



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 14 OF 2018

(FORMERLY NRB ELC 172 OF 2014)

PETER PAUL NDURURI (Suing on behalf of DONOR

SAMUEL WAMUTU WAIGANJO.....PLAINTIFF

VERSUS

KIMANI NJUGUNA.....1ST DEFENDANT

ERIC THOMAS OSIEMO.....2ND DEFENDANT

ANTHONY GITHIACA KIAL.....3RD DEFENDANT

LAND REGISTRAR (THIKA LAND REGISTRY).....4TH DEFENDANT

CHIEF LAND REGISTRAR(LAND REGISTRY NAIROBI).....5TH DEFENDANT

CHAIRMAN, NATIONAL LAND COMMISSION.....6TH DEFENDANT

THE HON. ATTORNEY GENERAL.....7TH DEFENDANT

JUDGMENT

By a Plaintiff dated 20th December 2013, the Plaintiff filed this suit against the Defendants and sought for Judgment against them jointly and severally for:-

1. A Permanent injunction to restrain the Defendants by themselves, servants and or assigns from interfering in any manner with the suit premises L.R No. Thika/ Municipality 9/22, and or transferring, charging, offering as security and or in any way encumbering the title thereto.

2. A Declaration that the suit premises Title Number L.R No. Thika Municipality 9/22, belongs to the Plaintiff and an order cancelling the title thereto issued to the Defendants and or any other person that the Defendants do give vacant possession thereto to the Plaintiff.

3. An order to compel the Defendants to cause to be transferred the suit premises L.R No. Thika Municipality/Block 9/22 to the Plaintiff by executing all the necessary documents and in default thereof the same to be executed by the Deputy Registrar of this Honorable court.

4. In the alternative, an order for allocation of alternative land of equal value and or pecuniary compensation at current market value.

5. General Damages

6. Costs of this suit

7. Any other relief this Honourable Court may deem fit to grant

The Plaintiff averred that he is the proprietor of the suit property, which was allocated to the Donor **Samuel Wamutu Waiganjo**, by the Commissioner of lands. That to facilitate issuance of the title documents for the suit premises, the 5th Defendant issued him with a copy of Lease Document and a letter advising the Thika District Land Registrar to issue him with a Lease Certificate for the suit premises. That upon applying for the issuance of the Lease and Certificate, he discovered that the 1st 2nd & 3rd Defendants, together with the 4th Defendant had fraudulently transferred and caused the suit property to be registered in favour of the 3rd Defendant and who has now charged the land to acquire finances from the Bank.

That the Defendants jointly and severally fraudulently procured title documents. He particularized fraud by the Defendants as; issuing and procuring falsified documents to facilitate registration in the 1st, 2nd & 3rd Defendants names; unlawfully re-alloting the suit premises to the Defendants and third parties working in conspiracy to defeat the Plaintiffs title; transferring the suit premises to 3rd parties; making of parallel registration documents to procure issuance of title documents in the Defendants name.

He averred that the 1st, 2nd and 3rd Defendants have trespassed into the suit premises and commenced construction thereon of permanent building in contravention of his rights.

The suit is contested and the 3rd Defendant filed a Defence dated **17th April 2014**, and denied all the allegations made in the Plaintiff. He further averred that the Plaintiff lacks **locus standi** to lodge the suit and denied the existence of the Power of Attorney. The 3rd Defendant averred that he is the registered owner of the suit property. That by an agreement dated **3rd July 2010**, between him and the 1st & 2nd Defendants, he agreed to purchase the suit property at **Kshs. 14,500,000/=**. That he conducted due diligence and he was issued with a Certificate confirming that the 1st & 2nd Defendants were duly registered proprietors. That he then applied for a loan of **Kshs. 7,000,000/=** from Family Bank and upon payment of the purchase price, the suit property was duly transferred to him.

That he bought the suit property openly and validly with no **Notice** of the Plaintiff's claim. He further averred that he is a purchaser for value, having followed due process in the acquisition of the suit property.

The 4th, 5th, 6th and 7th Defendants also filed their statement of Defence dated **10th April 2014**, and denied the allegations made in the Plaintiff. They averred that if the suit property was registered in the 1st and 2nd Defendants names, then the same was based on documents presented before the 4th & 7th Defendants offices, who exercised due diligence and the said documents being believed to be genuine, were thus registered and therefore performing their duties according to law without unprofessionalism.

The matter proceeded by way of viva voce evidence wherein the Plaintiff called two witnesses and closed his case, while the Defendants called 4 witnesses. Though duly served with Summons to Enter Appearance, the 1st & 2nd Defendants did not Enter Appearance and the suit proceeded without their participation.

PLAINTIFF'S CASE

PW1, Peter Paul Mburu Ndururi, testified that he was suing on behalf of **Donor Samuel Wamutu Waiganjo**, as he sought to buy the plots from him in **Section 9 Thika** in the year **2008**. That the plots were unsurveyed and **Mr. Waiganjo** gave him the Power of Attorney dated **19th March 2008**, to go for the title. That he obtained the land as **unsurveyed Plot No. G, Thika Municipality**, and he was given the document for the land in its original form.

That **Mr. Samuel Wamutu Waiganjo**, obtained the documents on **12th August 1982**. That all the requisite fees to be paid were indicated in the letter of allotment amounting to **Kshs. 52,115/=**, which he paid and he was given the Registry Index Map (RIM), which was sent to the Land Registry by **Mr. Kimwele**, a registered land Surveyor based in Nairobi. Further that the allotment was in the name of **Samuel Wamutu Waiganjo**, as he had the Power of Attorney, he caused the land to be registered as **Thika / Municipality Block 9/22**, and he paid the rates in the said name. That in the year **2011**, he approached the Ministry of Lands for a lease title and he received a letter informing him to collect his title from the Thika Lands Registry, but that when he presented the letter, he found that the title had been registered and released to other people.

That he went to the Lands office in Nairobi and found that the suit property was registered in the name of **Samuel Wamutu Waiganjo**, but in Thika, it was registered under different names. That an official search at Thika Land Registry indicated that the suit property was registered in the name of **Kimani Njuguna** and **Erick Thomas Osiemo**. That from the green card, the Certificate of Lease was issued on **26th November 1997**, and the same green card had a change of name to **Anthony Kiai**. He urged the Court to nullify the Certificate of Lease issued to the 1st and 2nd Defendants, who later sold it to the 3rd Defendant and the same be registered in his name. That in the alternative, he seeks land that is equivalent to the one he purchased.

He acknowledged that **Samuel Wamutu Waiganjo**, had capacity to appear in Court. That though he had documents to confirm that he purchased the suit property from him, he did not have a written Sale Agreement. That neither him nor **Samuel Wamutu Waiganjo**, had been issued with a title document. He further testified that the suit property was transferred to **Anthony Githika** on **25th November 2011**, and he was informed about the transfer in **2011**, and there is a charge on the same date it was transferred. That the 3rd Defendant charged the suit property before he purchased it and there are no allegations of fraud on the part of the 3rd Defendant. Further that the letter of allotment dated **12th August 1982**, is not signed by the Commissioner of lands and it refers to the **unsurveyed Plot No. G**. That the payments to be made were not done within 30 days as he paid on **20th April 2011**.

It was his further testimony there is no consent from the Ministry of lands for approval of the said transfer. That there is an allotment to the Defendants, that was done in cahoots with the Land Registrar. Further that he made payments after 30 days and the Ministry accepted his payments and he was given the letter dated **23rd September 2010**, by the Ministry of Lands and it was Copied to the Director of Survey. The Green Card was opened on **26th November 1997**, and it refers to **Block 9 Parcel No.22**, and it was unsurveyed by **1997**. He further testified that he did not enter into a sale agreement and the issue of transfer does not arise.

PW2, Samuel Wamutu Waiganjo, testified that the land was allocated to him in **1982**. That he gave the Plaintiff the Power of Attorney to deal with the Land. That the Land was unsurveyed and did not have a title. He adopted his witness statement as his evidence in Court. That he paid the rates to the Municipal Council of Thika. That he sold the suit property to the Plaintiff and he signed transfer forms and payment of stamp duty. That he wrote to the Commissioner of lands and all the payment were done in his name and the Plaintiff held the Land as a Donee. Further that the process of pursuing the title was ongoing in **2011**. That Nairobi was receiving payments from them and Thika land Registry was issuing a title and thus there was an irregularity in the registries.

It was his testimony that as per the letter of allotment, he was to pay an amount within a period of 30 days, but he did not pay within that period. That **Special Condition No. 9**, it forbids sale, transfer, charge until Special Condition No. 2 was fulfilled. That he confirmed that he was unable to make payments on time and there was no response on the letter. That he was allotted **Unsurveyed plot G Thika Municipality**. That he did not commission any survey for the property.

He further testified that he had an informal arrangement with the Plaintiff and that the transfer was not registered at the Ministry of Lands. That he wrote to the Commissioner seeking for extension of time to pay. That as per the letter of allotment, the allotment did not lapse as it was not revoked. That he transferred the Interest of the Land to the Plaintiff. That he did not make a sale as the Plaintiff is still holding the Power of Attorney and he was never informed that the allotment letter had been revoked. That Nairobi registry are still accepting his payments to the plot. That when Plot G was surveyed, it became **Thika Municipality Block 9/22** as per the letter dated **29th November 2011**.

DEFENCE CASE

DW1 Anthony Githaika Kiai, adopted his witness statement dated **17th April 2014**, as his evidence in Court. He produced his list of documents as Exhibit 1. That he purchased the suit property from the 1st and 2nd Defendants for **kshs. 14,500,000/=** and the same was partly financed by Family Bank. He conducted a search and the 1st & 2nd Defendants were proprietors and he got a copy of the Lease dated **26th November 1997**. That he obtained Rent Clearance Certificate and letters to transfer in **November 2010**. That he is in possession of the suit property.

He further testified that he obtained the consent to transfer in Nairobi and he has a Clearance Certificate dated **30th September 2010**, and a similar clearance dated **5th October 2004**. That he was not given the Lease document. That he was not aware if the vendors were the original owners and he could not confirm if he had paid the rent.

That as per the file at the Commissioner of Lands, he is the registered owner and his Lease is held by the Chargee. That it was the responsibility of the Vendor and the Purchaser to pay all the charges before the transaction. That the ownership of property is through Certificate of Lease and the Lease itself.

DW2 Jonathan Ngumo Mbogo, testified that he is an Advocate of the High Court of Kenya . That in the purchase of the suit property, he acted for both the purchasers and the Vendor. That he was given all the documents and he did a Sale Agreement. That the purchaser had an offer dated **21st June 2010**, and after negotiations, they settled at **Ksh. 14.5 Million** and the sale agreement was executed in his presence.

He further testified that he conducted due diligence and also conducted a search which came out in the name of the 1st and 2nd Defendants and there was no encumbrance. That they found that the land had Rates arrears and they paid for it and he went to the land and confirmed that there were beacons. That a Surveyor was involved and he issued a beacons certificate. That the transaction was partially financed by the Bank and they received an undertaking and the transfer document was sent to the Bank's Advocates. That they charged 2 properties at the same time. That all the documents were handed over to them including the Lease. That the vendors did not give them the letter of allotment and that at that time, the ownership of the document was not in dispute. That they obtained Consent to transfer from the Commissioner of lands and that the transfer ought to be held by the Land registry.

That the letter of allotment is not part of the completion document's but a lease. That after issuance of title, the letter of allotment is left at the Ministry of Lands and the letter dated **29th September 2011**, cannot determine ownership. That the 3rd defendant developed the land in **2011**

DW3 Robert Simiyu testified that he is the Assistant Director of Land & Administration based at **Ardhi House Nairobi**. That the parcel of Land is **Thika Municipality Block 9/22**. He adopted his witness statement dated **16th September 2020**. He produced the list of documents as exhibit 1 to 9.

It was his testimony that the suit property was allocated on **12th August 1982**, to **Samuel Wamutu Waiganjo**, and that the allotment can be lost once the offer is not accepted. Further that once the land is allocated, it cannot be allocated again. That if the allotment is revoked, the government alerts the allottee. That **Samuel Wamutu Waiganjo**, accepted on **11th September 1982**, and the payment was done for **Kshs.10,430/=** and he was given a receipt dated **14th September 1982**. That he continued to make payments as an allottee. He further testified that he was to pay **Kshs.52,115/=** as legal fees as per the letter of allotment . That the allottee did the payment and the Lease was issued on **29th September 2011**, and the Commissioner of lands in a letter to the Director of Survey dated **2nd June 2010** requested him to prepare Registry Index Map (RIM). That vide a letter dated **23rd September 2010**, the Director of Survey forwarded the Registry Index Map (RIM) to the Commissioner of lands for the said land. That by then, the land had been surveyed. That the letter was copied to the District

Land Registrar, Thika and it was then that the Lease was processed and sent to Thika vide a letter addressed to District Land Registrar and copied to **Samuel Wamutu Waiganjo** and the Lease was issued to him.

That there was no such letter addressed to the 1st & 2nd Defendants. Though **Samuel Wamutu Waiganjo**, had applied to transfer the suit property, he could not, as he had not paid the correct fees, but that did not bar him from giving Power of Attorney. That they were never informed that the land was charged to the bank, and that the registration to **Kimani Njuguna** and **Erick Thomas Osiemo** was not proper. That the custodian of the allotment letter was the Commissioner of lands.

It was his evidence that in their file, the mention of the registration of the Land to **Anthony Githaika** was by **J Ngumo Advocate** seeking consent to transfer the suit property from the 1st & 2nd Defendants to 3rd Defendant. That they wrote back to the Advocate and sought for a copy of the Lease, to enable them respond appropriately and there was no response and thus they do not know where the consent came from as it did not originate from their offices. Further that there were no payments by the 1st & 2nd Defendants. That as per their records, the suit property belongs to **Samuel Wamutu Waiganjo**.

That as per the allotment letter, the payments were to be made within **30 days**, but the full amount was not paid. The Consent of the government has to be sought before the sale of the property, otherwise the sale is not valid. That as per their record, there is no title in favour of the 3rd Defendant. That he did not have any evidence to Challenge the signature of **Mr. Gachanja** on the Certificate of Lease. That the Lease held by the 3rd Defendant shows that it was issued before the one issued to the Plaintiff. That he had a letter to show that the letter of Consent by the 3rd Defendant did not emanate from Commissioner of Lands, being letter dated **8th December 2010**, and that the **Consent** is not genuine, as he had asked Elizabeth who informed him that the signature was not hers. That the 1st & 2nd Defendants are not in their records. That a Lease cannot be issued without having emanated from the Commissioner of Lands.

DW 4 Joseph Wangombe Kamuyu testified that he in charge of Thika Land Registry. He adopted his witness statement dated **9th March 2020**, as part of his evidence. He produced the list of documents as exhibits 10 to 26 . That he has a photocopy of the lease in favour of the 1st and 2nd Defendants. That he has the original copies in favour of **Samuel Wamutu Waiganjo**. That if the Lease from the 1st & 2nd Defendants originated from their office, then the triplicate ought to have been sent out to Nairobi, and they were to have the original. That they do not have any acknowledgment of the Lease and as the Lease are forwarded with a forwarding letter, he did not have the letter forwarding lease for the 1st & 2nd Defendants and the copy of the forwarding letter should be in the file.

Further that he did not have any document to show that the Lease came from Nairobi . That a consent to transfer dated **4th November 2010**, was issued to the 1st & 2nd Defendants and that the duplicate one should be in Nairobi together with the receipts. That from the records available, there were no receipts of any payment and nothing about the 1st & 2nd Defendants apart from the green card.

That **Anthony Githaika** is the registered owner of the suit property and he purchased from the 1st and 2nd Defendants. That the transfer was lodged in their offices and duly registered by the **Registrar of Titles** and there was no reason to doubt the transaction. That he had no reason to doubt the authenticity of the certificate of Lease, green card and no reason to believe that the 3rd Defendant was involved in the fraud. That the Rent Clearance Certificate is issued first and the letter of consent is dated **4th November 2010** and that is proper.

Thereafter, the parties filed written submissions which the 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 decided cases and renders itself as follows;

Both the Plaintiff and the 3rd Defendant lay claim to the suit property. It is the Plaintiff's contention that he has sued as a Donee of **Samuel Wamutu Waiganjo**, who was the person allocated the suit property. The Plaintiff has produced in evidence a Power of Attorney and therefore the Court is satisfied that the Plaintiff has the requisite locus standi to bring the suit. Further, the Plaintiff has produced a letter of allotment dated **12th August 1982**. That upon being allotted **unsurveyed Plot G**, he paid some amounts of monies, but since he could not pay all he sought for an extension of time for payment of the same. That PW2 later gave the Plaintiff the Power of Attorney to act on his behalf relating to any transaction over the suit property

Further, it is not in doubt that the Plaintiff then paid for the remaining balance that was to be paid by the said **Samuel Wamutu Waiganjo**, and after making all the necessary payments, he was given a Copy of the Lease by the Ministry of Lands in Nairobi and letter to take to the Land Registrar Thika so as to be issued with a Lease and it there that he discovered that the suit property had initially been registered in the name of the 1st & 2nd Defendants and later transferred to the 3rd Defendant.

Further **DW2 Robert Simiyu** the Assistant Director, Land & Administration based at Ardhi House Nairobi testified that as per their records, **Samuel Waiganjo** was initially allocated **Unsurveyed plot G Thika Municipality**, and that he paid all the monies required and that though he did not pay within the **30 days**, his allocation was never revoked and therefore he remained the allottee of the said property. He further testified that when the Plaintiff sought for a lease, the Commissioner of Lands wrote to the Director of Survey and vide a letter dated **23rd September 2010**, the Director of Survey sent the Registry Index Map (RIM) and indicated that **Plot G was Thika Municipality Block 9/22**. That they then wrote to the Land Registrar Thika to issue the said **Samuel Wamutu Waiganjo**, with the lease. It was his evidence that while they have an allotment letter regarding the registration of **Samuel waiganjo** as the owner of the suit property, there was no evidence that the 1st and 2nd Defendants were ever allotted the suit property and further that when he 3rd defendant wrote to their offices for Consent to be given, the Lands office wrote back requesting the Defendant to give them a Copy of the Lease and the same was not forthcoming.

On the other hand the 3rd Defendant claims to have bought the suit property from the 1st & 2nd Defendants. It was his evidence that he charged the suit property to **Family Bank** and since the Plaintiff did not sue Family Bank the suit is defective. He averred that he got the necessary **Consent**, and that he is an innocent purchaser for value having conducted due diligence.

The above being the undisputed facts, the Court finds the issues for determination are:-

1. *Whether failure to Sue family bank is fatal.*
2. *Who is the bonafide owner of the suit property.*
3. *Whether the Plaintiff is entitled to the orders sought.*
4. *Who should Bear costs of this suit.*

1. Whether failure to Sue Family Bank is fatal

The Court of Appeal in *William Kiprono Towett & 1597 Others Vs Farmland Aviation Ltd & 2 Others (2016) eKLR* held that:-

“...Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

Therefore, it follows that failure to sue Family Bank does not make the suit incompetent. This Court will only deal with the rights and interests of the parties before it.

2. Who is the bonafide owner of the suit property

It is not in doubt that when a registered owner's title to property is called into question, the party has an obligation to show the root of their title. See the case of *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.”

The Plaintiff called into question the 3rd Defendant's title to the suit property and it therefore follows that the 3rd Defendant ought to show the root of his title. The 3rd Defendant has contended that he bought the suit property from the 1st & 2nd Defendants. Though the 3rd Defendant produced a Certificate of title, DW2 and DW3 testified that there was no evidence that the 1st & 2nd Defendants were ever allotted the suit property. Further, though there is a copy of the Certificate of Lease, the Land Registry in Thika did not have the necessary documents to show how the 1st & 2nd Defendants procured the title.

It was further the evidence of DW2, that the Plaintiff was the one who had been allotted the suit property and the same had never been revoked. The Plaintiff has produced in evidence a letter of allotment evidencing the said allotment. In the case of *Ashmi Investment Limited v...Vs...Riakina Limited & another [2017] eKLR*, 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.”

It is not in doubt from the above that once land had been allocated, unless it was validly and lawfully cancelled, the same could not be reallocated. In this case, it is not in doubt that the Plaintiff was allocated the land on **12th August 1982**. DW2 confirmed that the said allocation was never revoked and therefore the Plaintiff remained the allottee of the suit property. On the other hand, the 1st and 2nd Defendants could not be allocated the land and secondly did not provide any evidence that they were ever allotted the said land. The court therefore finds and holds that the 1st and 2nd Defendants did not have any rights or interest over the suit land.

Given that the 1st and 2nd Defendants did not have any interest, it automatically follow that they could not pass what they did not have. See the case *Esther Ndegi Njiru & Another ...Vs... Leonard Gatei (2014) eKLR* where the Court held that:-

“Having held and found that the 2nd Defendant fraudulently processed and acquired the title to the suit property in his name my

view is that he did not acquire a good title to the property and no interest in the property could pass. The 2nd Defendant therefore not having any good title or interest in the suit property could not pass a good title to the Plaintiffs.”

From the evidence adduced, it is clear that the 1st & 2nd Defendants did not have a good title and therefore they could not pass a good title to the 3rd Defendant. The 3rd Defendant root of title has failed and since his title having been acquired unprocedurally must therefore be impeached. However, Plaintiff has been able to show the root of his title. He has produced a letter of allotment that he paid for and other payments made to the Ministry. His evidence has also been backed by documentation from the Ministry of Lands, which confirmed that the **Unsurveyed Plot G**, is the suit property and that the Certificate of Lease and the Lease were given to the Plaintiff and confirming that his documentation are in order.

The 3rd Defendant has however, contended that he is a bonafide purchaser for value. That the 3rd Defendant bought the suit property from the 1st & 2nd Defendants is not disputed. Further that he paid for the same having conducted an official search and confirming that they are the registered owners is also not disputed. Given that the original Lease and Certificate of Lease were not availed to this Court by the 3rd Defendant, it is not easy to conclude that the same ever existed. However, even as a bonafide purchaser, the fact that the 1st & 2nd Defendants did not have a good title and that the root of their title could not be explained, the 3rd Defendant cannot be said to hold a good title as **Section 26 of the Land Registration Act** exists to protect the owners of properties, otherwise fraudsters would be working their way to procure fake registration and thereby selling to 3rd parties to avoid liabilities and there would be no way the lawful owner of the properties would be protected. See the case of *Kenya Anti-Corruption Commission ...Vs... Online Enterprises Limited & 4 others [2019] eKLR* where the Court held that;

“The assertion of the defendants that they were innocent purchasers who were not aware of the fraudulent transaction does not hold water in this case as the purpose of section 26 is to protect the real title holders from the unscrupulous persons.”

The 3rd Defendant in his submissions submitted that he was a bonafide purchaser and that the case law relied upon by the Plaintiff were per incurium as the Court of Appeal in the case of *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased)Vs...Stephen Njoroge Macharia [2020] eKLR* upheld the rights of the bonafide purchaser.

This Court has carefully gone through the said case and the Court of Appeal in the said case of *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia (supra)* stated the following:-

“In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent. That the trio were parties to the fraud or had knowledge of it. We note just like the trial court that no criminal charges or proceedings were laid against Janet, Joseph and the respondent over the transfer and registration of the suit land. The learned Judge further held that there was no demonstration of fraud and that in fact the suit land had actually been transferred to Janet during the lifetime of the deceased who had not raised any complaint before he died. This position was also confirmed by the appellants in their testimonies that Janet was the registered owner of the suit land as at 8th October, 2010; that Joseph was then registered as the proprietor on 13th June, 2011 and the respondent was registered as owner of the suit land on 10th November, 2014. Indeed, the 2nd appellant confirmed that the other titles to the properties owned by the deceased were handed over to her mother by Janet. We are persuaded just like the trial court that if the appellants were aggrieved and felt defrauded, they had recourse under the law to report the matter to the police for their further investigations and appropriate action. Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities. No evidence was tendered to this end by the appellants. They did not call any witness from the land office to verify their allegations. The officials at the land’s registry are the custodians of land records and would have been in a better position to explain the concerns raised by the appellants. The respondent on the other hand produced the Green Card, which was the land register for the suit land and the entries made therein were in favour of the deceased, Janet, Joseph and himself.

The appellants further contested the existence of two title deeds over the same suit land. They produced what they claimed to be the original title in the name of the deceased in evidence and maintained that it was conclusive proof of ownership of the suit land by the deceased. The respondent’s counsel aptly submitted that no entry can be made in the Green Card without surrender of the original title. Therefore, it was upon the appellants to prove that what they had was the original title deed and not a duplicate copy while keeping in mind that the deceased handed over title deed of the suit land to Janet while he was still alive.

The appellants did not even call a Mr. Njoroge who allegedly handed to the appellants the alleged title deed and how he had come by it. We note that Janet was in possession of the other title deeds which she handed over to the 1st wife of the deceased upon his demise save for the title to the suit land which was in her name. To this end we are satisfied just like the trial court that fraud was not proved against Janet, Joseph and the respondent to the required standard.

In the instant appeal, the respondent currently holds the certificate of title to the suit land and is in actual possession having acquired the same on 10th November, 2014 upon transfer and registration. It is therefore prima facie evidence that he is the absolute and indefeasible owner as provided for under Section 26 of the Land Registration Act. His title is also shielded from being defeated by Section 25 unless proved otherwise”

From the above excerpts, there is no doubt that the said Joseph who sold the suit property to the bonafide purchaser had a good title over the property. The major thing that was being contested in the said suit is whether he actually did pass the said title and not whether he had a good title to pass. Therefore, it is the Court’s considered view that case law relied upon by the 3rd Defendant to rebut case law by the Plaintiff do not present the same scenario and there they are distinct.

The upshot of the above analysis is that the Court finds and holds that the Plaintiff having shown the root of his title, is the bonafide owner of the suit property.

3. Whether the Plaintiff is entitled to the Orders sought

The Plaintiff has sought for various orders amongst them the execution of transfer documents in his favour and permanent injunction. In the case of **Alice Chemutai Too...Vs...Nickson Kipkurui Korir & 2 Others [2015] eKLR** the Court held that:

*“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of **Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012** where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”*

Section 26 of the Land Registration Act provides for impeachment of title if it is proved that the same was acquired unprocedurally. In this instant, the Court has found and held that the title held by the 3rd Defendant was acquired unprocedurally and therefore the same must be impeached. The court is also empowered under **Section 80 (1) of the Land Registration Act, 2012**, to order for 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 found that the 3rd Defendant’s registration was acquired unprocedurally, it follows that for the Plaintiff to be able to enjoy his rights and privileges over the suit property, the same must be cancelled.

Having held that the Plaintiff is the bonafide owner of the suit property, then for him to be able to enjoy all the rights and privileges, a Permanent Order of injunction ought to be granted. As for damages the Court has stated above that the 3rd Defendant who is in possession of the suit property is an innocent purchaser for value. Therefore, this Court finds and holds that the said prayer is not merited. However, the Plaintiff is entitled to the orders of injunction and rectification of the title sought.

4. Who should bear costs of this suit

Section 27 of the Civil Procedure Act gives the Court the discretion to grant costs. It is trite that costs usually follow the events. In this instant case, the Plaintiff is the successful party and is therefore entitled to the costs of the suit. However, the Court having found that the 3rd Defendant is an innocent purchaser for value, finds and holds that the 1st & 2nd Defendants are to bear the costs of the suit.

Having carefully considered the pleadings herein, the available evidence, the exhibits produced in Court, the written submissions and the relevant provisions of the law, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities.

Consequently, the Court enters Judgement for the Plaintiff against the Defendants jointly and severally as prayed in the Plaint dated **20th December 2012**, in terms of **prayers No. 1, 2, and 3**. However, the 1st and 2nd Defendants shall bear the costs of this suit.

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

Mr. Rungare for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

M/s Mugi holding brief for Mr. Muturi for the 3rd Defendant

Mr. Njagi holding brief for Ms Ndundu for the 4th, 6th and 7th Defendant

No appearance for the 5th Defendant

L. GACHERU

JUDGE

24/6/2021