



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 275 OF 2018

DANIEL GATUMA MUTUA & 10 OTHERS.....PLAINTIFFS

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

THIKA DISTRICT LAND REGISTRAR.....2ND DEFENDANT

T. MASHAERI MAKORI.....3RD DEFENDANT

JACKSON WACHIRA WANGONDU T/A MWAMUKI INVESTMENT.....4TH DEFENDANT

JOSEPH WANJOHI MBURU T/A MBURU MWENDIA INVESTMENT.....5TH DEFENDANT

WILLIAM NJURUMBA MUHIA T/A MBURU MWENDIA INVESTMENT.....6TH DEFENDANT

JUDGMENT

By a Plaint dated **12th November 2018**, the Plaintiffs sought for Judgment against the Defendants jointly and severally for the following orders:-

- a) A Permanent Injunction to restrain T. Mashaeri Makori or his servants, employees or agents from evicting the Plaintiffs or entering, dealing and/or interfering with the Plaintiffs possession, occupation and ownership of their plots and or demolition or damage to their permanent houses, family home or rental homes.***
- b) An order for immediate cancellation of the fraudulent Title No. Thika Municipality Block 6/1108, in the name of the 3rd Defendant T. Mashaeri Makori, dated 11th July 2016.***
- c) An order that the Thika District Land Registrar do process and issue to the Plaintiffs valid Certificate of Leases for their respective individual Plots Nos. 25, 35,21, 12, 36, 19, 2, 9 ,10,12, 13 23 from registered land known as Title No. Thika Municipality Block 6/1108, (formerly UNS. Residential Plot No. C & Thika Municipality forthwith.***
- d) Compensation to the Plaintiffs by the 1st & 2nd Defendants at the current market value for each of the 12 developed Plots.***
- e) Compensation to the Plaintiffs by the 3rd, 4th 5th & 6th Defendants at the current market value for each of the 12 developed plots.***
- f) General damages for demolitions/ damages and fraud against the defendants jointly.***
- g) Cost of the suit and Interest from the date of filing suit.***

The Plaintiffs averred that they are the bonafide owners of the suit properties which had been granted to the original allottees, the 4th, 5th & 6th Defendants herein. That on diverse dates they were issued with individual Plot Certificates **Plots Nos. 25, 35,21, 12, 36, 19, 2, 9 ,10,12, 13 & 23** by the said Defendants, after purchase of their respective plots between **Kshs.350,000/= to Kshs. 700,000/=**. That their plots were demarcated out of the subdivision **of L.R 6/1108 (formerly UNS Residential Plot No. C –Thika Municipality**. As per the Ministry of

Land allotment letter dated **10th August 1999**, to **Jackson Wachira Wangonde**, who was the Secretary of **Mwamuki Investment B**, whereas some two plots out of **L.R 6/1343(D)**, formerly known as residential Plot No. D Thika Municipality were sold to **Joseph Mburu and William Muhia t/a Mburu Mwendia Investment**, and they were issued with **12 individual Plot Certificates**.

That the Plaintiffs have been in possession and have developments worth **Kshs.55 million**, where they reside with their families. Further that the 3rd Defendant claims ownership and has fenced the land where the Plaintiffs land are located, using fraudulently acquired title issued on **11th July 2016**, long after the Plaintiffs had obtained the **12 individual Plot Certificates**. Further that the 2nd Defendant colluded with the 3rd Defendant and processed fraudulent title in disregard of the existing Original allotment letter for unsurveyed plot No. C issued on **10th August 1999**.

The Plaintiffs particularized the Defendants joint liability for fraud as the land not being available for re-allocation; Causing fraudulent transfer entry by the 2nd Defendant; Subjecting the Plaintiffs to frequent threats of dispossession; threatening of the Plaintiffs with demolition by the 3rd Defendant; faking registration by the 3rd Defendant, condoning fraudulent transfer by the 4th, 5th & 6th Defendants and they have thus suffered general damages for fraud and imminent loss and dispossession.

The suit is contested and the 1st & 2nd Defendants filed their Defence dated **29th November 2018**, and denied all the allegations made in the Plaintiff. They contended that all the allegations are baseless and vexatious and the Plaintiffs must prove the root of their title. That if any transfers were done, the same were done following the due process.

The 3rd Defendant filed his Statement of Defence dated **23rd November 2018**, and denied all the allegations made in the Plaintiff. He averred that the parcels that the Plaintiffs purchased are different from his and he has no claim against the Plaintiffs. That the Plaintiffs are not in occupation of his parcel **L.R 6/1108**, and that he has nothing to do with parcels **UNS residential plot No. C & D Thika Municipality** or Thika Municipality **Block 6/1343 D**.

The 4th Defendant also filed its statements of Defence dated **20th December 2018**, and denied all the allegations made in the Plaintiff. He averred that he had reported the fraudulent activities to the Police and the matter is under investigation. That the Plaintiffs suit discloses separate causes of action and they ought to have filed separate suits.

The 5th Defendant too filed his statement of Defence dated **20th December 2018**, and averred that the Plaintiffs have wrongly sued him.. He denied condoning the fraudulent transfer. He further averred that he had reported the fraudulent activities to the Police and the matter is under investigation. That the Plaintiffs suit disclose separate causes of action and they ought to have filed separate suits.

The 6th Defendant filed his statement of Defence dated **20th December 2018**, and averred that the Plaintiffs have wrongly sued him.. He denied condoning the fraudulent transfer, and that he had reported the fraudulent activities to the Police and the matter is under investigation. That the Plaintiffs' suit discloses separate cause of action and they ought to have filed separate suits.

After Close of pleadings, the matter proceeded by way of viva voce evidence wherein the Plaintiffs called **5 witnesses** and the 4th, 5th and 6th Defendants called two witnesses. The 1st & 2nd Defendants did not call any witnesses while the 3rd Defendant although duly served did not participate in the hearing.

PLAINTIFF'S CASE

PW1 Daniel Gatuma Mutua, adopted his witness statement dated **12th November 2018** as part of his evidence. He produced his list of documents as Exhibit 1. That the allotment letter for the property he obtained is plot No. 25 and the Company is called **Mwamuki**. That he received the letter from the Secretary one, **Jackson Wachira** and the other officials had a receipt with the Company logo. That the plot is unsurveyed and he was given the letter of allotment dated **10th August 1999**, and the amount listed is **Kshs. 120, 740/=**. That the list is dated **25th October 2011**, almost 10 years after the letter of allotment was given. That he went through the conditions on the letter of allotment.

Further that **Jackson** did not have a Certificate of Lease. He further testified that he was issued with certificates from **Mwamuki Company Limited**. That he has built on the land, but he did not obtain the approval for the development and he has never paid any rates. That he bought the property from **Jackson**. That he only sued **Mwamuki** and the others were sued by the other Plaintiffs. That the Defendants colluded to have the 3rd Defendant issued with the title deed. Further that **Jackson** was given a letter of allotment by the government in **1999**, and he paid for acceptance. He urged the Court to cancel the title that was issued on **11th July 2016** after the acceptance from the government.

PW2 Elias Kirimi Andrew Thiongo, adopted his witness statement dated **November 2018**, as part of his evidence. He relied on the list of documents produced by PW1. That he bought the plot from **Mwamuki Investment**, vide sale agreement dated **3rd December 2012**. That the sale agreement showed he bought land from **Dominic Ngugi**, and he gave him his Certificate of ownership. That he did not have confirmation from the Land Registrar that **Dominic** was the owner nor did he investigate to find out if the land was registered. That **Mwamuki** has never asked him to vacate the land.

Further, that he is giving evidence on behalf of **Pamela Kawira Njiru**, his wife and the **plot is No. 35**. That he bought the plot because he was shown the original letter of allotment dated **10th August 1999** and **Dominic** showed him the receipt of payment of the **stand Premium**. That he bought the land in **2012** and upto **2016**, no one had claimed it. That he is being disturbed by the 3rd Defendant who obtained his title in **2016** and in **2011**, the 3rd Defendant was not the owner. That he has built on the suit land and the 3rd defendant has been threatening them.

PW3 Peter Waithaka Mwangi, adopted his witness statement dated **12th November 2018**, and relied on the exhibits produced in Court. That the Sale Agreement was between him and **Mwamuki Investment Ltd** and that he specifically bought the land from **Agnes Wambui Githuku**. That she showed him the Certificate of ownership and she had shares in **Mwamuki** and his Certificate from **Mwamuki** was **No. 178** That there was an allotment letter from **Mwamuki Investment Limited**.

Further that he bought the land on **10th December 2014** for **Kshs. 580,000/=** and **Mwamuki** has never threatened him nor prevented him from using the land and he sued them as he would like to have his title and that he has built on the land.

PW4 Margaret Wanjiku Gakuru testified that she is **Francis Mureithi Kamau's** wife and that he died on **27th February 2020**. She adopted his witness statement dated **12th November 2018**, as her evidence in Court. She also relied on the exhibits produced in Court. That **Charles Kigera** sold to her **Plot No. 12B/6**, and he gave her his Certificate of ownership, and she produced their share certificate. Further that the said Charles was a member of **Mwamuki**. That she did due diligence and she did not go to the **Registrar of Lands** to confirm if the plot was registered in their office. That the vendor were to give them Certificate of titles.

That **Mwamuki** has never stopped her from building on the plot. Further that she bought the land in **2013**, and was shown the survey map. That the **3rd** defendant encroached on their suit plots and she would like **Mwamuki Investment** to give them Title Deeds.

PW5 Lucia Njeri Maina adopted her witness statement dated **12th November 2018**, and relied on the exhibits produced in Court as her evidence. That she bought the land from **Mburu Mwendia** and the Agreement was from **Simon Kamau Mwangi**, and she paid the money to **Mburu Mwendia**. That she was given a Certificate in the name of **Simon** that was later changed to her name. That the allotment letter showed that the land was owned by **Mburu Mwendia**. That they did not investigate whether the land belonged to **Mburu Mwendia**.

Further that she built house in **May 2017** and she was not stopped, but the **3rd** Defendant put an X on her house. That when she bought the Plot she was given an allotment letter.

On **28th July 2020**, the Plaintiff's Advocate made an Application to dispense with the Physical appearance of 5 other witnesses, the Court adopted their witness statements.

DEFENCE CASE

4TH DEFENDANT

DW1 Jackson Wachira Wangondeu testified that he was the owner of **Mwamuki Investment**. He adopted his witness's statement dated **20th December 2018** as part of his evidence. He produced his list of documents as Exhibit 1. That his Company was the original allottee of the suit property. That he has not gotten title deeds for the subdivisions as someone invaded the land and he reported the matter to the CID. That his letter of allotment has never been cancelled. Further that his **Co-Defendant** has unsurveyed **Plot No. C & D**. That he has never seen any letter of allotment for **Mashaeri Makori**, and the Land Registrar has not shown that the said Mashaeri Makori was given any letter of allotment. It was his evidence that he is in support of the Plaintiffs claim.

He further testified that his business is registered. That his letter of allotment is dated **10th August 1999**, for residential **Plot No. C Thika Municipality** allocated to **Jackson Wachira Wangondeu**. That he paid when he was given the letter of allotment although he paid the stated amount later, though he was to pay within **30 days**. That condition provides that if acceptance is not paid within 30 days, the offer would be considered lapsed. That as per the Sale Agreement, he was transferring subdivisions of **Plot C** and that he sold the plots as **Mwamuki Investment**. Further, that he subdivided the land in **2010-2011**, before he had paid for the allotment. That the survey of the land was by a surveyor, but the said surveyor was not the District Surveyor. However, the District Surveyor approved the subdivisions. That he did not obtain consent to subdivide.

That he sold plots in **Block No. 6** that he got after subdivision. That the Land is still under the name of **Mashaeri Makori**. That he paid the **Stand Premium** and he did not obtain any consent to transfer from the Commissioner of Lands. That he was never informed that his letter of allotment had been cancelled.

DW2 Wilson Muhiu, adopted his witness statement as part of his evidence. He produced his list of documents as Exhibit No. 2. He also adopted the **5th** Defendant's witness statement as his evidence in Court. That he sold land to the **8th** Plaintiff. That he had a letter of allotment dated **10th August 1999**, and the same was never cancelled and that he has never gotten any Notice that the letter of allotment was cancelled.

That he was given the subdivision map by the government and he was to be given a title deed on the basis of the PDP. That the title held by **Mashaeri Makori**, was obtained fraudulently and he denied being involved in fraudulent activities. That he paid the **Stand Premium** and he sold the land to some of the Plaintiffs. Further that he was allocated residential **plot D** and sold to the Plaintiffs **Plot No. 9**. That he did not comply with all the conditions in the allotment letter and that he has never paid anything to the government. That the subdivisions were done by **Mburu Mwendia** and the subdivision charges were paid to the government. That they reported the matter to the Police.

After Close of viva voce evidence, the parties filed written submissions which this Court has carefully read and considered. The Court has also read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law. The Court notes that the **3rd** Defendant despite filing a Defence did not adduce any evidence in Court to support his claim and therefore the allegations in his Defence remains mere allegations so did the **1st** & **2nd** Defendants. See the case of **John Wainaina Kagwe..Vs..Hussein Dairy Ltd [2013]eKLR**, where the Court of Appeal held as follows:-

“The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent’s defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident....”

The Court finds that the issues for determination are;

1. Who is the rightful owner of the suit property

2. Whether the Plaintiffs are entitled to the orders sought

1. Who is the rightful owner of the suit Property

The Plaintiffs have sought for various orders amongst them the cancellation of the title held by the 3rd Defendant in L.R **Block 6/1108** and that they be granted Leases in respect to the suit property. The Plaintiffs claims are grounded on the fact that they bought their properties from the 4th, 5th and 6th Defendants.

It is not in doubt that the 4th, 5th and 6th Defendants were allotted **UNS Residential Plot No. C & D–Thika Municipality**. The Plaintiffs have produced in evidence allotment letters dated **10th August 1999**. Though the 1st & 2nd Defendants have insinuated that the allotment may have been cancelled for failure to comply with the conditions as set out in the said allotment letter, the 4th Defendant produced in evidence the receipt for payment of his plot dated **28th October 2011**. Further, there is no doubt that if there is a cancellation of any allotment to a party, then the same must follow due process and in this instant there is no evidence that the 4th, 5th and 6th Defendants allotment letters were ever cancelled. The Court therefore finds that in the absence of such revocation and/or any other allocation to another party, then then the 4th, 5th and 6th Defendants remain the allotted parties to the Unsurveyed Plots **C & D** and thus the sale of the same to the Plaintiffs was valid.

It is also not in doubt that **Jackson Wachira Wangonde**, the 4th Defendant paid **Kshs.120,747/=** on **28th October 2011**, for unsurveyed **Residential Plot No. (C) Thika Municipality**, and a receipt was issued by the Department of Lands. That means the said payment was accepted. Thus **Jackson Wachira Wangonde**, had been issued with a letter of allotment for this unsurveyed Resident Plot (C) Thika Municipality on **10th August 1999** and it indicated the amount to be paid as **Kshs.120,747/=** which the said **Jackson** paid on **28th October, 2011**.

Further **William Njurumba Muhia**, the 6th Defendant was allotted Plot No. Unsurveyed Residential Plot No. ‘D’ Thika Municipality on **10th August 1999** and the amount to be paid upon acceptance of the same was **Kshs.84,580/=**.

The Plaintiffs averred and testified that they bought their individual plots out of the subdivision of **Thika Municipality Block 6/1108**, which was formerly unsurveyed **Residential Plot No. (C) and (D) Thika Municipality**, which plots were owned by 4th Defendant as secretary of **Mwamuki Investment ‘B’** and **William Njurumba Muhia T/A Mburu Mwendia Investment**.

The 4th, 5th and 6th Defendants testified that once they obtained the letter of allotment and later paid the **Stand Premium** they caused the said unsurveyed plots to be surveyed and after surveying, the said plots became **Thika Municipality Block 6**.

Though the 1st and 2nd Defendants denied the Plaintiffs’ allegations, they did not call evidence to disapprove the said evidence tendered by the Plaintiffs. This was the finding in the case of **Avtar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998**, where the Court held:-

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated.

Similarly, in this case, the 1st and 2nd Defendants though they denied all the allegations made by the Plaintiffs, they chose not to call any evidence to shed light on what could be the true position. The 1st and 2nd Defendants did cross-examine the Plaintiffs and the other Defendants but chose not to even file a witness statement. Given that the 2nd Defendant is the Land Registrar Thika, his evidence could have been very crucial, they chose to withhold the said evidence.

In NRB Petition No. 376 OF 2014; Irene Wangari Gacheru & 6 others vs The Attorney General, the Court held as follows;

“Where the Respondent opt not to call witness but cross examined the Petitioner, the only evidence on record is the evidence tendered by the petition and it stands uncontroverted and unchallenged.”

But once a party cross-examine an opponent’s witness, he can only rebut the issue raised during cross examination by calling witness. Hence failure to call witness leave the Petitioner’s evidence unchallenged.”

In this case, the 1st and 2nd Defendants chose not to call any evidence and thus the Plaintiffs evidence remain unchallenged by them.

It is evident from the documents produce by the Plaintiffs that they purchased their individual plots, which are subdivisions of Thika Municipality Block 6, as from the year 2012. Various receipts and sale agreement have been produce in Court to support the said allegations.

The 4th, 5th and 6th Defendants also confirmed having sold the suit property to the Plaintiffs herein. The Plaintiffs alleged that they have been in occupation of their individual plots since purchase on various dates from 2012 and have built their residential homes, which are now worth about Kshs.5 million. However, the 3rd Defendant who only filed a Defence but did not defend the suit has a title deed for the alleged area or parcels of land that is now the Plaintiffs individual plots. That the 3rd Defendant has threatened to evict the Plaintiffs and thus this suit.

The Plaintiffs alleged that the 3rd Defendant acquired his certificate of lease on 11th day of July 2016. That the said acquisition was done long after the Plaintiffs had settled on their respective parcels of land.

Though Section 26(1) of the Land Registration Act provides that a Certificate of title issued to be a proprietor is conclusive evidence that such an proprietor is the absolute and indefeasible owner, such a title can be challenged if the same was acquired illegally, unprocedurally or through fraud. Section 26(1) of the Land Registration Act, provides as follows;

“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.

The 3rd Defendants title herein **Thika Municipality Block/1108**, was called into question. It was incumbent upon him to show the root of his title. See the case of Munyu Maina ...Vs... Hiram Gathiha Maina, Civil Appeal No.239 of 2009, where the Court of Appeal held:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to 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.”

The 3rd Defendant chose not to defend this suit and so the Plaintiffs' evidence is uncontroverted. The 4th, 5th and 6th Defendants testified that once they discovered that 3rd Defendant had a title for the suit property that they had sold to the Plaintiffs, they reported the matter to the Police. Investigations by DCIO was ongoing. The 3rd Defendant failed to appear in court and testified on how he acquired the said Certificate of lease.

In the case of Daudi Kiptugen ...Vs... Commissioner of Lands & 4 Others [2015] eKLR the Court held as follows:-

“The acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

The 3rd Defendant acquired the Certificate of lease in his name while the Plaintiffs were in occupation of the suit property. The 4th, 5th and 6th Defendants had been allotted the said parcels of land while it was unsurveyed. There was no evidence from the 1st and 2nd Defendant on whether the said letters of allotment had been revoked and or cancelled.

As early stated, the 2nd Defendant did not aid this Court by availing evidence of how the 3rd Defendant got registered as the proprietor of the suit property.

Failure to call evidence by the 1st, 2nd and 3rd Defendants means that the Plaintiffs evidence is unchallenged and this Court would have no reasons to doubt it.

However, the 4th, 5th and 6th Defendants have explained themselves out. They were allotted two **Unsurveyed plots No. (C) and (D) Thika Municipality**. After surveying and subdivision, the two plots became **Thika Municipality block 6**, which is the suit property. The 4th, 5th, and 6th Defendants denied ever colluding to defraud the Plaintiffs of their money or parcels of land. That they have allowed the Plaintiffs to

remain on their individual plots since purchase of the same.

It is evident that the 3rd Defendant's Certificate of lease for **Thika Municipality Block 6/1108**, the suit property was acquired fraudulently, unprocedurally or through misrepresentation or corrupt scheme. As provided by **section 80** of the **Land Registration Act**, the Court has power to cancel such title and rectify the register. It provides:-

“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.”

For the above reasons the Court proceeds to cancel the Certificate of lease and the lease held by the 3rd Defendant herein **T. Mashaeri Makori** which was issued on **11th July 2016** long after the Plaintiffs had purchased the suit property.

Having carefully considered the available evidence, the Court finds that the Plaintiffs have proved their case against the 1st, 2nd and 3rd Defendants herein on the required standard of balance of probability. Consequently, judgment is entered for the Plaintiffs against the 1st, 2nd and 3rd Defendants jointly and severally. However, the Plaintiffs have no claim against the 4th, 5th and 6th Defendants as the said Defendants are also victims of fraudulent activities at the Thika Lands Registry.

For the above reasons, the suit herein against the 4th, 5th and 6th Defendants is dismissed entirely.

In a nutshell, the Court enters Judgment for the Plaintiffs herein against the 1st, 2nd and 3rd Defendants jointly and severally in the following terms as per the Plaint dated **12th November, 2018**; in terms of **prayers No. (a)(b)(c) and g**. The Plaintiffs are entitled to costs of this suit.

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of July 2021.

L. GACHERU

JUDGE

15/7/2021

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. Gitau Mwaro for the Plaintiffs

M/s Ndundu for the 1st and 2nd Defendants

M/s Kinyua holding brief for Mr. Nganga Ngigi for the 4th, 5th and 6th Defendants

No appearance for 3rd Defendant

L. GACHERU

JUDGE

15/7/2021