



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND CURT

AT THIKA

ELC CASE NO. 66 OF 2017

(FORMERLY NRB ELC NO. 330 OF 2010)

PETER PAUL MBURU NDURURI.....PLAINTIFF

VERSUS

MARGARET WAITHIRA.....1ST DEFENDANT

ISAAC MUIRURI MATU.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

MUNICIPAL COUNCIL OF THIKA.....4TH DEFENDANT

JUDGMENT

By an Amended Plaint dated 31st January 2011 the Plaintiff sought for Judgment against the Defendants and severally and sought for the following orders; -

- a) A Declaration that the Plaintiff is the legal owner of Land Parcel L.R 4953 /11/31.***
- b) The registration and or conversion of L.R 4953/11/31 to Thika Municipality Block 10/137, in the names of the 1st & 2nd Defendants was illegal and fraudulent***
- c) The 1st Defendant's Title Thika Municipality Block 10/137 be cancelled and the 1st Defendant give the Plaintiff the vacant possession of L.R 4953/11/31.***
- d) A Permanent Injunction restraining the defendants from interfering with the Plaintiff's quiet possession and enjoyment of the land parcel NL.R 4953 /11/31.***

The Plaintiff averred in his claim that he is the legal and registered owner of **L.R 4953/11/31**, the suit property herein and he had taken possession and commenced development of the same in **1996**. That without any color of right, the 1st Defendant encroached and trespassed and unlawfully commenced construction and destruction of the suit property in **2010**. That upon investigations, the Plaintiff learnt that on **15th December 2010**, the 3rd Defendant issued a Lease under the Registered Land Act **L.R Thika Municipality Block 10/137**, to the 2nd Defendant. That the **Thika District Land Surveyor** has established that a **L.R 4953/11/31 and L.R Block 10/137**, are on the same ground. That the Plaintiff's Grant was registered on **26th April 1976**, and the same has never been surrendered to the Government, while the 1st Defendant's parcel of land was registered on **15th December 2010**.

It was contended that the purported registration of Lease for **Thika Municipality Block 10/137**, was fraudulent and illegal. That sometimes on **8th January 2009**, the 2nd Defendant purported to transfer the suit property to the 1st Defendant and the same was illegal as the 2nd Defendant did not have a good title. He particularized fraud by the 1st Defendant as colluding with the 2nd Defendant to obtain lease for the suit property, colluding with the 3rd Defendant's officials to obtain documents to construct on the Plaintiff's land, being in possession of the Plaintiffs land and commencing construction.

Fraud by the 2nd Defendant was particularized as purporting to have been allocated the Plaintiff's land purporting to have obtained

requisite authentic documents of ownership and presenting false documents to the 3rd Defendant. Fraud by the 3rd Defendant was particularized as; colluding to issue lease documents and changing the entries in the register without due care and attention and without supporting documents, issuing a lease certificate while well aware that there existed another title, opening and keeping records. For 4th Defendant's fraud; permitting 1st Defendant to construct on the Plaintiff's land, approving building plans while well aware the 1st Defendant did not have any property.

The suit is contested and the 1st Defendant filed a Defence dated **13th September 2012** and denied all the allegations made in the Plaint. That she is the registered owner of **L.R 10/137**, which she acquired in **December 2008**, and the transfer to the Plaintiff's name was done on **9th January 2009** and the Certificate issued to the Plaintiff. That before the purchase of the suit property, she undertook a search at the lands office and established that the Title was in the name of the 2nd Defendant and entered into a sale agreement with him. That she purchased the suit property and commenced the Development of the same. That when she was constructing, there was no claim over the suit property by the Plaintiff who has offices in Thika. That she has invested well over **sixty million** in the project. That she purchased the suit property for value and without any notice and the Plaintiff's alleged title was later in time.

The 4th defendant filed a Defence dated **22nd August 2012**, and denied the allegations made in the Plaint and averred that it never permitted the 1st Defendant to develop. That the Plaintiff's suit is bad in law and ought to be struck off.

The matter proceeded by way of viva voce evidence wherein the Plaintiff called 3 Witnesses and the Defendant called 1 witness.

PLAINTIFF'S CASE

PW1 Peter Paul Mburu testified that he is the registered owner of **L.R 4953/1/31**, and that he purchased the same in **1984** from **Charles Karanja**. That the suit property took too long to be transferred to him as the Law Firm of **Macharia Njore** split. That the suit property was registered in his name in **2010** and when he went to the site, he found a construction by the 1st Defendant, who had a title for **L.R 10/137**. Further that the District Surveyor visited the suit property and found that the two Titles were lying on the same parcel of land. That the 1st Defendant's Title was issued in the year **2009**, and the first registration was in favour of **Isaack Muiruri Matu** in the year **2008**. Further that his Grant was registered on **26th April 1976**. He adopted his witness statement as his evidence and further produced the list of documents dated **21st January 2012** as Exhibit 1 to 10. That he had been paying rates until his file was hidden in **2010**.

That he bought the suit property from **Charles Kariuki** and there is no sale agreement and the land was transferred to him in **2010**. That when he conducted the transfer, **Karanja** was not alive and he did not have letters of Administration. That he did not have a Clearance Certificate from the council and he did not have the consent to transfer from the Commissioner of lands. That the transfer was done by an Advocate. He denied that his Title was invalid. That he paid rates for **Kshs31,000/=** in the year **2004**. That the suit property was valued at **Kshs.300,000/=**. He further testified that he was not aware of how much he paid for the stamp duty.

Further that the 1st Defendant obtained the Title through Fraud. That the person who sold the property to the 1st Defendant was not genuine or a bonafide owner of the suit property. Further that the 1st Defendant constructed without approved plans. That he paid the rates until the file was hidden and that he had not valued the land. That he filed the suit in **2010**, and amended it in **2012**. That he wants the **Kiambu County Government** to pay what ought to be paid by the municipal Council as they took over their functions. That the agreement was drawn by **Macharia Njore Advocates** and he gave the responsibilities to his Advocates. That on **5th October 2004**, He paid for the annual rent and clearance certificate and the 1st Defendant continued with the construction despite being aware that there was a suit in Court. That the Commissioner of Lands has never written to him informing him that his Title was cancelled. Further that he obtained a letter of consent dated **17th March 2010**, from the Department of lands, with regards to the transfer of land. He produced a further list of documents and letter of consent as Exhibit 11, Clearance Certificate Exhibit 12 and Application for consent Exhibit 13.

That he made the Application for consent after the death of **Charles Karanja**, who had transferred the documents to him. That Karanja did not sign the Application for consent as he had passed away. That **R.M Mulinge & Company Advocates** applied for the clearance certificate on his behalf. That he did not have a Sale agreement to show that **Paul Karanja** sold the property to him. That **Paul Karanja** executed all the transfer documents to him.

PW2 Gildine Gatwiri Karanu testified that she is the Chief Land Registration officer attached at Ardhi House. That according to their records **Title No. L.R 4953/11/31 IR No. 29188**, the registered proprietor is **Paul Mburu Ndururi** and that he attained ownership on **28th May 2010** and a Title Deed was issued. That with regards to Thika Municipality **Block 10/137**, she made efforts to look at the planning office and also the correspondence records office and there were no records with regards to the land. That **L.R 4953/11/31** was first registered to **Jacob Kimani Mwangi** on **26th April 1976**, being the first registration. Further that it was registered under **Cap 281** and if the same was converted to Cap 300, it would have been indicated in the Title and that according to the Title it was never converted to Cap 300.

That with regards to **L.R No. 4953/11/31**, she came across various documents such as the Title Deed, vesting order dated **13th November 1977** and that the property was vested to **Charles Karanja** and the next document was the transfer to **Paul Mburu**. That the value for stamp duty was **Kshs.300,000/=** as at **19th February 2010**, and that she was unable to see certain documents required for the transfer, that there is no I.D for Charles Karanja and Pin Certificate and that the same are required for transfer. That the correct description is No. **4953/II/31** and that there are no other documents relating to the transfer from **Charles Karanja to Peter Mburu**,

Further that the transfer to **Charles Karanja** was signed in 1977 and there is memorandum for registration of a Title Deed. That she did not peruse the records of the Thika Lands Registry in respect of **Thika Municipality 10/137**, and that her report states that there are no records of the same. That the conversion is done by the Chief Lands Registrar Office to the Director of Survey. That there were no records of how the numbers were issued. That she did not have interaction at the Thika Office as she checked the planning office where all

documents go to and that the Director of survey would not issue any number without instructions from the Chiefs Lands office.

PW3 Peter Waweru Karanja testified that the suit proper was initially owned by his father **Charles Mungai**. That they applied for Succession Cause and went through audited account of his father's land and the suit property was included. That he later learnt that the suit property had been sold to **Peter Mburu Ndururi** and as the Administrator, he has no claim over the suit land. That he has no authority of the other Administrators to testify on their behalf. That it ceased to be part of his father estate in **1980**. That he learnt that the suit property had been sold to the Plaintiff in **2019**. That he was not aware that the land had a new number. That his father passed on in the year **2000**. That the Plaintiff told him that the suit property had been sold to him and the development in the suit property was in the year **2015/2016** and it was in the first floor. That he had not rectified the confirmed grant and they have not taken steps to inform the Court that the Estate belongs to someone else. That at the time the Certificate of confirmed grant was issued, the property had already been transferred in **2010**, and it did not belong to his father's Estate.

DEFENCE CASE

DW1 Margaret Waithera Mwaura adopted her witness statement dated **13th September 2012**, as her Exhibit in Court. She further produced her list of documents as Exhibit 1, 2nd List of documents as Exhibit 2 and the 3rd List of documents as Exhibit 3.

That the Plaintiff never came to the site to ask her to stop the construction. That she started the construction in **2009**, and that only the Municipal Council personnel came and alleged that the suit property belonged to someone else. That she took her documents to the planner who confirmed her documents were genuine. That the person alleging the property was his was **Karanja**. However, the Plaintiff is **Ndururi**. That she completed the construction in **2012**, and she had been issued with an occupation Certificate by the time she was sued in Court. That she bought the suit property through her Advocates, paid the full purchase price and the land was registered in her name and she pays land rent and rates.

Further that she had built upto 2nd Floor and she completed the construction in **2010**. That she was aware the suit property had a case in Court, but she continued with the construction. That she bought the parcel of land from **Isaack Muiruri**, who showed her the plot and gave her the Title Deed and the Certificate of Lease and they did the transfer at the Advocates office. That she only pays the land rates and that she did not have the land rent clearance certificate, there was no consent to transfer from the Commissioner of lands. That she has two plots in the area and she has never intended to amalgamate the two Title Deeds. That she was attempting to amalgamate different plots and not this one.

The parties thereafter, filed written submissions which the Court has carefully read and considered. The Court has also carefully read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and finds that the issues for determination are;

- 1. Who is the bonafide owner of the suit property**
- 2. Whether the Plaintiff is entitled to the orders sought**
- 3. Who should bear the cost of the suit**

1. Who is the bonafide owner of the suit property

It is not in doubt that both the Plaintiff and the 1st Defendant lay claim to the suit property herein. It is also not in doubt that while the parties both lay claim to the suit property, the two hold title documents having different L.R Nos. The Plaintiff holds Title to **L.R 4953/11/31**, and the 1st Defendant lay claim to L.R. **Thika Municipality Block 10/137**. The Court notes that the suit is not founded on any Contract, but that there are two parties who both lay claim to the suit property and contend that having bought the same from another party they are entitled to the suit property. From the onset the Court finds that both titles and reference numbers refer to the same property as was evidenced by the report by the District Surveyor dated **13th September 2010**.

When a person's ownership to property is called into question, it is trite that the said proprietor has to show the root of his ownership. See the case of **Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others [2016] eKLR**, where the Court held that;

'A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

Further In the case of **Munyru Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Court of Appeal held that:-

"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."

Thus to be able to determine who is the bonafide owner of the suit property, the Court must determine which party has been able to show the root of his/her title.

Vide a letter dated 13th September 2010 J.D Machung confirmed that L.R No. 4953 /11/31 is the same as L.R 10/137, registered under Cap 300. It is the Plaintiff's evidence that he bought the suit property from one Charles Karanja . Further the Plaintiff's testify that upon the purchase of the suit property, he did not transfer the same immediately to himself, but only transferred the suit property in 2010. The Plaintiff has produced in evidence a transfer dated 7th December 1986, and further a Lease which indicates that on 28th May 2010, the suit property was transferred to him.

In her evidence PW2, the Chief Land Registration Officer attached at Ardhi House testified that as per their records, the Plaintiff is the registered owner of the suit property having registered as such in 2010. That further as per their records, the suit property was first registered to **Jacob Kimani Mwangi** and the same was transferred to **Charles Karanja** vide a Vesting Order before the same was transferred to the Plaintiff. The Court is thus satisfied that the Plaintiff has been able to show the root of his title.

The 1st Defendant lays claim to the suit property having bought the same from the 2nd Defendant **Isaack Muiruri** vide a sale garment dated 9th October 2008 and she was issued with a Lease dated 8th January 2009. The 1st Defendant also produced certificate of Lease dated 15th December 2000, issued to the said **Isaack Muiruri**. PW3 testified that as per their records, there is no evidence of the existence of **L,R Block 10/137**, and vide a letter dated 22nd November 2018, the same was also indicated. It was also PW2 evidence that it is the Office of the **Chief Land Registrar** that does the conversion of land, which the office did not do. The 1st Defendant has failed to indicate to this Court how the said **Isaack Muiruri** gained proprietorship of the suit property . Was he allocated the land, did he buy the land. All this the 1st

Defendant has failed to provide information on. The Court takes Judicial Notice that Ardhi house that is the custodian of all land transactions in the Country and the information that are in the lands registries ought to reflect the information contained at Ardhi House. That if a party is to be allocate a piece of property, then the same must be reflected in the records at Ardhi house that must correspond with those at the District Land Registry.

The Court has no reason to doubt the evidence of PW2, that **Chief Land Registrar** is the custodian of all records and that the same must be reflected at the Planning records. For the above reasons, the Court finds and holds that the 1st Defendant has failed to prove the root of her title. This is so as her title is tainted with illegality as the 2nd Defendant could not in any way pass a good title if he did not have any in the first place.

The Court therefore finds and holds that the Plaintiff is the bonafide owner of the suit property.

2. Whether the Plaintiff is entitled to the orders sought

The Plaintiff had sought for several orders amongst them a declaration that he is the lawful owner of the suit property, that the conversion was fraudulent and also sought for an order of cancellation of the same and finally permanent injunction.

The Court has already held that the 1st Defendant has failed to prove the root of her title and therefore she is not the lawful owner of the suit property. The Court has further found that the Plaintiff was able to prove the root of his title and therefore he is the lawful owner and thus, he is entitled to a Declaration that he is the Lawful owner. PW3 testified that there is no evidence of the conversion ever taking place. It was also PW2s evidence that the Chief Land Registrar, who is the authority responsible for the said conversion did not have any records of the same. Though the 1st Defendant sought to rebut the said evidence, no evidence was produced to show and or prove that indeed the conversion took place.

It is trite that whoever alleges must prove and he who seeks the Court to rely upon any piece of evidence must bring forth the said evidence. It is thus clear that the 1st Defendant failed to prove how the conversion took place. The only conclusion that this Court can arrive at is that the said conversion was fraudulent, given that there is no evidence of the same ever being done from the relevant authority responsible for conversion.

The Plaintiff has also sought for the cancellation of the 1st Defendant's Title. In the case of Elijah Makeri Nyangwara –Vs- Stephen Mungai Njuguna & Another [2013] the Court held that ;

“The evidence in this case puts no one in doubt that the title to the 1st defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1st defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st defendant and his registration as proprietor of the suit land. The plaintiff should be registered as owner of the suit land. It is regretful that the 1st defendant was snared by the scheme perpetuated by the 2nd defendant. I sympathise with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land.”

Further in the case of Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR the Court held that

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally,

or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

The title held by the 1st Defendant was procured unprocedurally as there are no records as to how and when the conversion was done. The root of the Plaintiff’s title dates way back in the year 1976. Even if the two were competing interest, which they are not the Plaintiff’s Title would still be superior to the one being held by the 1st Defendant. The Court therefore finds and holds that as per the powers granted to it under **Section 80 of the Land Registration Act which are the Replica of Section 143 of the Registered Land Act Cap 300 (Repealed)**; this Court is vested with the necessary jurisdiction to cancel title to land that was procured unprocedurally . Hence the said prayer is merited.

The Plaintiff has also sought for a permanent injunction. The Court having held and found that the Plaintiff is the lawful owner; and the Court having cancelled the 1st Defendants title, It is thus not in doubt that the Plaintiff is holding absolute and indefeasible rights and interests over the suit property and he is thus entitled to a Permanent Injunction Order so that he can enjoy peaceful and quiet occupation and possession of the suit property.

3. Who should bear the costs of this suit

Section 27 of the Civil Procedure grants the Court the discretion to grant costs. However, it is trite that costs usually follow the events unless special circumstances present themselves. In the instant case, the Court finds no special circumstances and therefore the Plaintiff being the successful party is entitled to the costs of the suit.

Having carefully read and considered the Pleadings by the parties, the evidence adduced, the written submissions and the provisions of law, the Court finds and holds that the Plaintiff has proved his claim against the Defendants herein on the required standard of balance of probabilities. Consequently, the Court enters judgment for the Plaintiff against the Defendants jointly and severally as prayed in the Amended plaint and dated **31st January, 2011** in terms of prayers No. (aa), (bb), (cc) & (dd) with the costs to the Plaintiff.

The Plaintiff is also at liberty to apply.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Lucy