a separate page produced by 4<sup>th</sup>-6<sup>th</sup> defendants as D-Exhibit 12 (c). It shows that on 25.9.2002, Richard Mwangi Wachira of ID card no. 3413457 acquired the land from the plaintiff. This transaction is the root cause of the dispute herein. The first tell-tale signs that something was amiss is the missing documents.

37. According to DW1, the land Registrar, when a transfer is effected, the original title has to be surrendered at the land Registry and it is then cancelled. The cancelled title remains in what is called a parcel file. Also retained in the parcel file are the transfer documents including the; Transfer itself, ID card Pin certificate and consent document. In the present case, DW1 stated that there is record of how the suit land moved from Warson limited (the plaintiff) to Richard Mwangi as per the white card, but there are no transfer documents for that transaction in the parcel file. He also stated that he is the custodian of such documents. The fact that the documents of transfer from plaintiff to 1<sup>st</sup> defendant including the **“cancelled surrendered title”** are missing from the 6<sup>th</sup> defendant's registry is a manifestation of things gone wrong. How comes that after this transaction of 25.9.2002, the 6<sup>th</sup> defendant was able to conveniently keep in safe custody the documents as appertains the transfer from 1<sup>st</sup> defendant to 2<sup>nd</sup> and 3<sup>rd</sup> defendants?

38. Another point of consideration is the discrepancy in the identity of the 1<sup>st</sup> defendant. The ID card used by Richard Wachira is the one availed as P. Exhibit 38 (item 6 in plaintiffs list of 9.11.2015). Though not very visible at the front, the back of the document clearly bears the name of Richard Mwangi Machira ID no. 3413457. This is the same ID which was being used when Richard was being registered as owner of the land on 25.9.2002, but the registration in both the white card (4<sup>th</sup>-6<sup>th</sup> defendants Exhibit 12 (c) and the certificate of lease (4<sup>th</sup> - 6<sup>th</sup> defendants Exhibit 1) were done in the name of Richard Mwangi Wachira. This again is a clear manifestation of 6<sup>th</sup> defendants input in the fraud despite their attempt to avail an affidavit to clarify the issue of names, five years later in 2007.

39. Having admitted that they are the custodians of such documents as the surrendered title and transfer documents, it was incumbent upon the land registrar to comment on why plaintiff was still having the original title. DWI did comment and stated that;

***“There was no fraud on the part of the land Registrar Thika as all documents are in the parcel file”.***

40. While being cross examined by plaintiff’s counsel, DW1 stated that;

***“The title by Warson must have been requested for surrender but I am not aware if this was done. I believe it was surrendered.....I believe the documents must have been produced at the time of registration.***

41. While being shown the original title of plaintiff in cross examination the land registrar’s comment was that;

***“I have looked at the title and I don’t think it is genuine.....”.***

42. As rightly submitted by plaintiff, it is trite law that he who alleges must prove. It was incumbent upon the land registrar to state in what sense he thought the original title of plaintiff was fake yet he is the one who was supposed to have kept in safe custody the alleged surrendered and cancelled original copy of plaintiff’s title.

43. To this end, I do find that there was fraud in the alleged transaction of transfer of the suit land from plaintiff to 1<sup>st</sup> defendant on 25.9.2002, whereby the parties involved must have been the 1<sup>st</sup> and 6<sup>th</sup> defendants. There is nothing to show that plaintiff was even remotely aware of the heinous transactions. Further, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were certainly not involved in this transaction of 25.9.2002.

#### **Transfer between 1<sup>st</sup> defendant, 2<sup>nd</sup> and 3<sup>rd</sup> defendant**

44. This transfer occurred in year 2007. Both 2<sup>nd</sup> and 3<sup>rd</sup> defendant as well as 4<sup>th</sup> – 6<sup>th</sup> defendant have given the transaction a clean bill of health. But again, there are telltale signs that all was not well. The first sign is to be seen in documentation. The documents which 1<sup>st</sup> defendant furnished the 2<sup>nd</sup> and 3<sup>rd</sup> defendants during the conveyancing process are captured in paragraphs 5 of their statement of defence and they have also been produced as exhibits. These were;

- Certificate of lease
- Form of statement of rates from Municipal council of Ruiru.
- A general receipt no. 00428 again from municipal council of Ruiru.
- Clearance certificate
- Consent to transfer.

45. All these documents bore the name of Richard Mwangi Wachira. No reasonable explanation was advanced by 2<sup>nd</sup> & 3<sup>rd</sup> defendant as to why the subsequent agreement made on 22.5.2007 was capturing the seller as Richard Mwangi Machira.

46. Further the subsequent transfer was executed by Richard Mwangi Machira. The pin supplied by Richard during the transfer was No. A0029030481. Plaintiff had availed the Pin of Richard A0029030481 and it bore the name WACHIRA RICHARD MWANGI. When it came to stamp duty payment, Richard was using the name Richard M. Machira. All these documents that plaintiff has concerning Wachira alias Machira are the ones plaintiff obtained from the land registry when he went there with the D.C.I.O of Kasarani.

47. An explanation has been advanced by the land registrar that Richard had availed an affidavit to clarify that all these were his names. It is DW1 who appears to be conversant with it, yet he had no evidence of how this document landed at the Thika land registry. According to the land registrar the affidavit was not a registrable instrument so it was not registered. But again he admitted that it was not captured in the booking form D exhibit 2 for 4<sup>th</sup> – 6<sup>th</sup> defendant and there is no evidence to show that it was one of the documents submitted by the conveyancing lawyer.

48. As for 3<sup>rd</sup> defendant (Ruth), she saw the affidavit in court during the hearing, yet it bears the date 22.5.2007, the date the sale agreement was made between them and 1<sup>st</sup> defendant. I am inclined to believe that the date of 22.5.2007 was indicated in the affidavit in order to sanitize the agreement and the subsequent transfer. Sadly the point of signing the agreement is when 2<sup>nd</sup> and 3<sup>rd</sup> defendants ought to have taken cognizance of this affidavit, but they didn’t thus missing an opportunity to question the identity of the vendor.

49. In any event if there was an error in registration of title on 25.9.2002, why did the error remain in place for the next 5 years?

50. Another issue to consider is the interest in the land. It has emerged that the interest in the title was a lease hold one. When plaintiff was buying the land from Damaris and Stephen in August 2001, the transfer was clearly titled “Transfer of lease”. But when it came to the transfer from 1<sup>st</sup> defendant to 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the document of transfer is titled “**Transfer of land**”. Again no plausible explanation has been advanced by DW1 for this discrepancy. What is clear is that the title was a leasehold interest despite the feeble explanation by the land Registrar that it doesn’t matter.

51. If the documents presented by Richard had not conveniently vanished into thin air it would have been possible to discern the kind of documents Richard Machira/Wachira had presented so as to arrive at an error in the name of Richard Mwangi Wachira.

### **The Role of the Land Registrar**

52. As pointed out by DW1, the land registry is the custodian of such crucial documents like the titles including previously surrendered ones, transfer documents etc. In the present case PW1 has given an account of how he got wind that there were people constructing on his land. He did seek police help as the people on site were hostile, but that did not work. Therefore, PW1 took another step of going to Thika Land Registry with the D.C.I.O and that is when they were allowed to peruse the records. PW 1 was having his original certificate, so it was a very serious allegation being made by PW 1 against the land registry regarding the two titles in existence. This ought to have raised a red flag on the part of the land registrar to investigate the truth of the matter. However, the land registrar made not even the slightest effort to investigate the matter.

53. In his testimony, the land registrar did state that while looking at the documents in the parcel file, he did come across a letter dated 2.10.2009 by D.C.I.O. Kasarani division directed to district land registrar Thika alluding to the fact that D.C.I.O. was conducting investigations of fraudulent transaction involving the suit land. Ten years down the line, the land registrar was not in a position to tell the outcome of such investigations.

54. Even before the filing of the suit, PW 1 states that his advocate wrote to the Attorney General and he states as follows: ***“I was alleging that there was collusion between the land officials and those purporting to transfer PW 1’s property. I was alleging fraud”.***

55. That notice must have been issued before September 2009 (when suit was filed). That however didn’t prevent the land registry from continuing with the slumber for the next ten years or so. The 4<sup>th</sup> – 6<sup>th</sup> defendants have not in any way tried to mitigate the situation by even conducting the slightest investigations or even asking the DCIO what befell the matter.

56. As pointed out in plaintiff’s submissions, a party is bound by their pleadings. The 4<sup>th</sup> – 6<sup>th</sup> defendants appear to be heaping blame upon the 1<sup>st</sup> – 3<sup>rd</sup> defendants in the statement of defence. How then does the land registrar turn around to declare the certificate of lease of 2<sup>nd</sup> – 3<sup>rd</sup> defendants as valid!

57. Considering that the Land Registry was the source of the missing documents (regarding the transaction of 25.9.2002) and keeping in mind that the land registrar is mute on issue of investigations regarding existence of two titles, I would conclude that the land registry at Thika was involved in the fraud and therefore, it is hence no wonder that they were missing in action when it came to the issue of investigations. Woe unto plaintiff if he had not heeded the advice of his counsel to file a civil suit. For the land registrar appears content that none of their officers was ever charged with fraud!

### **Which of the two titles is good.**

58. In the case of **Denis Noel Mukhulo Ochwada and another vs Elizabeth Murungari Njoroge & another court of appeal 298 of 2014 Nairobi**, the court took the position taken in **R.G Patel vs! Laelji Makayi** court of appeal for Eastern Africa where it was stated that;

***“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.***

59. I have no hesitation in making a finding that there was fraud in the transaction of the suit land in 2002 where plaintiff allegedly transferred the suit land to one Richard Wachira and in 2007 when Richard Wachira transferred the land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. I must also point out that I am appalled by the cavalier manner in which the land registrar has taken the issue of missing documents of the year 2002 transaction, the issue of the complaint lodged by PW 1 since 2009, the subsequent investigations and even the manner he casually glanced at PW 1’s original certificate of lease passing it as perhaps a fake document.

60. The court still has to determine the question as to whether 2<sup>nd</sup> and 3<sup>rd</sup> defendants were involved in the aforementioned frauds. Are they innocent or bonafide purchasers? A bonafide purchaser is one who buys property for value with no notice of any defects in the seller’s title. In this case, it has emerged that 2<sup>nd</sup> and 3<sup>rd</sup> defendant entered into an agreement for the sale of the land with 1<sup>st</sup> defendant on 22.5.2007 long before they did a search (which was done on 20.6.2007).

61. It is now a well-accepted practice that when buying property, the first point of call is the search, the certificate of official search. Had they done so, 2<sup>nd</sup> and 3<sup>rd</sup> defendants could perhaps have raised a red flag as to why the agreement was being made by MACHIRA yet the registered owner is WACHIRA. Again the red flag could have been raised at the point of execution of the transfer.

62. It is not lost to this court that 1<sup>st</sup> defendant was able to conduct the transaction in 2007 but couldn’t be traced thereafter. He has vanished into thin air. He would not want to be found. I am inclined to believe that this was a case of lack of thorough due diligence on the part of 2<sup>nd</sup> and 3<sup>rd</sup> defendant.

63. In the case of **Esther Ndegi Njiru and Another vs. Leonard Gatei, Nairobi ELC No. 128 of 2011** (involving a suit property in the area known as Ruiru Kiu/Block 2 ), the court had this to say in respect of a fraudulently acquired title;

***“Having found that the 2<sup>nd</sup> defendant fraudulently processed and acquired the title to the suit property in his name, my view is that he did not acquire a good title to the property and no interest in the suit property could pass to him. The 2<sup>nd</sup> defendant***

therefore not having any good title or interest in the suit property could not pass a good title to the plaintiff.....The processing of the title in his name and thereafter selling the parcel of land to the unsuspecting plaintiffs was illegal and un-procedural. The 2<sup>nd</sup> defendant must have known what he was doing. He was simply a con man otherwise he would have appeared to defend and /or clear his name”.

64. In the case of Elijah Makeri Nyangw’ra vs Stephen Mungai Njuguna & another (2013) eKLR Hon. Justice Munyao Sila while considering the application of section 26(1) (a) and (b) of the Land Registration Act, the Judge rendered himself as follows:-

*“The law is extremely protective of title and provides only two instances for 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 of title has been acquired through a corrupt scheme.*

*For the first limb, it appears to me that the title of the 1<sup>st</sup> defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1<sup>st</sup> defendant was a party to the fraud or misrepresentation. Indeed, to me the 1<sup>st</sup> defendant was an innocent purchaser for value. He was probably conned of his money by the 2<sup>nd</sup> defendant and that is why he is the complainant in the first count of the criminal charges facing the 2<sup>nd</sup> defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2<sup>nd</sup> defendant. I cannot therefore impeach the title by virtue of the provisions of sections 26(1) (a). Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.*

65. In Godfrey N. Nyaga vs Margaret W. Theuri and 3 others it was stated thus;

*“Whereas the law respects and upholds sanctity of titles, the law also provides for situations when the title shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of the constitution removes protection of title to property that is found to have been unlawfully acquired”.*

66. In the Ugandan case of the Court of Appeal Katende –vs- Haridas & Company Ltd [2008] 2 E A 174 the judges of appeal defined a bona fide purchaser thus:

*“A bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine he must prove the following:*

- i. He holds a certificate of title;*
- ii. He purchased the property in good faith;*
- iii. He had no knowledge of the fraud;*
- iv. He purchased for valuable consideration;*
- v. The vendors had apparent good title;*
- vi. He purchased without notice of any fraud;*
- vii. He was not party to any fraud.”*

67. In the present case, Richard Wachira/Machira did not have a good title. Thus even if the 2<sup>nd</sup> and 3<sup>rd</sup> defendants may not have been aware of the fraud, still they obtained nothing from Richard save papers! **Article 40 (6) of the constitution** coupled with the provisions of section 26 1 (a) & (b) of the **Land Registration Act** in my view places a responsibility to purchasers of titled properties to ascertain the status of the property beyond carrying out an official search. Thus whereas 2<sup>nd</sup> and 3<sup>rd</sup> defendants may not have been involved in the fraud and corrupt schemes which started sometime in year 2002, still their rights and interests cannot be protected as Richard Wachira aka Machira had no proprietary interest in the suit property capable of being transferred to them (2<sup>nd</sup> and 3<sup>rd</sup> defendants). It follows that plaintiffs title is the good one.

#### **Notice of Indemnity**

68. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did file a notice of indemnity pursuant to provisions of order 1 rule 24 and rule 22 of the Civil Procedure rules of which the question of liability was to be determined during the trial. However during the trial, the defendants stayed with each other, none blaming the other.

69. The court cannot therefore determine in these proceedings as to how 2<sup>nd</sup> and 3<sup>rd</sup> defendant can get redressed for being misled into corrupt, schemes by 1<sup>st</sup> and 4<sup>th</sup> – 6<sup>th</sup> defendants.

70. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are however at liberty to pursue their claim independently of these proceedings against the other defendants.

71. **Final orders**

1) A declaration is hereby issued to the effect that registration of 1<sup>st</sup> defendant as proprietor of the lease hold interest in land parcel no. Ruiru/Kiu/Block 6/252 and subsequent registration of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as proprietors of the said parcel of land is fraudulent, illegal, un-procedural, null and void.

2) It is hereby declared that the purported transfer of land dated 8<sup>th</sup> June 2007 presented by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the 6<sup>th</sup> defendant the District land registrar Thika is fatally defective, incompetent, incapable of transferring land or leasehold interest in land parcel no. Ruiru/Kiu/Block 6/252 and the same is null and void and of no effect.

3) An order is hereby issued for the Cancellation of the certificate of leases issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and cancellation of all entries after 24<sup>th</sup> August 2001 in the land register appertaining to land parcel no. Ruiru/Kiu/Block 6/252 in respect of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

4) It is hereby declared that plaintiff is the lawful proprietor of land parcel no. Ruiru Kiu/Block 6/252.

5) An order of permanent injunction is hereby issued restraining 2<sup>nd</sup> and 3<sup>rd</sup> defendants by themselves, their employees, servants, agents or in any other manner howsoever from trespassing, selling, charging, disposing, transferring, building, constructing any structure or carrying on any activity of whatever nature on land parcel no. Ruiru/Kiu/Block 6/252.

6) A Mandatory injunction is hereby issued against 2<sup>nd</sup> and 3<sup>rd</sup> defendants by themselves, their employees, servants and or agents, ordering 2<sup>nd</sup> and 3<sup>rd</sup> defendants to vacate and hand over vacant possession of land parcel RUIRU KIU/BLOCK 6/252.

7) All the documents in the Thika land registry in respect of parcel no. Ruiru/Kiu/block 6/252 running from year 2002 to date are to be removed forthwith and instead, plaintiff is to avail a copy of his original certificate of lease along with the decree herein to form a basis of the parcel file document for future references.

8) Any orders of injunction, inhibition, caution or restriction that may be in place in respect of land parcel No. Ruiru/Kiu/Block 6/252 are hereby discharged in order to give effect to the implementation of this Judgment.

9) The the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants are jointly and severally condemned to pay cost of the suit to the plaintiff.

Dated, signed and delivered at Thika this 2<sup>nd</sup> day of May, 2019.

**MBUGUA LUCY**

**JUDGE**

2/5/2019

In the presence of

Diana: Court Assistant

Miss Nguru H/B for Mr. Ombwayo for 2<sup>nd</sup> & 3<sup>rd</sup> Defendants

Mr. Wamwayi for Plaintiff

Miss Ndundu H/B for Mr. Motari for 4<sup>th</sup> & 6<sup>th</sup> Defendants