



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 144 OF 2013**

**MBIIRI KAMAU (REPRESENTING A.C.K**

**KITHARAINI CHURCH, THE CHURCH**

**COMMISSIONERS FOR KENYA TRUSTEES**

**OF THE ANGLICAN CHURCH OF KENYA).....PLAINTIFF**

**VERSUS**

**MUNYANGIA NJOKA.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR KIRINYAGA DISTRICT.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Summary of Facts**

The Plaintiff herein, acting on behalf of A.C.K Kitharaini Church and the Church Commissioners for Kenya Trustees of the Anglican Church of Kenya filed suit by way of a plaint dated 20<sup>th</sup> June 2012 before the High Court at Embu. The Plaintiff was granted leave by the Court on 17<sup>th</sup> March 2016 to amend its plaint, which it did. The amended plaint removed Mbiiri Kamau as the representative and rectified the Plaintiff's identity to 'The Anglican Church Commissioners for Kenya.' The Plaintiff avers that the commissioners had by way of a sale agreement dated 20<sup>th</sup> July 2006 purchased a parcel of land, Ngariama/Ngiriambu/2697 (hereinafter referred to as the suit land) from one Elizabeth Wanjiku Muchiri and the resultant title issued to the Plaintiff on 30<sup>th</sup> November 2007. That prior to the purchase, the Plaintiff had conducted an official search and satisfied themselves that the suit land was registered in the name of Elizabeth Wanjiku Muchiri. It is the Plaintiff's case that Elizabeth had also obtained consent from the Land Control Board to transfer the suit land. Later on, the Plaintiff at the time of purchasing the green card to the suit land discovered that the land registrar had cancelled their name from the register. The Plaintiff filed a witness statement from Elizabeth Wanjiku Muchiri who stated that the 1<sup>st</sup> Defendant had provided financial assistance to her family in filing a succession cause for her late father, Daniel Muguto Muthiru in Succession Cause 144 of 2002, in exchange for one acre of land. That previous to that, the 1<sup>st</sup> Defendant had purchased another property from Elizabeth's family. That the 1<sup>st</sup> Defendant and Elizabeth agreed for her to exchange the portion of land bequeathed to her in exchange for the suit land, which at the time was registered in the name of the 1<sup>st</sup> Defendant. That the same was done, Land Control Board consent obtained on 22<sup>nd</sup> February 2005 and the transfer registered on the same day. That as the new proprietor of the suit land, she sold and transferred the same to the Plaintiff on 29<sup>th</sup> November 2007. On this premise, the Plaintiff has approached the court seeking for judgement to be entered against the defendants jointly and severally and for the grant of the following reliefs:

- a. That the District Land Registrar Kirinyaga be ordered to reinstate the Plaintiff's name by cancelling out the name of the 1<sup>st</sup> Defendant from the register;***
- b. That the 1<sup>st</sup> Defendant be restrained from cultivating and interfering with the land;***
- c. Costs of the suit at Court rates;***
- d. Any further relief that the court may deem fit to grant.***

The 3<sup>rd</sup> Defendant entered appearance on 11<sup>th</sup> July 2012 and filed his statement of defence on 24<sup>th</sup> July 2012. On the same day, the 3<sup>rd</sup> Defendant filed a preliminary objection, wanting the suit to be struck out for offending *Section 13(1) of the Government Proceedings Act and Order 1 Rule 13 of the Civil Procedure Rules, 2010*. From the proceedings on record, it appears that the objection was not determined as no submissions or ruling on the same can be traced from the file.

The 1<sup>st</sup> Defendant entered appearance on 16<sup>th</sup> July 2012 and filed his defence on 27<sup>th</sup> July 2012. He filed a further defence in response to the amended plaint on 6<sup>th</sup> April 2016. He averred that he is the registered proprietor of the suit land, having been issued with a title thereto on 02<sup>nd</sup> June 2000. He avers that he has never at any time transferred the suit land to Elizabeth Wanjiku Muchiri. He admits that there was at one time a verbal agreement to sell the land to the said Elizabeth for a consideration of One Hundred and Fifty Thousand Shillings (Ksh. 150,000) but that Elizabeth was unable to raise the purchase price and the transaction therefore never took off. He avers that the transfer form presented by the Plaintiff indicating that he had transferred the suit land to Elizabeth was not genuine, that his signature thereon was forged and that he did not know the purported witness to his signature, Peter Muchoki. He also added that the said Peter Muchoki who was indicated as a witness to his signature had failed to append his own signature in witness thereof.

On 12<sup>th</sup> October 2012, the file was transferred to the Environment and Land Court at Kerugoya.

The 2<sup>nd</sup> Defendant filed his defence on 17<sup>th</sup> May 2017. He averred that the suit land was first registered in the name of Magondu Gathigi on 8<sup>th</sup> February 2000. That on 2<sup>nd</sup> June 2000, it was transferred to the 1<sup>st</sup> Defendant and a title deed issued on the same day. That the suit land was then transferred to Elizabeth Wanjiku Muchiri on 22<sup>nd</sup> February 2005 and later to the Plaintiff on 29<sup>th</sup> November 2007 for a consideration of Two Hundred Thousand Shillings (Ksh. 200,000). That title to the suit land was then issued to the Plaintiff on 30<sup>th</sup> November 2007. That vide letters dated 26<sup>th</sup> November 2009 and 2<sup>nd</sup> February 2011 to the registrar, the 1<sup>st</sup> Defendant complained that he had not transferred the suit land to Elizabeth Wanjiku Muchiri and that the original title deed was still in the 1<sup>st</sup> Defendant's possession. That on the strength of the 1<sup>st</sup> Defendant's letters, the land registrar cancelled the Plaintiff's title from the register as well as the registration of the transfer to Elizabeth Wanjiku Muchiri. That on 27<sup>th</sup> November 2009, a restriction was registered against the suit land restraining any dealings until such time as the title held by the 1<sup>st</sup> Defendant on the suit land was surrendered. It was only on 16<sup>th</sup> March 2011, that the registrar wrote to the Plaintiff informing him of the cancellation of his name from the register and the reasons thereof.

### **Submissions**

The Plaintiff filed submissions on 18<sup>th</sup> February 2021. The submissions reiterated the contents of the amended plaint and supporting affidavit. The Plaintiff took issue with the manner in which the cancellation of its proprietorship was done, without advance notice and without being given an opportunity to be heard. The Plaintiff further stated that it's right to own the suit land is protected by the Title deed issued in its name and that the fraud alleged by the 1<sup>st</sup> Defendant ought not to defeat its proprietorship. *Sections 24, 25 and 26 of the Land Registration Act (No.3 of 2012)* are cited in support. Further, the Plaintiff contends that should the alleged forgery be true, then the 1<sup>st</sup> Defendant ought to have reported the matter to the police. It is the Plaintiff's further submission that from the evidence tendered, they are innocent purchasers for value and were not and have not been party to any fraudulent or corrupt dealings over the suit land. They cite the case of *Lawrence Mukiri Mungai Vs The Attorney General & Others (Civil Appeal No. 146 of 2014)* and *Super Nova Properties Limited & Another Vs District Land Registrar Mombasa & 2 Others (Civil Appeal 98 of 2016)* in support of their position.

The 1<sup>st</sup> Defendant filed his submissions on 04<sup>th</sup> March 2021. He adopted the contents of his defence. He submits that the plaint is incompetent, bad in law and improperly filed by reason of the Plaintiff's lack of *locus standi*. It is his position that no commissioner from the Anglican Church was called to testify and that the supporting affidavit is deposed by a person who is not a commissioner. In relation to the sale agreement entered into between Elizabeth Wanjiku Muchiri and the Plaintiff, it is the Defendant's position that since the same has not been tendered it could not have been in writing thereby offending *Section 3 (3) of the Law of Contract Act*. The decision in *Silverbird Kenya Limited Vs The Junction Limited, Knight Frank Sannx Auctioneers & Century Cinemas Limited (Civil Suit No. 365 of 2011)* is cited in support. It is the 1<sup>st</sup> Defendant's conclusion therefore that the Plaintiff has failed on a balance of probabilities to prove its case and that the suit thus ought to be dismissed.

### **Issues for Determination**

- 1. Whether the Plaintiffs have *locus standi* to institute the suit.**
- 2. Whether the cancellation of the Plaintiff's title from the registrar followed due process.**
- 3. Whether the Plaintiff is an innocent purchaser for value.**
- 4. Whether the reliefs sought by the Plaintiff can be granted.**

### **Legal Analysis and Opinion**

The court has evaluated the rival submissions and affidavits and taken into consideration the authorities cited.

On the first issue on whether or not the Plaintiff had *locus standi* to file suit, the Court notes that the 1<sup>st</sup> Defendant's complaints against the place of Mbiiri Kamau as a representative of the commissioners is overtaken by events. This is because; the Plaintiff with leave of the court amended its plaint and its identity therein to read 'The Anglican Church Commissioners for Kenya'. The Plaintiff, being a registered trust is vested in law with legal personhood and is therefore able to sue or be sued in its name. With the promulgation of the 2010 Constitution, it is indubitable that the scope of *locus standi* was enlarged significantly. Succor is found in the Supreme Court's seminal decision in *Mumo*

**Matemu Vs Trusted Society of Human Rights Alliance & 5 others [2014] e KLR** which pronounced itself as follows:

*“It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general.”*

The second issue for determination relates to the legality of the cancellation of the Plaintiff’s title from the register by the registrar of lands on the basis of the 1<sup>st</sup> Defendant’s complaint about a forged transfer. **Section 79 of the Land Registration Act (No. 3 of 2012)** affords the registrar the power of rectify a register of any instrument on the following grounds:

**‘79. Rectification by Registrar:**

*(1) The Registrar may rectify the register or any instrument presented for registration in the following cases —*

*(a) In formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;*

*(b) In any case and at any time with the consent of all affected parties; or*

*(c) If upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;*

*(d) For purposes of updating the register;*

*(e) For purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.*

*(2) No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) without the proprietor's consent unless —*

*(a) The proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or*

*(b) It would for any other reason be unjust for the alteration not to be made, Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.*

*(3) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.*

*(3A) A person aggrieved by the decision of the Registrar under this section may apply to the Court for any necessary orders.*

*(4) The Cabinet Secretary may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under this section and without prejudice to the generality of the foregoing, the regulations may provide for —*

*(a) The process of investigation including notification of affected parties;*

*(b) Hearing of the matters raised; and*

*(c) The criteria to be followed in coming up with the decision.’ (underline, mine)*

The immediate observation from this provision is that the power of rectification does not include the power of cancellation of a proprietor’s title. The power of cancellation is a preserve of the court by dint of **Section 80 of the Land Registration Act (No. 3 of 2012)**.

**‘80. Rectification by order of Court:**

*(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, 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.’*

Numerous decisions have pronounced themselves on this position. See **Republic Vs Registrar of Tiles Mombasa & 4 others Ex-Parte A.K. Abdulgani Limited [2018] e KLR**, where the Court held that;

“... What was the right procedure to follow in asserting the respondent’s and interested parties’ interest in the suit land? Surely, not by ultra vires action of revocation of grant of title but by suitable judicial proceedings in that behalf. In a recent decision, *Franns Investments Limited Va The Registrar of Titles, Mombasa & 2 Ors., Mombasa Petition No. 63 of 2012* this Court has ruled on the issue as follows: “It is clear that it is now settled that Registrar of Tiles or the Land Registrar as the case may be does not have power to revoke title to land.”

***Republic Vs The Registrar of titles Mombasa & 2 others Ex parte Emfill Ltd (2012) e KLR***, where the Court of Appeal held that;

“For these reasons, I find that the government cannot revoke title to land even for public need or interest or for alleged illegality. The government is obliged to move the court for appropriate orders to revoke, cancel or rectify title in such circumstances. A unilateral decision published in the Gazette will not do. The considerations of public interest such as presented by the Respondent in this proceedings may only be used by the Court in appropriate case in making an order for cancellation of title or in authorizing, subject to due compensation, the compulsory acquisition or takeover of the private property.”

The Registrar’s decision to cancel the Plaintiff’s title was thus *ultravires* and illegal, a situation further compounded by the fact that notice to the Plaintiff was issued after the cancellation had already been effected.

The third issue for determination is whether the alleged fraud perpetrated by Elizabeth Wanjiku Muchiri has any effect on the proprietorship of the Plaintiff to the suit land. It is the Plaintiff’s case that he is the registered proprietor of the suit land having been so registered on 30<sup>th</sup> November 2007. Indeed, the law affords a registered proprietor protection from challenge of his proprietorship save for in very limited circumstances. See ***Section 26 of the Land Registration Act (No. 3 of 2012)***:-

**“26. Certificate of title to be held as conclusive evidence of proprietorship -**

(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.’*

In ***Civil Appeal No. 246 of 2013 between Arthi Highway Developers Limited Vs West End Butchery Limited and Others***, the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The court pronounced itself thus:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

However, in circumstances where title to property is challenged, it is not enough for the proprietor to wave the title as proof of ownership, but he must go beyond and prove the legality of the said title. This was the finding of the Court of Appeal in the case of ***Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal number 239 of 2009*** where the court held that:

“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 would not be noted in the register.”

It is not contested that the 1<sup>st</sup> Defendant was registered as a proprietor of the suit land on 2<sup>nd</sup> June 2000. There is also no dispute that a transfer of the suit land was registered in favour of Elizabeth Wanjiku Muchiri on 22<sup>nd</sup> February 2005, although no title was issued in her name. It is further agreed that it is Elizabeth Wanjiku Muchiri who transferred the suit land to the Plaintiff, which transfer was registered on 29<sup>th</sup> November 2007 and the resultant title issued on 30<sup>th</sup> November 2007.

The dispute thus stems from the imputation of fraud upon one Elizabeth Wanjiku Muchiri by the 1<sup>st</sup> Defendant. The specifics of the fraud are that Elizabeth Wanjiku Muchiri, without the consent or knowledge of the 1<sup>st</sup> Defendant as the registered proprietor of the suit land, forged the 1<sup>st</sup> Defendant’s signature on the transfer documents relating to the suit land and succeeded in having the transfer registered. That therefore in essence Elizabeth Wanjiku Muchiri did not have good title and could therefore not pass any good title on to the Plaintiff.

The Court notes that Elizabeth Wanjiku Muchiri was not made party to the suit. That notwithstanding, notice is also taken of the fact that a *bona fide* purchaser for value is able to acquire a good title even where the history of the title is checkered with fraud, as long as they were not cognizant of or a party to the fraud. See ***Eunice Grace Njambi Kamall and another Vs The Hon. Attorney General and 5 others Civil Suit No. 976 of 2012*** where the court cited the case of ***Fletcher Vs Peck 10 U.S 87 (1810)*** to illustrate how other jurisdictions have handled the issue of sanctity of title and the plight of innocent third parties. In the said ***Fletcher Vs Peck*** case (supra) **Marshall J.** had this to

say:-

*“If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him.”*

A bonafide purchaser for value has been described as follows:

**Lawrence Mukiri Vs Attorney General & 4 Others [2013] e KLR** where the Court stated what amounts to *bona fide* purchaser for value, thus:

*“... A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:*

- a. He holds a certificate of Title.*
- b. He purchased the Property in good faith;*
- c. He had no knowledge of the fraud;*
- d. The vendors had apparent valid title;*
- e. He purchased without notice of any fraud;*
- f. He was not party to any fraud.”*

The question therefore is whether the acquisition of the suit land from Elizabeth Wanjiku Muchiri was done so legally and procedurally. The Plaintiff asserts that he did conduct a search prior to entering into the sale agreement, which search revealed that Elizabeth Wanjiku Muchiri was the registered owner of the suit land. The Plaintiff further states that Land Control Board consent was given, transfer forms executed and the agreed consideration of Two Hundred Thousand shillings (Ksh. 200,000) settled. It is the Plaintiff's case that the transfer was registered and a title issued to them on 30<sup>th</sup> November 2007. Now in support of these assertions, the Plaintiff has produced three documents. The first is an extract of the minutes of the Gichugu Land Control Board meeting held on 8<sup>th</sup> November 2001. Minute 23 captures the approval of the transfer of the suit land from Elizabeth Wanjiku Muchiri to the Plaintiff. The Court notes that the minutes are not signed. The second document presented is the title document issued by the registrar to the Plaintiff on 30<sup>th</sup> November 2007. The third is a green card showing the cancellation of the Plaintiff's title and a restriction placed against the title on 27<sup>th</sup> November 2009. As pointed out by the 1<sup>st</sup> Defendant, the sale agreement between Elizabeth Wanjiku Muchiri and the Plaintiffs has not been tendered in evidence, nor the stamp duty payment slip, nor the transfer forms relating to the transaction. It is also material to note that Elizabeth Wanjiku Muchiri was never issued with a title, the original title still being in the custody of the 1<sup>st</sup> Defendant, and so during the registration process, no title was surrendered. The official search ostensibly conducted revealing Elizabeth Wanjiku Muchiri as the registered proprietor has also not been presented.

It is trite law that *whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Unfortunately, in the face of challenge to title, the Plaintiff has failed to demonstrate that his title was acquired lawfully and procedurally. The Court is persuaded in the reasoning in the case of Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura Vs Attorney General & 4 others [2017] e KLR which bore facts similar to the present case. In that case, the court found as follows:*

*“The conduct of the 3<sup>rd</sup> respondent in deliberately failing to enter into a written sale agreement with the 2<sup>nd</sup> respondent; failing to pay stamp duty for the transfer (if any); and failing to keep a copy of the transfer, if at all, raises more questions than answers and portrays him quite negligent in his business transactions. In our view, he cannot be described as a bona fide purchaser for value. The trial court should therefore have ordered rectification of the register. As at the date of the trial, the appellant was still holding a valid Title Deed to the suit property, which title was issued to him in 1992. The 2<sup>nd</sup> respondent was allegedly issued with a Title Deed for the same property in 1996. A property cannot have two valid title deeds. Even assuming that the second title had been issued by mistake, the first in time prevails; see **Gitwany Investment Limited Vs Tajmal Limited & 3 others [2006] e K.L.R**”.*

In the circumstances, the Court finds that the Plaintiff has failed to defend the manner in which the suit property was acquired and that therefore the veil of indefeasibility of title has successfully been pierced by the 1<sup>st</sup> Defendant. As such, the reliefs sought by the Plaintiff cannot be granted.

I hereby direct the Land Registrar to exercise his power under **Section 80 of the Land Registration Act (No. 3 of 2012)** to cancel the Plaintiff's title and to maintain the 1<sup>st</sup> Defendant's name as the registered proprietor. The 1<sup>st</sup> Defendant shall have the costs of this suit. It is so ordered.

**JUDGMENT READ, SIGNED AND DELIVERED PHYSICALLY AT KERUGOYA THIS 23<sup>RD</sup> DAY OF JULY, 2021.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Mr. Muchira for 1<sup>st</sup> Defendant
2. Plaintiff/Advocate – absent
3. 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Advocate – absent
4. Kabuta – Court clerk.