



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 76 OF 2015**

**BETTY MUKUI (Suing as the Administrator of the  
ESTATE OF JOSEPH MAKORI JUMA (DECEASED)).....PLAINTIFF**

**JACQUELYNE KWAMBOKA MAKORI (Suing as the Administrator of the  
ESTATE OF JOSEPH MAKORI JUMA (DECEASED)).....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BEN MOKAYA .....1<sup>ST</sup> DEFENDANT**

**REGISTRAR NAKURU LANDS REGISTRY.....2<sup>ND</sup> DEFENDANT**

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

**J U D G M E N T**

1. The instant suit was commenced by the plaintiff by way of a plaint dated 18<sup>th</sup> March 2015. The plaintiffs instituted the suit as the administrators of the estate of Joseph Makori Juma (deceased). The plaintiffs claimed that the deceased was as at the time of his death the registered proprietor of land parcel title Number Njoro/Ngata 1/1382 (New Kiambu) hereinafter referred to as the “the suit property”) The plaintiffs averred the 1<sup>st</sup> defendant had unlawfully entered and constructed a residential house on the suit property on or about December 2014. They sought judgment against the defendants as follows:-

*(a) Permanent injunction against 1<sup>st</sup> defendant by himself, his assigns, personal representatives, his servants and/or agents or any one whomsoever restraining them from entering, conveying, dealing, advertising, trespassing, selling or transferring ownership to any third party of the parcel of land known as Tile Number: Njoro/Ngata1/1382 ( New Kiambu).*

*(b) An order of eviction against the 1<sup>st</sup> defendant his assigns, personal representatives, his servants and/or agents or any one whomsoever from the land known as tile Number: Njoro/Ngata 1/1382.*

*(c ) An order of eviction against the 1<sup>st</sup> defendant his assigns, personal representatives, his servants and/or agents or any one whomsoever from the land known as Title Number : Njoro/Ngata1/1382.*

*(d) An order to the 2<sup>nd</sup> defendant to cancel any tile documents issued adverse to registration of title Number: Njoro/Ngata1/1382 in the name of Joseph Makori Juma ( deceased).*

*(e) A declaration that Joseph Makori Juma (deceased) is the registered proprietor of Title Number Njoro/Ngat0a1/1382 and the said land is property of his estate.*

*(f) General damages*

*(g) Costs of this suit from the time of filing at the current court rates and*

*(h) Any other just and equitable relief as this Honourable court may deem appropriate.*

2. The 1<sup>st</sup> defendant in statement of defence dated 8<sup>th</sup> March 2015 while denying the averment contained in the plaint averred that he was in physical possession and occupation of the suit property as the lawful registered owner of the property. He denied that Joseph Makori Juma (deceased) was lawfully registered as the owner of the property. The plaintiffs amended the plaint on 20<sup>th</sup> April 2016 to enjoin the Attorney General as the 3<sup>rd</sup> defendant on behalf of the Land Registrar. The Attorney General filed a statement of defence on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on 26<sup>th</sup> September 2019. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants denied the plaintiffs had any cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> and sought for the dismissal of the suit on account of being an abuse of the court process.

3. The suit was heard before me and the 1<sup>st</sup> plaintiff (PW1) testified as the sole witness in support of the plaintiffs case, The 1<sup>st</sup> defendant (DW1) and the Land Registrar one Raymond Gitonga (DW2) testified for the defence.

4. Betty Mukui (PW1) on behalf of the plaintiffs testified that her late husband, Jacob Makori Juma owned land parcel Njoro/Ngata 1/1382 and was the registered owner as per the original title which he held and which she had in her possession in court. The witness relied on the witness statement that she had recorded and the bundle of documents exhibited by the plaintiffs. She stated that her late husband never lost his title at any time and she stated she was surprised to be notified there was a Gazette Notice “PEX4” giving notice of the loss of the title. She stated their title had never gotten lost and she stated that prompted her to seek to register a caution over the suit property. PW1 further testified that she visited the suit property in 2014 and found someone had constructed a double storey residential house on the land. It was her further evidence that they had never sold the land to the 1<sup>st</sup> defendant and that he had no right to the property.

5. In cross examination by Mrs. Mukira advocate for the 1<sup>st</sup> defendant, the 1<sup>st</sup> plaintiff agreed the caution she presented for registration was never registered. She disagreed that her late husband was never at any time registered as owner of the suit property arguing that she was holding the original title which showed he had been registered. The 1<sup>st</sup> plaintiff further under cross examination stated when she went to the lands office to seek clarification, the land registrar informed her it was another person who was registered as the owner of the land and he requested her to produce the title that she had which she declined to do. The 1<sup>st</sup> plaintiff maintained the title in the hands of the 1<sup>st</sup> defendant was not genuine.

6. PW1 further cross examined by Mr. Weche State Counsel stated that her husband had purchased the plot from another person. She stated other than the title, she did not have any other documents for the land. She stated she did not know how her late husband got the title but he showed her the land.

7. DW1 Bernard Mokaya Ombongi testified that he purchased the suit property vide the Agreement of sale dated 8<sup>th</sup> October 2012 (DEX4). He relied on his witness statement dated 8<sup>th</sup> May 2015 and the bundle of documents which were admitted as DEX 1-7. The 1<sup>st</sup> defendant stated he took possession and occupation of the land and has constructed a residential house on the property. He stated sometime in 2015 a lady came to the site claiming that somebody had constructed on her plot and upon getting the report the 1<sup>st</sup> defendant stated he carried out a search at the lands office and obtained an abstract of title (green card) which affirmed he was still the registered owner “DEX3 and DEX7” respectively.

8. The 1<sup>st</sup> defendant confirmed he purchased the land from one Joseph Kipchumba Kisorio who as per the abstract of title was registered under Entry No.4 and upon purchase of the property the 1<sup>st</sup> defendant stated he was registered under Entry No.6. He stated the records did not show the deceased was ever registered as owner of the land.

9. Cross examined by Mr. Weche State Counsel DW1 affirmed that he had not produced in any evidence the consent of the Land Control Board or the stamp duty payment receipts on the transfer. The witness on further cross examination by Ms Gikonyo advocate for the plaintiffs stated that at the time he bought the land the same was vacant and had not been fenced.

10. DW2 Raymond Gitonga, Land Registrar Nakuru testified and produced the certified copies of documents for land parcel Njoro/Ngata Block1/1382. He affirmed that the register for the land parcel was opened on 30<sup>th</sup> July 1997 and that the first registered owner was Jasasmil Mattresses Limited under Entry No.1. The property was transferred to James Kamau Mwangi and title issued to him on 7<sup>th</sup> August 1997 under Entry Nos 2 and 3 respectively. The property was transferred to Joseph Kipchomba Kisorio and a title issued to him on 8<sup>th</sup> May 2006 under Entry Nos. 4 and 5 respectively. On 22<sup>nd</sup> March 2013 Benard Mokaya Ombongi was registered as the owner and a title issued to him as per Entry Nos 6 and 7 in the green card.

11. The Land Registrar testified that the name of Joseph Makori Juma did not appear in the register. He stated that a caution presented for registration by the plaintiffs on 2<sup>nd</sup> March 2013 was rejected because it indicated Joseph Makori Juma (deceased) was the registered owner of land parcel Njoro /Ngata Block1/1382 yet he was not. The Land Registrar affirmed that the land registry did not have any other register for the suit property and stated he could not explain how the title made in the name of Joseph Makori Juma could have been made yet there were no records.

12. In cross examination the Land Registrar stated that their records do not show that Joseph Makori Juma (deceased) was ever registered as owner of the suit property. He stated that there were instances where titles are forged and he said he could not vouch for the authenticity of the title in the name of Joseph Makori Juma. He stated they did not have any record of the Gazette Notice relating to loss of the title issued to Joseph Makori Juma. The witness maintained they only rely on the records that they hold at the Land Office in effecting any transactions affecting a land parcel. The Land Registrar explained that it was the registered proprietor who ordinarily notifies the Land Registrar in case of the loss of his title so as to be issued with a new title.

13. The parties filed written submissions following the closure of the trial. I have reviewed and considered the pleadings the evidence adduced and the submissions filed by the parties. The following are the issues that arise for determination: -

**(i) Whether the 1<sup>st</sup> plaintiff's deceased husband Joseph Makori Juma was validly registered as the proprietor of land parcel**

**(ii) Whether the 1<sup>st</sup> defendant was a bonafide/ innocent purchaser of land parcel Njoro/Ngata1/1382 (New Kiambu) and whether he was lawfully and validly registered as the proprietor of the same?**

**(iii) What orders/ relief should the court grant?**

14. The plaintiffs case is predicated on the fact that the 1<sup>st</sup> plaintiff's deceased husband, one Joseph Makori Juma held a title to land parcel Njoro/Ngata/1/1382 before he died. The 1<sup>st</sup> plaintiff testified that her late husband was the owner of the land. She stated that her husband had put a fence around the parcel of land. No evidence was led by the 1<sup>st</sup> plaintiff to show how her late husband acquired the land. It was not apparent whether he had been allocated and /or he had purchased the same. Although the 1<sup>st</sup> plaintiff stated that her husband had purchased the plot, she could not give the name of the person who sold the land to her husband and neither did she have any copy of agreement or any other document that could have shown that indeed her husband had purchased the parcel of land.

15. The plaintiffs relied on the title that they stated had been issued to Joseph Makori Juma on 7<sup>th</sup> August, 1997 and a copy of search certificate that purportedly had been done on 24<sup>th</sup> February 2010. The plaintiffs tendered in evidence a copy of a Gazette Notice No.4585 dated 29<sup>th</sup> April 2011 where purportedly the late Joseph Makori Juma was giving notice of the loss of his title so that he could be issued a new title. The plaintiffs vide their advocates letter dated 14<sup>th</sup> June 2011 protested and disowned the Gazette Notice affirming that the title to the suit property was not missing as they held the original title as the administrators of the deceased estate. During the hearing it never became clear, at whose instance the notification of loss of the title to the suit property was made.

16. On the part of the 1<sup>st</sup> defendant he adduced evidence as to how he acquired title to the suit property. He produced a copy of the sale agreement dated 8<sup>th</sup> October 2012 that he had entered into with Joseph Kipchumba Kisorio who was the registered owner of the suit property. The 1<sup>st</sup> defendant explained that he had done a search that revealed the said Kisorio was the registered owner of the land. The abstract of title (green card) exhibited by the 1<sup>st</sup> defendant affirmed that indeed the said Kisorio was registered as owner on 8<sup>th</sup> May 2006. The 1<sup>st</sup> defendant was consequent to the sale transaction registered as owner of the suit property on 22<sup>nd</sup> March 2013 as evidenced in the title abstract.

17. The evidence by the Land Registrar corroborated the 1<sup>st</sup> defendant's evidence as regards the ownership of the suit property. The Land Registrar affirmed as per the records held by the lands office that the 1<sup>st</sup> defendant was the registered proprietor of the suit land and the history of ownership was as shown in the green card. Under section 26 of the Land Registration Act 2012 a certified copy of the register is prima facie evidence that the person shown on the register is the absolute and indefeasible owner of the property and such title can only be challenged on grounds of fraud and /or misrepresentation and/or the title was acquired illegally or unprocedurally or through a corrupt scheme. The person so registered must be proved and/or shown to have been party to the fraud. Section 26 (1) of the Act provides:-

**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.**

18. The plaintiffs did not tender any evidence to prove that the 1<sup>st</sup> defendant fraudulently acquired the title to the suit property. Indeed the plaintiff did not plead that the 1<sup>st</sup> defendant had fraudulently acquired title to the suit property and there was no proof of fraud against the 1<sup>st</sup> defendant. The 1<sup>st</sup> plaintiff in fact did not prove how her late husband acquired the title that he held over the suit property. In the absence of any records respecting the title held by the late Joseph Makori Juma in the lands office, it was imperative on the part of the plaintiff to adduce evidence to illustrate and demonstrate how the late Joseph Makori Juma (deceased) acquired the land. Where there are two competing titles as in the present case, it is necessary for the root of each of the titles to be established. In the case of the plaintiffs, they were merely dangling the title documents but there was nothing else to support the acquisition of the title. In the case of *Munyu Maina -vs- Hiram Gathiha Maina (2013) eKLR* the Court of Appeal held:-

*“—When a registered proprietor's root of title is under challenge it is not enough 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 behold 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”.*

19. The 1<sup>st</sup> defendant in my view demonstrated how he acquired his title. He bought the land from a Mr. Joseph Kipchumba Kisorio who as per the title abstract was the registered owner of the land from 8<sup>th</sup> May 2006. Prior to the said Kisorio being registered, James Kamau Mwangi had been the registered owner from 7<sup>th</sup> August 1997. The root of the 1<sup>st</sup> defendant's title is evident and on the evidence, I am satisfied he was a bonafide purchaser for value and that he was validly registered as the legal proprietor of the suit property. On the contrary there is no proof that Joseph Makori Juma (deceased) through whom the plaintiffs claim the land, was validly registered as the owner of the land. I hold and find that he was not. The net result is that I find and hold that the plaintiffs have failed to prove their case on a balance of probabilities. Accordingly, the suit is dismissed with costs to the defendants.

20. It is so ordered

**JUDGEMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF OCTOBER 2021.**

**J M MUTUNGI**

**JUDGE**