



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 10 OF 2018

MARGARET NJERI MUIRU.....APPELLANT

VERSUS

FRANCIS WANAINA NGIGI.....RESPONDENT

(Being an Appeal from the Judgment in Thika CMCC No. 519 of 2006 delivered on 19th March 2018, by Hon C.A OTIENO OMONDI, Principal Magistrate)

JUDGMENT

The Appellant **Margaret Njeri Muiru**, was the Defendant in Thika **CMCC 519 OF 2006**, while **Francis Wainaina Ngigi** was the Plaintiff in the said suit. By a Plaint dated **29th June 2006**, the Plaintiff (Respondent) brought this suit against the Defendant (Appellant) and sought for the following orders:-

a) The removal of caution lodged on 13th January 2006, by the 1st Defendant and removal of the restriction lodged on 27th February 2006, and further the defendant, their servant, agents, employees or workmen be permanently restrained from interfering with the suit land.

b) Costs of this suit.

In their statement of Claim, the Plaintiffs (Respondent) averred that on **25th February 2005**, they entered into a sale agreement whereby the 1st Plaintiff sold the suit property to the 2nd Plaintiff. That the Plaintiffs obtained the **Land Control Board Consent**, but upon presentation to the Thika Land Registry, they were informed that the land had been cautioned by the Defendant. That the Plaintiff further discovered that a restriction had been lodged on the land without the proprietors consent.

The suit was contested and the 1st Defendant (Appellant) filed a statement of Defence dated **17th July 2006**, and denied all the allegations in the Plaint. She averred that the suit property has always belonged to her exclusively from **11th October 1988**, when she became a member of **Githunguri Constituency Ranching Company Limited**, vide share **Certificate No. B.1346**, after the share was transferred to her by her father **Paul Muiru Muchomba**. That she was justified in cautioning the suit property, as it belonged to her father. Further that the 2nd Defendant was justified in placing the restriction so as to prevent escalation of illegality.

She further averred that she was issued with a Clearance Certificate by the Company to collect title deed for residential **No. 906**. That on **12th September 1994**, lands officer at Kiambu issued a letter to the Commissioner of lands at Nairobi to prepare the lease certificate in respect to the property. That she was requested to pay some fees, which she failed to raise, but continued occupying the suit property and allowed one of her relative to till the land after she re located to Kinangop.

That in **2003**, she informed her relative **Mary Muthoni Muchomba**, to stop cultivating the land as she was desirous of cultivating it herself. Further that on **20th January 2006**, she was informed that the land had been converted from **leasehold to freehold** and she was to pay **Ksh.6,000/=** for another clearance certificate at the Thika Lands Registry and the same was issued upon her payment of the suit property.. That upon presenting the clearance certificate and transfer form, she learnt that the suit property had already been transferred to **Francis Wainaina Ngigi**, and title deed issued to him on **8th April 2003**, and it was then that she cautioned the land.

That she reported the matter to the District Officer's (D.O's) offices who summoned the Plaintiffs (Respondents) and they went to the Githunguri offices and the 1st Plaintiff could not produce any document in support of their claim, and upon detection of some fraud, the District Officer referred the matter to the Criminal Investigation Department (CID). The 1st Defendant further averred that the 1st Plaintiff fraudulently and irregularly acquired the suit property and she particularized fraud under paragraph 18.

She sought for the following orders;

a) A Declaration that the 1st defendant is the land owner of land reference No. Ruiru West Block 1/Githunguri/906 and that the registration done on 8th April 2003, was illegal and fraudulent and should be cancelled or expunged from the land register and replaced with a registration of the 1st defendant as the lawful owner of the said land parcel.

b) Cancellation of title deed issued to the 1st Plaintiff in respect of land reference No. Ruiru West Block 1/Githunguri /906 and a new title be issued in favour of the 1st defendant.

c) Costs and interest of the suit.

d) Any other or further relief fit to grant

After Close of pleadings, the matter proceeded by way of Viva Voce evidence, wherein the Plaintiffs(Respondents) called one witness and closed their cases.

PLAINTIFF'S (RESPONDENT'S) CASE

PW1 Francis Wainaina Ngigi testified that he is the owner of **Ruiru West/Block 1/906**, and was issued with a title deed on **8th April 2003**. That he was given a Clearance Certificate on **30th May 2002**, by **Githunguri Ranching Company Limited**. That the suit property originally belonged to his father **Stephen Ngigi Warui**. That on **16th June 1968**, he paid **Kshs.5/=** membership fee and on **24th May 2015**, he paid the survey fee. On **10th March 1983**, he paid **Kshs.800/=** for his share, and on **30th May 1983**, he paid **Kshs.600/=** for survey. That his father passed on, on **23rd November 1994**, and on **18th April 1998**, the plot was transferred to him and he was issued with a Certificate on the same day. That after he was issued with a title deed, he decided to sell the land and is when he noticed that **Margaret Njeri** had cautioned the land.

That each share member was getting 3 portions and that he did not transfer all the portions at the same time. That the 1st Defendant and the Police went to **Githunguri Constituency Ranching Company**, and certified that the plots papers were genuine. That his ballot paper No. was **906** and the same was being utilized by the 2nd Plaintiff.

DEFENCE (APPELLANT'S) CASE

DW1 Margaret Njeri Muriu stated that her father gave her **L.R 906 on October 1988**. That she got share certificate on **11th October 1988**, and she paid **Ksh.250/-** transfer fee. That she left her neighbor to care for the land. That on **21st November 1994**, she went to the Commissioner of lands and she was to pay **Kshs. 5000/=**, but she could not raise it and the title deed was not processed. That she paid **Kshs.6000/=** for Clearance at **Githunguri Constituency Ranching Company**.

She further testified that when she visited the lands office in Thika, the Registrar informed her that a title deed had already been issued. That they went to the District Officer (DO) and the Plaintiffs were summoned and they were asked for their documents and the District Officer ordered the Plaintiff's to be charged in Court. That the Investigating officer had her original documents, but he passed on and so they were not produced. Further that she went to the land buying Company and she was issued with other documents. That she reported the loss and she was given another **Certificate B646 ballot** replacement, Clearance Certificate on **11th September 2008**. That there was a criminal case against the Plaintiff but the matter was not concluded as the investigating Officer passed on. She produced copies of exhibits in the criminal case as exhibits 7 .

That her father gave her a plot that was an **1/8th** and she was given a clearance certificate which indicates that it was **1/4** residential plot but on the ground it was **50 by 100**. That she learnt that the suit property had a problem in **2006**. That she as cultivating the land from **1988 to 2006**.

After the viva voce evidence, the parties filed their written submissions and the trial Court entered Judgment in favour of the Plaintiffs (Respondents herein) and stated;

***“I note that the Defendant ‘s case is that Ruiru West Block 1/ Githunguri/906 belongs to her as it had been given to her by her father. She produced documents in support of her case. I note that the Clearance Certificate dated 20th January 2006 issued by Githunguri Constituency Ranching Company Limited and produced in Court as Exhibit 5 indicates that it is for Block No. Ruiru West Block 1/ Githunguri. I note that this parcel is different from the suit property which is describes as Ruiru West Block 1/906 . Given the evidence presented, I find the Plaintiff has demonstrated clearly how he came to be the registered owner of Ruiru West Block 1/906..... Consequently I enter Judgment for the Plaintiffs s against the Defendant order for the removal of the caution lodged on 13th January 2006 by the 1st Defendant*”**

The Appellant was aggrieved by the above determination of the Court and Decree thereon, and she has sought to challenge the said Judgment through the **Memorandum of Appeal** dated **3rd May 2018** and filed on **17th September 2019**. The Appellant sought for the setting aside of the Judgment delivered on **19th March 2018** by **Hon. C.A Otieno Omondi Principal Magistrate Thika**.

The grounds upon which the Appellant sought for the Appeal to be allowed are;

1. *The Learned Magistrate erred in law and in fact when she failed to appreciate that the Certificate of Title Deed by the Respondent was subject to investigations ever since its issuance and that the Respondent has failed to establish how he became seized of bonafides of Plot no. Ruiru West Block 1(Githunguri) 906.*

2. *The Learned trial Court erred in law in dismissing the Appellant's Counter Claim when evidence was availed to show that the Appellant held the correct bonafides for the title No. Ruiru West block 1(Githunguri) 906.*

3. *The Learned Trial Court erred in law in dismissing the Plaintiff's case, when the Respondent held title which was cumbered by irregularities.*

4. *The Learned trial magistrate erred in Law and in fact by shifting the burden of proof beyond documents which parties and another court in CR 2984 of 2006 (Thika) which judicial notice had already been taken*

5. *The learned Magistrate misguided herself in law and in fact when she held that Section 26(1) is coached in absolute terms whereas the case before her was seeking revocation and/or annulment of the title No. Ruiru west Block 1(Githunguri) 906.*

6. *The Learned Trial Court failed to take cognizance of order 10 and 11 that this suit was filed before the year 2010 and hence it was upon parties to agree in the manner on how to proceed and in acting in contravention with sales of procedures rendered the entire proceedings a mistrial.*

7. *The Learned Magistrate gave a judgment per incuriam due to her non conception of legal issues obtaining to issuance of Githunguri constituency ranching Company Limited Titles and her failure to call for appropriate registers through the Plaintiff who provoked the proceedings.*

The Court directed that the Appeal be canvassed by way of written submissions. However, despite several chances given to the parties, none of the parties filed their written submissions.

This being a first Appellate Court, it was held in the case of Selle...Vs...Associated Motor Boat Co. [1968]EA 123, that:-

“The Appellate court is not bound necessarily to accept the findings of fact by the court below. An Appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

Having carefully read and considered the Memorandum of Appeal, It is the Court's considered view that the issue for determination is *whether the Appeal is merited.*

It is not in doubt that both the Appellant and the Respondent were laying claim to the suit property. Further it is not in doubt that the Appellant registered a caution against the suit property and alleged that the Respondent's registration as the proprietor of the suit property was acquired through fraud. It is thus not in doubt that the Appellant having challenged the registration of the Respondent, the Respondent had an obligation to show the root of his title. See the case Munyu Maina...Vs.. Hiram Gathiha Maina [2013] eKLR, held as follows:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

It was the Respondent's contention that the suit property was initially allocated to his late father and when his late father passed on, the same as transferred to him. He produced in evidence receipts dating way back to **1968**, indicating that his father had paid for entrance fee. Survey fee and also the share certificate. The Court has seen the said receipts and they have clearly been indicated as ballot. The Respondent further produced in evidence a ballot card **No. 906 and reverse 112 906.**

To further support his case, the Respondent produced Clearance Certificate dated **30th May 2002**, that confirmed that he was the registered owner of the suit property and therefore enabled the transfer of the suit property to him.

In response, the Appellant also averred that she received the suit property from her father. She produced in evidence payment receipts dating to **11th October 1988**, share certificate Clearance Certificate dated **8th November 1993**, and another Clearance Certificate dated **20th January 2006**. That while the Clearance Certificate produced in evidence by the Respondent showed that he was the owner of **Ruiru West Block 1/ 906**, the Clearance Certificate by the Appellant showed that she was the owner of **Ruiru West Block 1/ Githunguri**, which the trial Court correctly held that the same is different from the suit property. However in both Certificates, the Plot No. has been indicated as **Plot 906**, and therefore the Court holds and finds that indeed the two parcels of land are different.

However, it does not escape the Court's mind that the plot Number indicated for both parties is **906**, and that they both have a ballot No. **906**, which is the one for the plot. As already held by the Court above, the Respondent's father balloted for the suit property in **1968**, while the Appellant's father was allegedly granted the suit property in **1988**. Therefore, it follows even if the Court was to find that both parties

had been allocated the same suit property as they have both produced in evidence 'documents to show the root of their titles, by the time the Appellant's father was being allocated the land, the Respondent's father had already been allocated the land and therefore the same was not available for allocation. See the case of **Ashmi Investment Limited v...Vs...Riakina Limited & another [2017] eKLR** where the Court held that:-

“the court finds that by 2013 when the Plaintiff paid for plot D, it was no longer available as the plot had already been allotted by the Commissioner of Lands and to the 1st Defendant who had paid for it and taken up possession and was in the process of procuring a certificate of title over it.”

Further in the case of **Republic ...Vs... City Council of Nairobi & 3 Others (2014) eKLR**, Odunga, J. had this to say about land that has already been allotted:-

“once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

The Upshot of the above therefore is that the Court finds and holds that the Respondent was able to show the root of his title. Having been able to show the root of his title, then the same could not be impeached and he is entitled to the protection of the same. Further he is entitled to enjoy all the rights and privileges appertaining to it and therefore the prayers for removal of the caution is merited.

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the **Memorandum of Appeal**, together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reasons to upset the said determination of the said trial magistrate.

The upshot of the foregoing is that the Appellant's Appeal is found **not merited** and consequently the said Appeal is **disallowed and dismissed entirely. The Judgment and Decree of the trial court is upheld.**

On the issue of costs, the Court finds that the same is granted at the discretion of the court. Given that the Respondent did not file any documents in the Appeal and despite being given a chance to file written submissions, none of the parties complied with the said directions, the Court orders each party to bear its own costs of this Appeal.

It is so ordered.

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 Mwangi for the Appellant

M/s Wambui for the Respondent

L. GACHERU

JUDGE

24/6/2021