



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 190 OF 2018

WANYOIKE MUNGAI ALIAS MICHEAL WANYOIKE MUNGAI....PLAINTIFF

VERSUS

BEATRICE KARANJA ALIAS BEATRICE NYINDUMB.....DEFENDANT

JUDGMENT

By a **Plaint** dated **14th June 2018**, the Plaintiff herein brought this suit against the Defendant for orders that;

a) A declaration that the Plaintiff is the lawful owner of the land parcel Number L.R 4953/1420

b) An order directing the register of titles to cancel the entries relating to the transfer of the titles to the land parcel number L.R No.4953/1420, to Josphat Njuguna Karanja and all subsequent entries thereafter.

c) A permanent injunction restraining the Defendant either directly or through her agents, servants or any other person demanding through them from selling, transferring, alienating, trespassing into or otherwise dealing or interfering with the land parcel number L.R 4953/1420.

d) Costs of this suit and interest at Court rate till payment in full.

In his statement of claim, the Plaintiff averred that he was the registered proprietor of the suit land from **1st may 1982**. It was his contention that around **31st December 1986**, one **Josphat Njuguna Karanja (Deceased)**, fraudulently and without his knowledge executed and registered a forged transfer against the suit land into his name which fact came to his knowledge after the Defendant trespassed into his land.

He particularized fraud as fraudulently presenting forged transfer instrument of the said parcel of land to the **Registrar of Titles** to facilitate the fraudulent transfer of the said parcel of land, without his knowledge; dishonesty dealing with his land.

He averred that at all material times the Defendant is the Executor of the **Will** of the said **Josphat Njuguna Karanja (Deceased)** and had been issued with a grant of probate, He further averred that on the **4th of May 2012**, the Defendant caused to be published in the Kenya Gazette the loss of the title to the suit property and was subsequently issued with a provisional certificate of title to the said property on the **25th of October 2012**. That on the **6th of June 2018**, the Defendant trespassed on his land and started to excavate stones, boulders and digging trenches. He contended that the action of the Defendant is manifestly unfair and inequitable and is calculated to deny him his lawfully acquired property and he stands to suffer irreparable loss and damage unless the Defendant is restrained from dealing with the parcel of land in a manner adverse to his interest and right of ownership.

Though the Defendant was served with **Summons to Enter Appearance** as is evident from the **Affidavit of Service** filed by **Samson Karau Mutiso** on **24th January 2019**, she did not enter any Appearance nor file her Defence. The matter proceeded for Formal Proof wherein Plaintiff gave evidence for himself and called one witness.

PLAINTIFF'S CASE

PW1 - Micheal Wanyoike Mungai adopted his witness statement and stated that he did not know the Defendant. He produced his **list of documents** as **exhibit 1** and his **supplementary list of documents** as **Exhibit 2** and a letter from his advocate. He urged the Court to allow his case and have the Defendant barred from encroaching on his land.

The Plaintiff was directed to file written submissions and in compliance with the said directive, he filed the submissions on **30th July 2019**.

The Court has now carefully read and considered the Pleadings, evidence adduced, documents and the written submissions. The issue for determination is whether the Plaintiff is entitled to the orders sought.

The Plaintiff's evidence remain uncontroverted and unchallenged. It is evident that the Defendant was duly served with Summons to Enter Appearance but failed to enter such appearance and thereby defends the suit. The fact that suit has not been contested means that the Plaintiff's evidence remains uncontroverted and unchallenged. However the Plaintiff is still required to prove his case on the required standard of balance of probability. See the case of Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, where the Court cited the case of Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988, and held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the said evidence as adduced by the Plaintiff. The Court has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with a logical conclusion. It is trite that as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR, where the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further the case of Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponnet has not made a presence in the contest.”

The Plaintiff has alleged that he is the registered owner of the suit property but he lost his title deed. He further alleged that the suit property was fraudulently transferred to one **Josphat Njuguna Karanja**, without his knowledge. This Court has already noted that the evidence by the Plaintiff remains uncontroverted and unchallenged. The Plaintiff has produced evidence to show that he was allotted the suit land and he later became the registered owner of the suit land. Without any evidence to controvert the assertions by the Plaintiff, this Court has no option but to take it as the gospel truth.

From the evidence produced before this Court it is not in doubt that the Plaintiff was the owner of the suit property before it was transferred to the deceased and subsequently to his Personal Representative. However the Plaintiff has denied ever transferring the suit property to anyone. As already held by this Court, the evidence by the Plaintiff remains uncontroverted and therefore it can only be said that the acts of transferring the suit property to the deceased was through misrepresentation of facts by presenting documents that were not signed by the owner of the property who is the Plaintiff herein. This Court therefore holds and finds that the Plaintiff has proved his case on a balance of probability and therefore the transfer of the suit property was illegal.

Section 26 (1) of the Land Registration Act provides for circumstances under which a Court can impeach the title of a registered owner of a property. This Court therefore having held that the said transfer was illegal is empowered by **Section 80(1) of the Land Registration Act** to cancel the said title. Consequently, the Court holds and finds that the transfer of the property to the Defendant was unlawful and fraudulent and therefore order for the cancellation of the same.

See **Section 80(1) of the Land Registration Act** which provides;

“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.”

Having been satisfied that the Certificate of title held by the Defendant was procured by either **fraud, misrepresentation or illegally**, and as such is impeachable and ought to be cancelled as per the above provisions of law, the Court allows the said cancellation. Further the court has already held and found that the Plaintiff is the legal owner of the suit property and it is only fair that the register be rectified to cure the anomalies that were perpetrated and return to him his rightfully earned property.

Having now carefully read and considered the pleadings, the exhibits

before Court and the written submissions by the Plaintiff, the Court finds that the Plaintiff has proved his case on a balance of probability and therefore the Plaintiff's suit is allowed entirely in terms of prayers No.(a), (b) & (c) with costs to the Plaintiff.

It is so ordered.

Dated, Signed and Delivered at Thika this 1st day of November, 2019.

L. GACHERU

JUDGE

1/11/2019

In the presence of

M/S Mbirwe holding brief for Mr. Macharia for Plaintiff

No appearance for Defendant

Jackline - Court Assistant

L. GACHERU

JUDGE

1/11/2019