



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**E.L.C NO. 49 OF 2018**

**MARGARET NJOKI KAMAU.....PLAINTIFF/RESPONDENT**

**VS**

**REUBEN NDIVO MWANGI.....DEFENDANT/APPLICANT**

**JUDGEMENT**

1. The Plaintiff instituted the instant suit against the Defendant vide a plaint dated 5/2/2014 for prayers;

- a) The title deed of land ref. no KAKUZI/KIRIMIRI/BLOCK 9-1557 issued in favour of the Defendant be revoked and/or cancelled.
- b) The registrar of lands, Thika Registry be directed to register land ref. No. KAKUZI/KIRIMIRI/BLOCK 9-1557 in favour of MARGARET NJOKI KAMAU the Administrator.
- c) An order that the Defendant do surrender vacant possession of the land ref. no KAKUZI/KIRIMIRI/BLOCK 9-1557.
- d) An order of permanent injunction against the Defendant whether by himself, his servants, his employees or agents or otherwise, however from trespassing, occupying or interfering with Land Parcel Ref. No. KAKUZI/KIRIMIRI/BLOCK 9-1557 being the estate of the deceased person namely Gibson Mburu Nganga.
- e) Costs of this suit.

2. The Plaintiff instituted the suit in her capacity as the Administrator of the Estate of Gibson Mburu Nganga who is her deceased brother. She avers that the Defendant fraudulently caused the suit property to be transferred to his name on or about 29/5/2005. She enumerates the particulars of fraud on the part of the Defendant to wit causing illegal transfer of land parcel Ref No. KAKUZI/KIRIMIRI/BLOCK 9-1557 to himself without grant of letters of administration; intermeddling with property of a deceased person without due process of administration of the estate and colluding with officials at the Land Registrar's office to cause the said illegal transfer and prays for judgment as above.

3. What followed was a series of events that have significant bearing to the suit. The Defendant filed a Notice of Appointment of Advocates and filed no defence. The Plaintiff subsequently filed for request of judgment which was endorsed on 7/4/2014 and the matter proceeded for formal proof. Judgment was entered in favor of the Plaintiff vide judgment issued on 10/07/2014. The same was served on the Defendant who filed an application for stay of the judgment vide the application dated 4/018/2014.

4. The Court allowed the application and directed the Defendant to file his defence within seven days of the date of ruling, 24/06/2019. There was no compliance. Next the Defendant filed an application for leave to file defence out of time which leave was granted and the Defendant directed to file and serve the defence and all accompanying documents within 7 days from the date of ruling, 20/01/2021, there was no compliance still.

5. The matter was fixed for hearing on 8/03/2021 and the Defendant sought an adjournment which was disallowed with reasons and the matter proceeded for hearing.

6. PW1 the Plaintiff herein relied on her statement dated 15/02/2021 and all in the List of Documents 5/02/2014. It was her testimony that the suit land belonged to her brother Gibson Mburu Nganga who died on 24/12/2004. She testified that she took out letters of administration in respect of the estate; she produced a Limited Grant issued on 23/04/2012 as PExh. 2. Further, that her deceased brother had leased and not sold the suit property to the Defendant and the purported transfer happened after the death of her brother. The defence opted not to cross examine the witness marking the close of the Plaintiff's case, they also did not prosecute their case.

7. The Defendant did not file any submissions despite being in Court at the close of the hearing. On three occasions when the matter came up for mention to confirm compliance, there was no attendance by the Defendant despite Return of service being duly served.

8. It was the Plaintiff's submission that the Defendant was a lessee of her deceased brother and affirmed her testimony and pleadings. In casting doubt on the Defendant's title to the suit property she invited the Court to the provisions of **Section 26** of the Land Registration Act on indefeasibility of title in the event of irregularities. The Plaintiff relied on the case of **Gitwany Investment Limited vs. Tajmal Limited & 3 Others [2006] eKLR** which makes provision for challenging the title of a land owner where it was obtained fraudulently or on misrepresentation. In the end, the Plaintiff urged the Court to grant her prayers as drawn.

9. It is important to take into account the Defendant's conduct towards this matter, pertinently, the Court on 8/03/2021 noted that the delay in prosecuting the matter was occasioned by the Defendant. The Court did grant the Defendant an opportunity on several occasions and importantly in two rulings, to file his statement and the accompanying documents but thwarted his opportunity to prosecute the matter. Surprisingly, they opted not to cross examine the Plaintiff despite their presence at the hearing. The Plaintiff's evidence is thus uncontroverted.

10. It is not in dispute that one Gibson Mburu Nganga is deceased, also that the suit property is registered in the name of the Defendant. PExh 2, Limited Grant ad Litem shows that the deceased died on 24/12/2004. A Copy of the Green Card, Pexh3 shows on entry one the name of the deceased person entered on 29/05/2015 and on entry two is the name of the Defendant who was issued with a title on 29/09/2005. All these entries were made after the death of Gibson Mburu Nganga.

11. The Plaintiff gave uncontroverted evidence that the Defendant gained ingress into the suit property as a licensee but no evidence in the form of agreement was brought before Court. The Plaintiff attached letters from Tanathi Water Services Board addressed to the deceased one inviting the deceased for a meeting and the other forwarding a valuation report over his parcel of land that was to be affected by a proposed construction of Yatta Dam. There is further a letter dated 23/11/2011, from Tanathi this time addressed to the deceased and the Defendant herein but notably this was after registration of title.

12. Having analyzed the evidence and the submission by the Plaintiff, it is my considered opinion that the issues for determination are;

a. Whether the Defendant was accorded an opportunity to be heard?

b. Whether there was Fraud?

c. Whether the Plaintiff is entitled to the prayers sought?

13. The right to be heard is enshrined under Article 50(1) of the Constitution and similarly every person has a right to access justice. The Defendant was duly served; he entered appearance and filed no defence the matter proceeded by way of formal proof but was later set aside and the Defendant given an opportunity to defend the case. Despite been given an opportunity to put in defence, the Defendant failed to do so and filed another application which was subsequently allowed, the timelines notwithstanding. On all occasions, the Defendant failed to comply with the orders of Court. It has been settled in various case laws that Court orders cannot be issued in vain and any difficulty in compliance necessitates a party to seek the guidance of Court. **See Nairobi Misc. No. 276 of 2015 Republic v Principal Secretary, Ministry of Defence Ex-Parte George Kariuki Waithaka [2018] eKLR.**

14. At the hearing of the case Counsel for the Defendant was present and opted not to cross examine the Plaintiff. The suit sought to challenge his title to property and he was under an obligation to defend his title. I associate myself with the sentiments by the Learned Judge in Nakuru ELC No. 285 of 2012 **Julia Wanjiku Gaburia (Suing as the legal administrator of the Estate of the late Joseph Gaburia Mitaru) v Sammy Ndungu Mungai & another [2020] eKLR** when he stated ... A registered proprietor whose title is under challenge cannot simply wave the very same title which is being questioned. Particularly when it is alleged that his title is tainted by fraud and where the Plaintiff has adduced sufficient evidence to shift the evidential burden of proof as is the situation in this case, the registered proprietor must do more to demonstrate the whole process of the acquisition of his title. It was incumbent on the Defendant to defend his title and at least show the Court how he acquired the disputed title.

15. Prior to issuing a date for judgment the Court mentioned the matter thrice to confirm filing of submissions in all instances the Defendant failed to appear despite service. This is an old matter and the Plaintiff has been waiting on the matter to be concluded for seven years, justice is a double edged sword it cuts on both sides, one party need not suffer at the behest of the other. Allowing the sword of Damocles to hang over the head of the Plaintiff for a continued period without any sufficient cause will be against the rules of natural justice. To this end I find the Defendant was accorded a fair opportunity of being heard.

16. Section 26 of the Land Registration Act provides that a Certificate of Title is a conclusive evidence of ownership. The Act provides, (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

17. Essentially, the Court by application of this section cannot take away the title of a registered owner unless it is established that the title was acquired illegally, un-procedurally or through a corrupt scheme. The Plaintiff has alluded to fraud as enumerated in paragraph 7 of the plaint as stated earlier.

18. The Court of Appeal in **Civil App. No. 106 of 2000 Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR**, Justice P Tonui, (as he then was) quoted with approval the case of **Davy v Garrett (1878) 7 Ch. D 473 at 489** and stated as follows on issues

of fraud “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. This has been so settled in a number of cases and the person alleging must prove, it is not enough to allege that fraud was committed.

19. The Plaintiff produced a copy of green card which showed that the land was registered after the death of the deceased, she further led evidence to her being appointed the administrator of the Estate of Gibson Nganga, this evidence remained unchallenged. In her bundle of documents, she produced an undated letter to the DC Thika East that challenged the title indicating at the time of transfer her brother had died. From the green card I also note that entry one and two share the same identity card number. This puts in doubt the authenticity of the entries.

20. The Court of Appeal in **Nairobi Civil App No. 298 of 2014 Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another [2018] eKLR** quoted with approval **R.G. Patel v. Lalji Makanji** where the East Africa Court of Appeal held “*Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.*”

21. The deceased died in 2004, the green card indicates that title was issued to the Defendant on 29/09/2005 several months after the death of the deceased. Evidentially, the title was in the name of the deceased at the time of his death and any transfer would be through transmission. Though the Plaintiff adduced no evidence that the deceased had not sold the land, the entry on the green card casts some doubt. It was the duty of the Defendant to show the Court how he caused the land to be registered in his name after the death of the deceased. No grant was produced by the Defendant to demonstrate he had the power to deal with the estate of the deceased upon his death.

22. The Plaintiff invited the Court to the holding in **Gitwany Investment Case**, the matter was based on the repealed Registered Land Act but the same provision is echoed in **Section 26** of the Land Registration Act. I agree with the learned Judge that the Act is meant to give sanctity of titles and protect our system of registration. In giving sanctity it will help to fish out the irregular allocation of titles or double titling.

23. Section 45 of the Law of Succession Act makes it illegal to take possession or dispose of, or otherwise intermeddle with the free property of a deceased person. Free property is defined under the Act as, the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death, land is undoubtedly one of the property. Before land can be transferred documents have to be signed. There is no cogent evidence that the deceased signed any documents and if so when? None was led thereby casting doubt in the mind of the Court.

24. From the draft Defence attached to the application for leave to file defence out of time, the Defendant alluded to having bought the land from the deceased. This was however not an issue before this Court as it was never canvassed, any purported dealing with the deceased property necessitated a grant and that lacking there was no way a party could deal with the property. **See Nakuru Civ App No. 64 of 2017 Daniel Kiragu Kinyua v Consolata Kipsoi [2020] eKLR.**

25. There was no evidence adduced by the Defendant to challenge the allegation by the Plaintiff. The role of this Court is to analyze evidence and it will only analyze the one presented before it. To this end I find that an element of fraud has been established and that the process of acquiring the title was un-procedural.

26. Having found that the title was not acquired procedurally, I note that a registered title is impeachable. The intent of section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions, I find the need to protect the assets of the deceased from falling in the wrong hands. See Eldoret ELC No. 60B of 2012 **Elijah Makeri Nyangwa v Stephen Mungai Njuguna & Another [2013] eKLR** In my considered opinion the real title holder is the deceased and there being no evidence as to how title was acquired by the Defendant the same should be in the name of the deceased.

27. **Section 80** of the Land Registration Act provides (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. The Defendant is not innocent of the improper procedure of the acquisition of title, it is prudent that the illegality be rectified.

28. The Plaintiff obtained a limited Grant for purposes this suit. There was no evidence led if a full grant has been issued and/ or obtained. Therefore, in the interest of justice it is just that the land be registered in the name of Gibson Mburu Nganga.

29. In the upshot the Plaintiffs case succeeds and judgement is given in her favour on the Plaintiff as follows;

a. The title deed of land ref. no KAKUZI/KIRIMIRI/BLOCK 9-1557 issued in favour of the Defendant be and is hereby revoked and/or cancelled.

b. The registrar of lands, Thika Registry be directed to register land ref. No. KAKUZI/KIRIMIRI/BLOCK 9-1557 in in the name of GIBSON MBURU NGANGA, deceased.

c. An order be and is hereby made ordering the Defendant to surrender vacant possession of the land ref. no KAKUZI/KIRIMIRI/BLOCK 9-1557 within a period of 45 days, in default eviction to ensue according to the provisions of the law.

d. An order of permanent injunction against the Defendant whether by himself, his servants, his employees or agents or otherwise, however from trespassing, occupying or interfering with Land Parcel Ref. No. KAKUZI/KIRIMIRI/BLOCK 9-1557 being the estate of the deceased person namely Gibson Mburu Nganga.

e. I make no orders as to costs.

30. **It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17<sup>TH</sup> DAY OF JUNE 2021**

**J.G. KEMEI**

**JUDGE**

**Delivered in the presence of;**

Ms Bore HB for Mrs Kimani for the Plaintiff

Defendant: Absent

Court Assistant: Alex