



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC MISC NO. 35 OF 2019

BENARD MBUGUA KINYANJUL.....APPLICANT

VERSUS

COUNTY LAND REGISTRAR, KIAMBU...1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

RULING

By a Notice of Motion dated 12th June 2019, the Applicant sought for the following orders as against the Respondent;

- 1. That a mandatory order do issue directing the 1st Respondent by himself or through his officers or agent or servant to unconditionally supply to the Applicant all the documents used to register the name of George Gathitu Wainaina in registration Section Part B Proprietorship Section Entry No. 5 date 16th March 2001, in piece of land known as Dagoretti/Kinoo 1070.**
- 2. That a mandatory order do issue directing the 1st Respondent by himself or through his officers or agents or servant unconditionally release Title Deed document in the name of the Applicant Bernard Mbugua Kinyanjui in the 1st Respondent custody of piece of land known as Dagoretti/Kinoo 1070.**

The Application is premised on the grounds that on 16th March 2001, the 1st Respondent registered the name of **George Gathitu Wainaina**, in registration Section PART B Proprietorship Entry 5, on the suit property without any colour of right. That from 16th March 2001, to date the Applicant has been writing to the 1st Respondent to supply the documents, without success. Further that the Ministry of Lands through Chief Land Registrar, and **Permanent Secretary** has been requesting from the 1st Respondent documents used to transfer the suit property without any success. That for the past 19 years, the 1st Respondent has ignored/ refused or neglected the letters which were addressed to him.

That the Inspector General applied for documents which were used to transfer the suit property from the Applicant to **George Wainaina**, to enable them investigate the fraud, but that the same was not supplied. That the Applicant has suffered for the past 19 years and the 1st Respondent has failed in its statutory and Constitutional duty and as a result the Applicant right to enjoy his property has been violated.

In his Supporting Affidavit, **Bernard Mbugua Kinyanjui** averred that on 16th March 2001, the District Land Registrar cancelled his name from the Register and fraudulently registered the name of **Gathitu Wainaina**, and his efforts to get the documents used for the said registration have not been fruitful. That the District Land Registrar received the letters seeking for supply on 2nd February 2008, but no supply or response was made. Further that despite his subsequent letters to the District Land Registrar, the same has born no fruits. Further that on 29th July 2011, the Chief Land Registrar, Kiambu wrote to the District Land Registrar and requested him to issue **Bernard Mbugua Kinyanjui**, with the documents used to transfer the suit property. Further that on 11th April 2012, he further wrote to the Permanent Secretary, who in turn wrote to the District Land Registrar requesting him to supply the Applicant with the supporting documents on how the suit property changed hands but no response was forthcoming.

That the District Land Registrar then wrote to the Ministry detailing the history of the suit property, which history was not required. That the Ministry then wrote to the District Land Registrar, Kiambu informing him that the Applicant wanted to be issued with certified true copies of the original documents that were used to transfer the suit property including an Application for Land Control Board, letter of consent, receipt for whole transaction, any other documents relating to the whole transaction, which letter enlisted no response. Further, that his efforts to get information from the **National Land Commission** have not been fruitful.

The Applicant filed a Further Affidavit on **9th December 2019**, and averred that he had attached the document that he failed to inhibit in his Supporting Affidavit and in his submissions. That the document was to show how he had been struggling with the instant matter for the last **19 years** as he had sought help to no avail.

The Respondent did not file any pleading in this matter. However, on **22nd January 2020**, the Applicant appearing in person and **Ms. Nyawira** taking instructions for the Respondents, agreed that the Land Registrar Kiambu appear in Court and produce the documents that the Applicant needed.

On **17th November 2020**, the Land Registrar Kiambu **Philip Munyoki Maingi**, appeared in Court and testified that he had the documents in Court, the same being the transfer document for **Dagoretti/ Kinoo/1070**. That the said land was transferred by charge in exercise of Power of Sale on **16th March 2001**, and that the same was transferred to **George Gathitu Wainaina**. That there were other documents to wit an Application for Consent from **Barclays Bank of Kenya Limited**. Letter of consent dated **1st March 2001**, Memorandum of Sale, payment receipt for stamp duty and that the transfer was effected.

The Court ordered the Applicant to go through the documents and verify whether the same was what he had applied for. On **31st May 2021** the Applicant informed Court that he did not get any of the documents that he had applied for to which the Court reserved a date for Ruling.

The Respondents did not file any submissions. The Court has carefully read and considered the pleadings by the Applicant, the Affidavits in support, the evidence adduced by the Land Registrar and the submissions and renders itself as follows;

The Applicant filed the instant Application seeking for various Orders. Amongst the said orders, the Applicant sought to be supplied with the documents that were used to register **George Gathitu Wainaina** as the owner of the suit property. The Applicant has also sought orders that the Respondents be ordered to release the title in his name. In the Court's understanding, as per the pleadings by the Applicant, that the registration of the said **George Gathitu Wainaina** be cancelled. The Court therefore finds and holds that the issues for determination are;

1. Whether the 1st Respondent has supplied the Applicant with the documents sought.

2. Whether the Applicant is entitled to the orders.

1. Whether the 1st Respondent has supplied the Applicant with the documents sought.

In his Application, the Applicant unconditionally supplied to the Applicant all the documents used to register the name of **George Gathitu Wainaina** in registration Section Part B Proprietorship Section Entry No.5 date **16th March 2001** in piece of land known as **Dagoretti/Kinoo 1070**.

On **17th November 2020**, the Land Registrar Kiambu **Philip Munyoki Maingi** appeared in Court and testified that he had the documents in Court, the same being the transfer document for **Dagoretti/ Kinoo/1070**. It was his evidence that the same was transferred by chargee in exercise of Power of Sale on **16th March 2001**. He produced in evidence an **Application for Consent from Barclays Bank of Kenya Limited**. **Letter of consent** dated **1st March 2001**, Memorandum of sale and payment receipt for **Stamp** duty. In his evidence, those were the documents that were used to transfer the suit property to the said **George Gathitu Wainaina**. It may or not may be that the said documents were sufficient to effect the transfer. However, the evidence by the Land Registrar is that as per their records, those were the documents that were used to effect the transfer of the suit property.

The Applicant is of the view that those were not the documents that he had asked for or needed. However, it is the Court's considered view that a party can only produce that which is in its possession. The **Land Registrar**, having produced and supplied the Applicant with the documents, he says were used to effect the transfer, this Court cannot then compel the **Land Registrar** to produce any other documents which it does not have. The Applicant had sought for an order that the documents used to effect the transfer be produced and the Court is thus satisfied that the same has been done regardless of whether or not the same were sufficient to effect the transfer.

The Court therefore finds and holds that the Respondents duly supplied the Applicant with the documents that were used to effect transfer of the suit property.

2. Whether the Applicant is entitled to the orders.

The Applicant had sought for two orders, one seeking to be supplied with the documents used to transfer the suit property and the Court finds that the same has been satisfied and therefore spent and cannot be granted.

The Applicant has also sought for a mandatory order compelling the Respondent to release the title document in his name and essentially cancel the **title deed** issued to **George Gathitu Wainaina**. It was the Land Registrar's evidence that the suit property was transferred as a result of **exercise of power of sale by a chargee**. It is further not in doubt that as per the evidence adduced that the said suit property is now registered in the said **George Gathitu Wainaina's** name. Therefore, it follows that the said **George Gathitu Wainaina** has Interest over the said property and adverse orders cannot be made in his absence or issued against him.

The Applicant ought to have filed a suit against the parties to whom he seeks orders to be effected against and therefore the Court finds and holds that the said orders are not tenable and Consequently, finds that the Applicant is not entitled to the orders sought. The Court finds the instant application is **not merited**.

Having now carefully read and considered the **Notice of Motion Application**, the evidence adduced and the written submissions, the Court finds and holds that the Applicant has not availed sufficient evidence to warrant the Court grants the orders sought. Therefore, the court finds and holds that the Applicant is **not** entitled to the orders sought and the Application is therefore not merited and it is dismissed entirely..

Costs usually follow the event unless the Court's finds that there are special circumstances that warrant deviating from the same. The Applicant had sought these documents from the Respondents who had to be summoned by Court in order to produce the same. The Respondents being a government institution, the Court is therefore inclined to order that each party to bear its own costs of the suit.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy