



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CIVIL SUIT NO. 508 OF 2017

CECILIA NDUTA.....1ST PLAINTIFF

LUCY WANJIRU.....2ND PLAINTIFF

VERSUS

STEPHEN GITAU GATHOGO.....1ST DEFENDANT

GEORGE GATHOGO WANJIRU.....2ND DEFENDANT

MARKARIOS NDUATI WANJIRU.....3RD DEFENDANT

LAND REGISTRAR, THIKA.....4TH DEFENDANT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT

JUDGMENT

By an Amended Plaint dated 21st June 2019, the Plaintiffs herein filed this suit against the Defendants and sought for the following orders;

- a. A Permanent Injunction be entered against the 1st, 2nd and 3rd defendants restraining them from interfering, trespassing, alienating, subdividing or in any way interfering with land parcel number **Ruiru East Block 1(Githunguri) 1373.***
- b. That the 4th defendant be compelled to reverse the transfer from the Plaintiff to the 1st, 2nd and 3rd defendants and the same to be registered back to the estate of Sella Muthoni Karanja (Deceased) as the Legal and registered owner of Ruiru east Block 1(Githunguri) 1373.*
- c. That the 4th Defendant be ordered to rectify the register /green card and all relevant documents to read Estate of Sella Muthoni Karanja (deceased) as the legal and registered owner of Ruiru east Block 1(Githunguri) 1373.*
- d. General damages against all the Defendants*
- e. Any other relief that this Honourable Court deems fit to grant.*
- f. Costs of this suit and interest thereon.*

In their statement of Claim, the Plaintiffs averred that their mother **Sella Muthoni (Deceased)** was the legal and bonafide owner of the suit property. That in 2015, she received information that the 1st to 3rd Defendants had illegally transferred the suit property to themselves. That the Deceased never transacted with the Defendants and therefore the purported transfer was fraudulent and illegal. Further that the acquisition of the suit property by the Defendants was irregular and voidable and unconstitutional.

They particularized fraud by the 1st, 2nd and 3rd Defendants as; securing the transfer of the suit property without any authority; failure by the 4th Defendant to keep land records; conspiring by the Defendants to transfer the suit property that belonged to the Plaintiff; the 4th defendant allowing transfer without any legal authority; acting without due care by the 4th Defendant. That the Deceased has been in possession of the title deed and the title deed if any held by the Defendants is a nullity. The Court was therefore urged to allow the claim.

The 1st, 2nd and 3rd Defendants filed their Statement of Defence dated 21st March 2016, and denied all the allegations made in the Plaint.

That the Plaintiffs title to the suit property was fraudulently obtained as they have not shown how the alleged land came into her possession. That the Plaintiffs have not shown that **Sella Muthoni** was a shareholder of **Githunguri Constituency Ranching Company** and as such her ownership is disputed.

It was their contention that their grandfather one **James Gathiriki**, had balloted for ¼ acres of land and a separate ¼ residential plot in **1995**, from **Githunguri Constituency Ranching Company**, and was issued with a receipt. That the suit property was originally owned by their grandfather and they inherited it from their late mother, who had inherited it from her father. That the Company effected transfer in favour of their mother and upon the demise of their mother, her shares were transferred to them and they became shareholders. That in **2012**, they began pursuing the issue of the title deed and presented the requisite documents to **Githunguri Ranching Company Ltd**, and they were issued with **Certificate No. 2948, a Clearance Certificate** from **Githunguri**.

That the suit property was further subdivided into **5 plots** and after subdivision, they each acquired their respective parcel. That the subject matter of the suit is nonexistent at the time of filing the instant suit. It was further averred that the Plaintiff is guilty of **fraud**, having illegally transferred the suit property to herself. That the orders sought are a nullity and that the only parcels of land are registered into their names.

In their Counter Claim, they reiterated the contents of the Defence and sought for orders that;-

a) Inhibitory orders to issue against the Plaintiff, her servant, agents, assignees or any other person claiming through her from interfering and/ or dealing in any way with Land Parcel No. Ruiru/Ruiru East Block 1/1373 now Ruiru/ Ruiru East Block 1/5832, 1/5833, 1/5834, 1/5835 and 1/5836.

b) An order for cancellation of the Plaintiffs Title Deed in respect of parcel of land known as Ruiru/Ruiru East Block 1/1373 if the same is in existence

c) Costs of this suit.

The 4th & 5th Defendants filed their statement of Defence dated **25th April 2016**, and denied all the allegations made in the Plaint. They averred that the suit offends all the mandatory provisions of **Section 13 A** of the Government Proceedings Act.

PLAINTIFF'S CASE

PW1 Cecilia Nduta Wainaina testified that she had the Power of Attorney from **Selah Muthoni Karanja**. She adopted the witness statement of **Selah Muthoni Karanja**, as her evidence in Court. She further produced the list of documents dated **4th August 2017**, as Exhibit 1. That the Land is **Ruiru East Block 1(Githunguri)1373**, and that her mother bought the land from **Githunguri in 1991**, and she got a Clearance Certificate on **22nd January 1991**, and ballot **No. 1377**, and share Certificate **No. 3926**. That as per search dated **22nd April 2005**, **Selah Muthoni** is the registered owner. That the land was later registered fraudulently in the name of other persons. That she conducted a Search in **2015**, and found names of the 1st to 3rd Defendants .

That her mother did not sell the land to the Defendants nor was there a Court Order transferring the suit premises. Further that they have been using the land **since 1991**, and they have planted trees and other subsistence crops and there are no structures on the suit property . That they obtained the documents **in 1992** and the Defendants got the title in **2012**.

She further testified that her mother paid for the plots as she bought the land in **1960**, as a shareholder and she was issued with the deed on **22nd June 1992**, and they paid for the title deed. That as per the green card, the 1st entry was **Githunguri Ranching Co. Ltd** in **2012**, and the 2nd entry was for the 1st to 3rd Defendants and her mother did not appear in the green card. That her mother was an employee of **Githunguri Ranching Company**. That the 4th Defendant transferred the suit property without the authority of the registered owner.

DEFENCE CASE

DW 1 Stephen Gitau Gathogo, the 2nd Defendant adopted his witness

statement dated **21st March 2016**, and denied obtaining the land

fraudulently. That the suit property belonged to their grandfather **James Gitau Gathirika**, as he had balloted in **1985**, and he later left the land to his mother **Rachel Wanjiru**, and the land was then transferred to them.. That there is a receipt dated **12th September 1992**, being transfer fees. That their mother passed on in **1997**, and they obtained registration of the suit property in **2013**. That they paid **Kshs. 9300/=** for the share certificate and the Clearance certificate . That they took the Clearance Certificate to the lands office and they became registered owners on **4th November 2013** . That their mother had always used the suit property.

Further, that they have subdivided the land and each one of them have a title and they have ben utilizing the resultant subdivisions. That they did not file for letters of Administration for their mother's Estate and they used the Chief's letter who confirmed that the land belonged to their mother. He denied participating in the removal of the green card. That they sought for the registration of the title when they got money in 2013. That they applied for **Consent** from the **Land Control Board** and obtained it. That they took all the relevant documents to the Land Registrar.

DW2 Robert Mugendi Mbuba, testified that he is a Land Registrar stationed in Ruiru. He adopted the witness statement by **Benard Leitich** dated **28th May 2018**, as his evidence in court. He further produced the list of documents as Exhibit 1 . He testified that the suit

property was registered on **13th August 2012**, in the name of **Githunguri Constituency Ranching Company Limited**. That on **16th September 2013**, the land was transferred in the joint names of **Stephen Gitau Gathogo** and **George Wanjiru Gathogo** and **Makarinos Nduati**. That the three of them were issued with title deed on **26th January 2016**, and the title deed was closed on subdivision to produce title No. Block **1/5832-5836**. That as per their records, there is a transfer from **Githunguri Constituency** to the **1st, 2nd and 3rd** Defendants. He produced the transfer forms as part of his evidence. That the transfer is supported by certified copies of the I.D and the **Land Control Board Consent** dated **11th June 2013**. That the subdivisions were validly done as he has the mutation forms and all the relevant documents.

That he has the Clearance letter from **Githunguri Constituency Ranching Company**, in the name of the **1st to 3rd** Defendants, the original share Certificate and a piece of paper of **Gitau Gathiriku**, an official receipts, tamped ballot, receipts from **Githunguri Ranching Co. Ltd**, and the original ballot stamped at the back and signed.

That he was not aware if the search in the name of **Serah Muthoni** was authentic and that he did not see the documents in the name of **Serah Muthoni**. He further testified that the search document has a seal of Thika District Land Registry and the Registrar is **Agnes Nganga** and he confirmed that there was a Land Registrar who passed on in **2018** named **Agnes Nganga**. Further, that there is a Certificate from **Githunguri Constituency Ranching Company** and there is an original title deed, which he would have to subject to the government printers for authenticity though it is an original title.

That there are many cases of double allocation at Thika Lands Registry and there are cases of a parcels of land having two green cards. However, in the instant case, there is only one, but he would have to verify the title deed. That he has produced authentic documents, but he has not seen the name of the Plaintiff as the proprietor.

Thereafter, the parties filed written submissions, which this Court has carefully read and considered. The Court has also read and considered the pleadings by the parties, the evidence adduced and the provisions of law and finds that the issue for determination are;

- 1. Who is the bonafide owner of the suit property**
- 2. Is the plaintiff entitled to the orders sought**
- 3. Are the 1st to 3rd Defendants entitled to the orders sought**
- 4. Who should bear the costs of the proceedings**

1. Who is the bonafide owner of the suit property

The Plaintiffs have contended that their mother **Selah Muthoni (Deceased)** is the registered owner of the suit property. That she obtained the suit property from **Githunguri Constituency Ranching Company Limited**, and after allocation, the same was transferred to the said **Sela Muthoni (Deceased)** and she acquired a title deed over the suit property. The Plaintiffs have produced in evidence a title deed dated **22nd June 1992**, indicating that the said **Selah Muthoni**, was registered as the owner of the suit property. They have further produced in evidence a Clearance Certificate from **Githunguri Constituency Ranching Company Limited**, a share Certificate and a ballot paper.

The **1st to 3rd** Defendants shave equally laid claim to the suit property, and averred that the suit property initially belonged to their grandfather, who transferred the same to their mother and upon the death of their mother, the said land was transferred to them. To support their contention, they produced in evidence receipts evidencing payment by their grandfather, a Share Certificate in the name of **Rahab** dated **4th November 1992**, a transfer evidencing transfer of shares from their mother to them and a clearance certificate indicating that they are the registered owners of the suit property.

Though both the Plaintiffs and the **1st to 3rd** defendants have produced in evidence documentations to show how they acquired title to the suit property, DW2 who is the **Land Registrar** and who testified on behalf of the **4th** Defendant gave evidence to the effect that the Land Registry only has the documentations with regard to the transfer of the suit property to the Defendants. That there was no trace of any transaction involving the transfer of the land to the Plaintiffs. It is the Court's considered view that the Defendants evidence has further been corroborated by the evidence of the Land Registrar who is the custodian of all documents regarding registration of land and certificates of titles.

The Plaintiffs produced in evidence a Clearance Certificate, an official search and a title deed, but they did not call evidence from the Company to corroborate their story. Further, apart from producing the said official search and title deed, the Plaintiffs did not take any further steps to authenticate the documents they had produced in evidence. There are two parties who have produced document's relating to the suit property and given that it is only the Defendants whose evidence has been collaborated by the evidence of DW2, who confirmed receiving the said documents from the **Githunguri Constituency Ranching Company Limited**, and also confirmed transferring the said property to the Defendants, then the Plaintiffs' case is not probable.

Section 26 (1) of the Land Registration Act, gives a registered owner of property absolute and indefeasible rights over the said property. However, it is not in doubt that the said title can be impeached if it is found to have been acquired unprocedurally or through fraud. In this instant case, the **1st to 3rd** defendants have shown the root of their title and it is the Court's considered view that the Defendants proved how they acquired the suit property and the same was acquired procedurally. However, despite the Plaintiffs producing documents indicating that their late mother was the owner of the suit property, they failed to prove that the title deed to the suit property was acquired procedurally as there seems to be no evidence of the transfer.

Therefore, this Court finds and holds that the 1st to 3rd Defendants are the bonafide owners of the suit property.

2. Are the Plaintiffs entitled to the orders sought

The Plaintiffs had sought for Permanent Orders of injunction against the 1st to 3rd Defendants and an order of the rectification of the register and reversal of the transfer. The Court has found and held that the 1st to 3rd Defendants are the bonafide owners of the suit properties. Therefore, the said 1st to 3rd Defendant are entitled to all the rights and privileges appertaining to the said property and thus a Permanent injunction cannot be issued against them nor can the Court cancel their Certificate of title.

Consequently the Court finds that the Plaintiffs are not entitled to the orders sought.

3. Are the 1st to 3rd Defendants entitled to the orders sought

The Defendants in their counter Claim sought for inhibitory Orders against the Plaintiffs and further for the cancellation of the title deed in the name of **Sellah Muthoni(Deceased)**. The Court having held that the 1st to 3rd Defendants are the bonafide owners of the suit properties, there is no doubt that they are entitled to all the rights and privileges relating to the suit property as provided for under Sections **24 and 25 of the Land Registration Act**. Such right includes the right to quiet and peaceful enjoyment of the suit property.

Further **Section 80 of the Land Registration Act** empowers this Court to cancel any title it finds to have been acquired unprocedurally. In this instant suit, the Court having held that the Plaintiffs have failed to satisfactorily explain acquisition of the title deed to the suit property, this Court finds and holds that the said title is impeached and ought to be canceled.

Consequently, the Court finds and holds that the Defendants are entitled to the Orders sought.

4. Who should bear the costs of the proceedings

Section 27 of the Civil Procedure Act gives the Court discretion to grant costs. However, it is trite that costs usually follow the event and the same are granted to the successful party, unless there are special circumstances. In this instant case, the Court finds that the Defendants being the successful litigants are therefore entitled to the costs of this suit.

The Upshot of the foregoing is that the Court finds that the Plaintiffs have not proved their case on the required standard of balance of probabilities and therefore their Claim is **not merited** and the Amended Plaint dated **21st June 2019** is dismissed entirely.

However, the 1st to 3rd Defendants have proved their case on the required standard of balance of probabilities in their **Counter-Claim** dated **21st March 2016**. Consequently, the Court enters Judgement for the 1st to 3rd Defendants as against the Plaintiffs herein as per this Counter-Claim dated **21st March 2016** with costs to the 1st to 3rd Defendants.

Orders Accordingly.

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF JUNE 2021.

L. GACHERU

JUDGE

24/6/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Kanja for the 1st and 2nd Plaintiff

M/s Musyoka for the 1st, 2nd and 3rd Defendant

Mr. Njagi for Ms. Fatma for the 4th and 5th Defendant

L. GACHERU

JUDGE

24/6/2021