



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 414 OF 2017**

**(FORMERLY NAIROBI ELC NO 578 OF 2012)**

**WILLIAM KIBERA WAIGANJO.....PLAINTIFF**

**(Suing as legal representative and Guardian of Leah Wachu Waiganjo)**

**VERSUS**

**NJERI MUCHANGIRU.....DEFENDANT**

**JUDGMENT**

1. This case holds the dubious distinction of having been dismissed twice on the same day! This happened on 20.11.2018 at 9.00 AM, the first time I handled the file. There was no appearance by the parties or their advocates, hence “**case was dismissed for want of prosecution**”. Later on at 9.40 AM same date, counsel for WILLIAM KIBERA, Mr. F.N Kimani appeared and explained that they got confused and went to the ELC court premises. I was certainly not sitting where the ELC court is situated, hence the explanation was merited and the order dismissing the suit was vacated. Mr. F.N. Kimani was ready to proceed. However, 10 minutes later at 9.50 AM, counsel for Njeri Muchangiru appeared. He had a pending application (filed on 18.9.2018) seeking for summons to some witnesses. The court allowed the application and even gave an order for summons to issue as prayed but gave directions for plaintiff’s case to proceed. Still counsel for defendant, Kouna was not ready. I hence directed matter to proceed at 2.00 pm to enable defence to put their house in order. Come 2.00 pm and there was no appearance for plaintiff and his advocate F.N Kimani.

2. That is how the plaintiff’s case came to be dismissed and it was not reinstated.

3. However Mr. Njeru appearing for Njeri informed the court that he had a counter claim and he could proceed with it. He was granted his wish. As the trial in the counter claim was commencing, F.N Kimani, appeared stating that he was held up before a magistrate’s court.

4. The court declined to reinstate his client’s case but he was allowed to participate in the counter claim.

5. Thus the determination herein is in respect of the counter-claim filed on 23.10.2012 by Njeri Muchangiru and the reply to defence and counter claim by William filed on 19.12.2012. Njeri has referred to herself as a defendant in the counter claim. In order to avoid any confusion, the court will continue to refer her as the defendant even if she is the claimant in the counter claim, while William will be referred to as the plaintiff.

**The dispute:**

6. The dispute herein is in respect of the parcels of land in Ruiru area, which parcels arose from the shareholding in Nyakinyua Land buying company. The two parcels are now registered in the names of Leah Wachu Waiganjo whose interests are being taken care of by his brother William. She has two title deeds to that effect one being land parcel no. RUIRU/RUIRU EAST/BLOCK 2/97 measuring 0.400 hectares and RUIRU/RUIRU EAST BLOCK 2/98 also measuring 0.400 hectares.

**Plaintiff’s case:**

7. PW 1, William testified and he also relied on his statement filed in court on 8.9.2012. He avers that the registered owner of the suit properties is Leah Wachu Waiganjo who is his sister. He avers that Wachu became a shareholder of Nyakinyua many years ago. However she fell mentally sick sometime in 1989. William was apparently issued with a guardian Ad litem order to represent the estate of his sister. I have seen this order dated 4.7.2012 in the court file in Nairobi Miscellaneous case no. 330 of 2012.

8. In support of his case plaintiff produced the following documents as exhibits;

- Receipt of 17.11.1976, 20.7.1983 (two receipts), 11.5.1977
- The ballot Share certificate for no. 2804 issued on 27.11.1978
- Share certificate no. 3148 issued on 27.11.1973
- The title deed for Ruiru/Ruiru East Block 2/97 issued on 26.8.1988 in the name of Wachu Waiganjo.
- Title deed for Ruiru/Ruiru East Block 2/98 issued to Wachu Waiganjo on 26.8.1988.
- Copy of green card for Ruiru/Ruiru East block 2/97

9. Plaintiff contends that he is the one who has been in occupation of the suit property. He also avers that they were acquitted in the criminal case. He also states that he has challenged the NLC proceedings in a Judicial Review case as NLC has no mandate to conduct the case.

### **Defence Case**

10. Defendant's case is that she is a member of Nyakinyua Co. having gotten her mother's share many years ago. The prove of her claim is contained in the documents which she produced as the following exhibits:

- A bundle of 15 documents, which are; a ballot no. 130, receipts dated 3.7.1973, 31.5.1978, 2.9.1983, 29.12.1982, 23.1.2001 (two receipts), 5.7.1976, 30.5.2012 (two receipts), 7.2.2007 (two receipts), 25.1.2006, share certificate NO. 2425 dated 13.4.1991 and share certificate no. 2424 dated 13.4.1991.
- Proceedings in criminal case 162/02 at SPM'S Court Thika.
- Gazette notice of 17.7.2017
- Proceedings before National Land Commission

11. Defendant avers that when she learnt that someone had taken her land she reported the matter to police hence William and his sister Leah were charged in the Thika Criminal court. She also lodged a complaint to the National Land Commission which determined the matter in her favour.

12. She avers that the two title deeds Ruiru/Ruiru East/Block 2/97 & 98 registered in the name of LEA WACHU were acquired fraudulently. Her prayer in the counter claim is for a declaration that the two parcels of land belong to her and hence the titles of Leah ought to be cancelled. She also prays for an order to have plaintiff vacate the suit parcels.

### **Determination**

13. Having regard to the pleadings herein, the evidence adduced and the submissions of the rival parties, I find that the issue for determination is only one **“whether the two titles registered in the name of Leah Wachu, the same being Ruiru/Ruiru East Block 2/97 and Ruiru/Ruiru East Block 2/98 were obtained fraudulently.** The two titles were registered in 1988 under the now repealed Registered Land Act.

14. Section 26 of the Land Registration Act provides that;

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.***

15. In the case of **Esther Ndegi Njiru vs Jane Mugo Wanjiru ELC Nairobi no. 128/11** the court while dealing with an almost similar scenario concerning land in Ruiru emanating from Githunguri constituency ranching co. Ltd had this to state;

***“Whereas the law respects and upholds sanctity of title, the law also provides for situations when title shall not be absolute and indefeasible”.***

See- ***Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others, Court of Appeal at Nairobi Civil Appeal No. 246 of 2013 (2015)Eklr***, also See- ***Elijah Makeri Nyanwara vs. Stephen Mungai Njuguna & Another Eldoret ELC Case No. 609 of 2012.***

16. Thus in the event that the titles of Leah fall under any of the exceptions in section **26 of Land Registration Act**, this court will not hesitate to cancel the same.

17. I will proceed to analyze the following points in order to determine the dispute at hand;

- (i) The root of the title and the parties interests in the land buying company known as Nyakinyua
- (ii) The criminal proceedings.
- (iii) Proceedings before the National Land Commission.
- (iv) Possession of the suit land.
- (v) Mandate of the land registrar.

#### **Root of the title and parties Interest in Nyakinyua Land buying Company**

18. I find that each side has given an account of how they acquired their interest in Nyakinyua. The process of acquisition of such interest in the land entailed; becoming a share holder in the company, the eventual issuance of a share certificate, balloting, making various payments etc. Looking at the documents, one cannot cast aspersions on either plaintiff or defendant's documents. Each has receipts of payments, each has share certificates, of which originals have been produced as Exhibits and they surely looked original. Each has a tiny pinkish document which they refer to as the ballot.

19. In the Counter claim of Njeri, she alleges that while plaintiff was fully aware that L.R. No.s RUIRU/RUIRU EAST/BLOCK 2/ 97 and 98 belonged to her, Leah had the title deeds fraudulently issued to her by the Land Registrar. The burden of proof lies upon her (Njeri) to prove fraud. In the case of **Denis Mukhulo Ochwada and Patrick Co. Obanya Aguto vs Elizabeth Murungari Njoroge and Lilian Wairimu Ngotho Court of Appeal no. 298/14 Nairobi** the court had this to say on fraud;

*“As regards standard of proof of fraud, the law is quite clear. In R.G Patel vs Leji Makangi the former court of appeal for Eastern Africa stated thus: 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”.*

20. Njeri's evidence is that balloting was done in 1990. However, she has some receipts dating back to 1973, 1978 and others in the 1980s. While being cross examined, she stated that ;

*“We used to contribute whatever you got. When you finished the payment you got a share certificate. Those who finished paying got the share certificate.*

21. The two share certificates of Wachu Waiganjo were issued on 22.11.1973 and 27.11.1978 respectively. Those of Njeri were issued on 13.4.1991 more than a decade later. A receipt availed by Njeri one of 2.9.1983 shows payments of Kshs.600 as survey fee and another of 29.12.1982 shs.600 again for survey fees.

22. William has availed similar receipts (two of them) for shs.600 dated 20.7.1987 for survey fees. It therefore appears that the process of surveying and identification of land must have started in the early 1980's. It was therefore possible for titles to have been issued thereafter.

23. It has also emerged that Njeri's interest is derived from her mother's share which she took over. When she did this, no one knows. Not even herself. What we have are some receipts where the name of Wairimu Mwai is cancelled to give way to the name of Njeri Muchangiru. On the other hand, Leah's share was not inherited from any one. Looking at the documents of both Leah and Njeri, Leah's documents with regard to the shareholding in the company came earlier than that of Njeri. What is apparent is that Leah's rights and interests in the suit parcels are superior to those of Njeri in that Her share certificates were issued decades ago in 1973 and 1978 respectively while those of Njeri came by in 1991. Further, Leah has titles to the suit land while Njeri has none. The first title in time prevails- See **Gitwany Investment Limited vs. Tajmal Limited 7 3 Others (2006) Eklr**, where the court stated that *“Like equity keeps teaching us, the first in time prevails”*.

24. My conclusion on this point is that there is not the slightest trace of fraud, misrepresentation or corrupt schemes in so far as the roots of the titles of Leah Wachu Waiganjo are concerned. There is hence no basis of cancelling the said titles.

#### **Thika SPM'S Criminal case no. 162/02**

25. It is alleged by Njeri that fraud on the part of William and Leah was established in the aforementioned criminal case. Njeri avers that William was acquitted because of bribery. That is but a mere allegation that has not been substantiated. I have perused the proceedings and I find no finding of Fraud. What the magistrate stated is that;

*“The accused (Leah) herself is a member of the society and she purchased shares therein. This is opposed to the complainant who was first given shares by her late mother who was a member. Even comparison of that level will reveal that the accused 1 has a more superior claim to the land than the complainant”.*

#### **National Land Commission Proceedings.**

26. The Jurisdiction of this court is set out under article 162 (1) (2) (b) of the constitution;

***“The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2). (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— (b) the environment and the use and occupation of, and title to, land”.***

27. Section 13 of the **Environment and Land Court Act** also stipulates that; ***“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land”.***

28. Where under those provisions of law has the jurisdiction of this court been ousted by National Land Commission?. The functions and powers of the National Land commission are set out under section 5 and 6 of the National Land Commission Act while the power to Review grants and dispositions is set out under section 14 of the act which provides that;

***“(1) Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.***

29. In the case of **Mwangi Stephen Muriithi vs. National Land Commission and 3 Others Petition 100 of 2017 Nairobi Constitutional and Human Rights Division**, it was held as follows;

***“Guided by the provisions of Articles 67, 68 (c) (v) of the Constitution and Section 14 of the Act, I find that that the 1<sup>st</sup> Respondent has jurisdiction to review all grants or dispositions of public land. The critical point however, is that the jurisdiction in this context extends only to public land as outlined above, or land that was previously public but was subsequently converted to private land”.***

30. There is not the slightest evidence that there was a complaint about public land. This was purely a case of competing rights of two private individuals. I am alive to the fact that a case has been mentioned, the same being **JR 5/2017** at Thika ELC. The particulars of this case have not been availed. However I note that defendants’ counsel (Njeru Nyaga) has purported to adduce evidence in his submissions touching on this issue. That is irregular and unacceptable and I disregard such submissions altogether. My conclusion on this point is that the National Land Commission had no Mandate to conduct the proceedings touching on the private interests of the litigants herein.

#### **Occupation**

31. Njeri has admitted that William is in occupation of the suit land, and she has never occupied the same.

#### **The land registry**

32. This is the office which is a custodian of titles. They have records of registration of land parcel in form of parcel files and a document called a green card. William has availed the green card for land No. Ruiru/Ruiru East Block 2/97 which shows that the land is registered in the name of Wachu Waiganjo. Two titles have also been produced by William to show that the suit parcels belong to his sister. No evidence has been adduced to challenge these documents.

33. When this case was called out on 20.11.2018 at 9.50 am, Njeri’s advocate brought to the attention of the court that they had a pending application dated 17.9.2018. the orders sought there in are:-

***“That the Hon. Court be pleased to issue witness summons to the following persons:***

***(a) Executive officer – Thika Criminal Registry***

***(b) Chairlady of Nyakinyua Investment Ltd.***

***(c) Advocate Githongo.***

34. There was no mention of a land registrar yet this is the office which would have put to rest the legality or otherwise of defendant’s titles. It is not lost to this court that on that day of 20.11.2018 after the court allowed the application of 17.9.2018, the court duly gave an order for summons to issue to the requested witnesses but gave directions that plaintiff’s case was to proceed on that day (Case of William). However defendant elected to testify and close their case without calling any other witnesses yet the court had given her a window to call such other witnesses.

35. Defendant does not have any technical expertise to determine that the titles of Leah are fraudulent. By failing to romp in the land registrar either as a party or as a witness, defendant’s case stood on shaky ground.

#### **Conclusion.**

36. All in all, I find that the counter claim has not been proved to the standard of a balance of probability. I proceed to make the following orders;

**1) The counter claim of Njeri Muchangiru is hereby dismissed, which means that the titles of Leah Wachu Waiganjo have**

**not been found wanting and William should hence continue to occupy the land.**

**2) Each party to bear their own costs of the suit.**

**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

Court Assistant: Diana

F.N. Kimani for Plaintiff: Present

C.K. Chege H/B for Mr. Njeru for Plaintiff: Present

Plaintiff: Absent

Defendant: Present