



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1307 OF 2015

EUNICE WANGUI JOSEPH

(suing in the capacity as administrator of the

Estate of Jackson Njoroge Kamau – Deceased).....PLAINTIFF

VERSUS

MARTIN KINYANJUI GUCHU.....1ST DEFENDANT

THIKA LAND REGISTRAR.....2ND DEFENDANT

JUDGEMENT

By a Plaint dated the 18th December, 2015, the Plaintiff is seeking for the following orders:

- a) That the 1st Defendant's title to land parcel number RUIRU/ KIU BLOCK 2 (GITHUNGURI) 2790 be annulled and/ or cancelled and the same be registered in favour of the Plaintiff.
- b) That a permanent injunction be issued against the 1st Defendant through himself, agent from further interfering with the Plaintiff's land parcel.
- c) An order to the 2nd Defendant for rectification of the Land Register to cancel the names of the 1st Defendant and substitute with that of the Plaintiff.
- d) General Damages
- e) Costs of the suit and interest on costs.
- f) Any other relief that the court may deem fit and just to grant.

The Defendants though duly served with the summons to enter appearance vide the Daily Nation Newspaper dated the 29th March, 2017 failed to enter appearance nor file a defence. On the 17th January, 2018, the Court directed that the matter was to proceed to hearing.

Evidence of the Plaintiff

The plaintiff had one witness.

The Plaintiff's deceased husband was the proprietor of land parcel number RUIRU/ KIU BLOCK 2 (GITHUNGURI) 2790 hereinafter referred to as the 'suit land'. The Plaintiff obtained letters of administration in respect of her deceased husband vide Nairobi HC Succ. Cause No. 105 of 2013 and the suit land formed part of the said estate. The Plaintiff claims the 1st Defendant fraudulently got registered as the owner of the suit land. As per the records at Githunguri Constituency Ranching Ltd offices, the Plaintiff's late husband was a shareholder therein and was issued with a ballot No.2040 for the suit land while the 1st Defendant who was also a shareholder was issued with a ballot No. 2037 for land parcel number RUIRU/ KIU BLOCK 2 (GITHUNGURI) / 2809. The Plaintiff's late husband was issued with title deed over the suit land on 9th August, 1993 but the 1st Defendant also unlawfully obtained title to the suit land on 11th April, 1995. The plaintiff's

husband had never transferred the land to the 1st defendant.

The Plaintiff filed her submissions that I have considered.

Analysis and Determination

Upon consideration of the materials presented in respect of the suit herein, the following are the issues for determination:

- Whether the Plaintiff's deceased husband was proprietor of land parcel number RUIRU/ KIU BLOCK 2 (GITHUNGURI) 2790.
- Whether the 1st Defendant legally acquired title to land parcel number RUIRU/ KIU BLOCK 2 (GITHUNGURI) 2790).
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

As to whether the Plaintiff's deceased husband was proprietor of land parcel number RUIRU/ KIU BLOCK 2 (GITHUNGURI) 2790).

It was the testimony of PW1 that the deceased Jackson Njoroge Kinyanjui was the proprietor of the suit land. It was her testimony that as per the records at Githunguri Constituency Ranching Ltd offices, her late husband was a shareholder therein and was issued with a ballot No.2040 for the suit land while the 1st Defendant who was also a shareholder got issued with a ballot No. 2037 for land parcel number RUIRU/ KIU BLOCK 2 (GITHUNGURI) / 2809. She confirmed that the said Ranching Company issued a clearance Certificate to her late husband, after which a title deed was issued on 9th August, 1993 which copy she produced as an exhibit. On perusal of the two extracts of the Green Cards as well as title deeds in respect of the suit land, it is evident that the Plaintiff's husband indeed obtained his title on 9th August, 1993 before the 1st Defendant's title which was issued on 11th April, 1995. As per exhibit 6 'a' which was a letter from Githunguri Constituency Ranching Company Limited dated 12th June, 2015 it confirmed that both the deceased and 1st Defendant were their members. Further, that the deceased was allocated the suit land while the 1st Defendant got land parcel number RUIRU KIU BLOCK 2/GITHUNGURI /2809. It further stated that it had confiscated the title deed issued to the 1st Defendant as it was not clear how he acquired the same yet he had not been allocated another land. In the case of *Munyua Maina Vs Hiram Gathia Civil Appeal No. 239 of 2009, the 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.'

From the Plaintiff's pleadings, testimony and exhibits, which were not controverted by the Defendants, she provided the history of the root of her title, which revealed that her deceased husband legally acquired the said land from Githunguri Constituency Ranching Company Limited. Section 28 of the Registered Land Act which was the regime under which the suit land was registered provides that:

The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - Section 26 of the Land Registration Act also makes provision in respect of a Certificate of Title being deemed to be prima facie evidence of ownership of land.

In relying on the above cited Court of Appeal decision and the legal provisions I have cited above, I find that the Plaintiff's deceased husband legally acquired the suit land after adhering to the proper legal processes.

As to whether the 1st Defendant legally acquired title to land parcel number RUIRU/ KIU BLOCK 2 (GITHUNGURI) 2790). I note from the evidence presented at exhibit 6 "a", the 1st Defendant was allocated a different parcel of land by the Githunguri Constituency Ranching Company Limited. His ballot number is different from the Plaintiff's deceased husband. The 1st Defendant never filed any Defence to refute the Plaintiff's averments. It is baffling as to how he proceeded to acquire a fresh title in 1995 to the suit land with a different ballot number. From the Green Card in respect of the title held by the deceased, there is no indication as to whether there was a transfer nor revocation of title. Further, it is trite law that once there is a transfer, the title is cancelled. In the current scenario, the deceased still held his title but the 2nd Defendant proceeded to transfer the land to the 1st Defendant. No explanation is given whatsoever in the Green Card held by the 1st Defendant on how he acquired the suit land. In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR* my brother Justice Munyao dealt exhaustively with the issue of title acquired fraudulently and held that the same was impeachable. In being persuaded by this authority as well as the facts at hand, I find that since the 1st Defendant failed to explain the root of his title, which was acquired after the deceased, I can decipher an element of fraud in respect of the said title and hold that the same was not acquired legally.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff. I note the Plaintiff has sought for various orders including injunction, rectification of register, cancellation of the 1st Defendant's title as well as general damages and costs. Since I have already held that the deceased title was legally acquired while the 1st Defendant obtained his title fraudulently, I find that the Plaintiff is indeed entitled to injunctive orders against the Defendants from interfering with the suit land. On the issue of General Damages, the Plaintiff never presented any evidence in respect of the same and only claimed for it in her submissions. The burden of proof was upon her to prove the damages she had suffered as a result of the Defendants' actions but since she did not do so, as a Court, I am unable to grant them. On the question of rectification of register and revocation of the 1st Defendant's title, I wish to make reference to section 143 of the Registered Land Act (repealed) that was the regime in place at the time of 1st defendant's registration, which stipulated thus: .

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. These provisions are similar to section 80 of the Land Registration Act which provides that: *'(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.*

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'

Based on the evidence before me, and relying on the above cited legal provision, I find that it is pertinent for the Land Register in respect of the suit land to be rectified and the Certificate of title held by the 1st Defendant cancelled as it was illegally obtained.

On the issue of costs, since it generally follows the cause, and bearing in mind that the Plaintiff herein has been inconvenienced with the Defendants' actions, I will award her the costs of the suit.

In the circumstances, I find that the Plaintiff has proved her case on a balance of probability and will proceed to enter judgement in her favour against the Defendants in the following terms:

- i.* The Plaintiff be and is hereby declared the bona fide proprietor of land parcel number **RUIRU/ KIU BLOCK 2 (GITHUNGURI 2790)**
- ii.* The Land Registrar Thika, be and is hereby directed to cancel the 1st Defendant's title to land parcel number **RUIRU/ KIU BLOCK 2 (GITHUNGURI 2790)** and rectify the said Land Register and substitute it with the name **EUNICE WANGUI JOSEPH**, who is the plaintiff herein.
- iii.* The 1st Defendant through himself or his agents be and is hereby permanently restrained from further interfering with the Plaintiff's land parcel **RUIRU/ KIU BLOCK 2 (GITHUNGURI 2790)**.
- iv.* Costs of the suit be and is hereby awarded to the Plaintiff to be borne by the 1st Defendant.

Date signed and delivered in open court at Kajiado this 10th day of July, 2019

CHRISTINE OCHIENG

JUDGE