



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 116 OF 2017

DAVID KHAYO KOKOKO.....PLAINTIFF

VERSUS

LAND REGISTRAR, KIAMBU.....1ST DEFENDANT

HUMPHREY MAINA KINYANJUI.....2ND DEFENDANT

JUDGMENT

By a Plaint dated **15th February 2017**, the Plaintiff sought for Judgment against the Defendants jointly and severally for the following orders;

- a. ***A mandatory order to compel the 1st Defendant to cancel all registration made on title to land parcel known as LR. No. GITHUNGURI/NYAGA/1637, after 19th October 2012, and return it to its original position as at 18th October 2012.***
- b. ***General Damages***
- c. ***Costs of the suit and interest at court rates.***

The Plaintiff averred in his claim that on or about **18th October 2012**, he placed a caution over **LR No. GITHUNGURI/NYAGA/1637**, (herein after referred to as the suit land), which **caution** was duly registered against the said title. That on or about **10th February 2014**, the 1st Defendant purported to have removed the said **caution** for reasons known only to himself, without serving any communication to the Plaintiff and proceeded to unlawfully transfer the suit property to the 2nd Defendant. That the Plaintiff has visited the 1st Defendant's offices four times requesting for proof of postal notification of intention to hold a hearing before removing the caution, and the 1st Defendant has failed to avail the same on all occasions. That the 1st and 2nd Defendant fraudulently and unlawfully colluded to remove the said caution on the suit land without following the due process of the law.

Fraud by the 1st and 2nd Defendant was particularized as follows; the 1st and 2nd Defendants transferred the suit property whereas they knew or ought to have known that there was a caution by the Plaintiff, which caution the Plaintiff had not removed; The 1st Defendant colluded with the 2nd Defendant and transferred the suit property to the 2nd Defendant using forged signatures and transfer documents; The 1st Defendant unlawfully effected the transfer of the suit property to the 2nd Defendant whereas he knew or ought to have known that there was a caution by the Plaintiff, which caution the Plaintiff had not removed.

The suit was contested by the 1st Defendant who filed a Statement of Defence dated **5th June 2017**, and denied all the allegations made in the Plaint. The 1st Defendant averred that the suit offends the mandatory provision of **Section 13A of the Government Proceedings Act**, as Notice of intention to sue was neither issued nor served upon the 1st Defendant.

The suit was also contested by the 2nd Defendant who filed a Defence dated **25th April 2017**, and denied all the allegations made in the Plaint. The 2nd Defendant averred that; sometimes between the period of **12th November 2013**, and **24th January 2014**, the 2nd Defendant herein together with others lent the sum of Kenya Shillings. Seven Million Seven Hundred and Forty Five Thousand (**Kshs. 7,745,000/=**) to one **Caroline Wambui Mwaniki (Debtor)**. That having been unable to repay the said loan, the debtor together with the registered owners of the suit property, agreed to have the property transferred to the 2nd Defendant, in partial settlement of the advanced loan, to a tune of Kenya Shillings Three Million (**Kshs. 3,000,000/=**). Pursuant to an agreement of sale dated the **7th day of April 2014**, the parties contracted on the terms and conditions of the transfer and the repayment of the balance of the outstanding debt.

The 2nd Defendant averred further that; following the execution of the Agreement of Sale; the parties thereafter proceeded to execute the transfer documents, which signatures were voluntarily appended on the said document. That the registered owners were fully aware of the transaction and they voluntarily transferred the suit property in partial settlement of the debt owed to the 2nd Defendant.

Further, the 2nd Defendant averred that; as of the date of transfer, contrary to the allegations of fraud made by the Plaintiff, there did not exist any encumbrance on the suit property and that the 2nd Defendant is a **bonafide purchaser for value** as he was never aware of the existence of a caution registered by the Plaintiff over the suit land.

The matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for himself and called no witness. The 2nd Defendant also gave evidence for himself and called no witness. The 1st Defendant did not appear in Court on the date of the hearing and thus the case was closed without any evidence from 1st Defendant.

PLAINTIFF'S CASE

PW1 David Khayo Kokoko, the Plaintiff herein, stated that he obtained a Decree from the **Chief Magistrates Court** dated **26th January, 2015**, having successfully prosecuted **Nairobi CMCC 315 OF 2014**. That after obtaining the Decree, he attempted to execute the same by attaching the suit property herein being (**L.R. No. GITHUNGURI/NYAGA/1637**) which was registered in the name of the Judgment Debtor in **Nairobi CMCC 315 OF 2014**, one **Caroline Wambui Mwaniki**.

PW 1 testified that he instructed auctioneers who visited **L.R. No. GITHUNGURI/NYAGA/1637**, and found **Humphrey Maina Kinyanjui**, 2nd Respondent herein, who alleged to have title to the said property. That he had placed a caution over the said property on **18/10/2012**, and the same was fraudulently lifted. Further that he was not given a **notice** that the **caution** would be lifted and there was no Court Order to that effect. Further, that the entries on the Green Card **had** not been signed contrary to the provisions of the **Land Act**. That he had registered a second caution on the suit property and that an application to remove the same had been made, but the caution was still in place. He urged the court to grant his claim as what was done was fraud.

In cross examination PW 1 testified that he obtained a Decree against **Caroline Wambui Mwaniki**, for an accruing debt. That the Caution he had placed was lifted by the Land Registrar on **10/2/2014**. Further that the entries made on the **Green Card** before the caution was removed was transfer of the suit land to the Children of **Caroline Wambui Mwaniki**, and the 2nd Defendant bought the suit land from the said children.

In addition **PW 1** testified that there was collusion between the Defendants to have the caution removed unlawfully. He added that the said **Caroline Wambui Mwaniki**, owed him and he had not directly sued her as she was deceased. That the Decree in the **Chief Magistrates Court**, was issued on **26/1/2015**, and he placed the caution on **18/10/2012**. That he did not have the documents of the case at the Chief Magistrates Court, but the case was concluded in his favour and that he had no evidence in support of the collusion he alleged. He added that the 2nd Defendant was holding an invalid title and no value could accrue from it.

DEFENCE CASE

DW1 Humphrey Maina Kinyanjui, the 2nd Defendant herein is the registered owner of the suit property. That he is a business man and he used to do business with **Caroline Wambui**. That he advanced the said Caroline, a loan of **Kshs. 8,000,000/=** which she was to repay. That he advanced the said loan to Caroline to enable her service a tender she had been awarded. That he later realized that Caroline had conned him and he reported the matter to the Police. That it was only after he reported the matter to the Police that Caroline agreed to partially repay him by transferring the suit property to him. That at the time, the suit property was registered in the name of Caroline's sons and an official search conducted evidenced the same. That via a sale agreement dated **7th April 2014**, Caroline's sons agreed to transfer the suit property to him as part payment of the loan he had advanced and their mother. That at the time of transfer, he conducted an official search over the suit property and there was no indication of a caution placed. That he received a letter from the Plaintiff demanding that he offsets the amount owed by Caroline, but he declined as he also had a claim against her. The suit land settled part of the money he advanced Caroline and therefore he legitimately and legally acquired the same.

The 1st Defendant as indicated herein above was not present at the hearing and therefore did not call any witnesses to the stand.

After *viva voce* evidence, the Court directed the parties to file their written submissions. The Plaintiff through the **Law Firm of Ongegu & Associates Advocates**, filed his written submissions dated **25th March 2021** on **1st April 2021**, and submitted that Ms. **Caroline Wambui Mwaniki**, having been a Defendant in **Nairobi CMCC No. 315 of 2014** and ultimately having been adjudged by the said court to be indebted to the Plaintiff to the tune of **Kshs. 4,142,714/70** and having at all relevant times, been aware through the Kiambu County Land Registrar's written notice, that her parcel of land registration **GITHUNGURI/NYAGA/1637**, bore a caution registered by the Plaintiff effective **18.10.12**, and yet went ahead to engage in corrupt and fraudulent schemes involving the 1st Defendant, which resulted in the property being transferred to the 2nd Defendant. The Plaintiff submitted that the said illegal transfer was solely meant to defeat the Plaintiff's recourse to the land or any interest therein and for that reason, the Court has an obligation to rectify the register by cancelling the offending entries as provided for under **Section 52** of the **Land Registration Act 2012**.

The Plaintiff further submitted that; the 1st Defendant contravened **Section 73** of the **Land Registration Act, 2012**, on the procedure to be followed when removing a caution. Further that the aforementioned contravention by the 1st Defendant violated the Plaintiff's right to fair **administrative action** envisaged under **Article 47** of the **Constitution** of Kenya. In support of his submissions, the Plaintiff relied on the following cases; **Esther Ndengi Njiru and Another vs. Leonard Gatei Mbugua (2020) Eklr** and the case of **Elijah**

Makeri Nyangw'ra vs. Stephen Mungai Njuguna & Another (2013)Eklr.

It was the Plaintiff's further submissions that he had proved his case on a balance of probabilities and he urged the court to grant the prayers sought in the Plaint dated 15th February 2017.

The 2nd Defendant filed his written submissions dated 30th September 2021, on 7th October 2021, through the **Law Firm of Igeria and Ngugi Advocates** and submitted that the 2nd Defendant was merely a bona fide purchaser for value and he did not choose to be a party and was dragged into the proceedings which left out the main protagonist **Caroline Wambui** and her adult children. The 2nd Defendant submitted further that it is trite law that **he who alleges must prove** and the Plaintiff had failed to prove his case. The 2nd Defendant urged the court to dismiss the suit with costs.

The 2nd Defendant in support of his submissions relied on the cases of; ***Shimoni Resort Vs. Registrar of Titles and 5 others (2016) eKLR***, ***Alice Chemutai Too vs. Nickson Kipkurui Korir & 2 others (2015) eKLR*** and ***Gami Properties Limited vs. National Social Security Fund Board of Trustees & Chief Land Registrar (2021) eKLR***.

The Court has 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. *Did the 1st Defendant illegally and fraudulently remove the caution placed by the Plaintiff?*
2. *Whether the 2nd Defendant was a bonafide and/or innocent purchaser for value of the suit property?*
3. *Whether the 2nd defendant acquired a valid title to the suit property?*
4. *Who should bear the cost of the suit*

(i) Did the 1st Defendant illegally and fraudulently remove the caution placed by the Plaintiff?

Section 2 of the Land Registration Act defines a caution to include a notice in the form of a register to the effect that no action of a specified nature in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gave the notice.

Section 71 (1) of the Land Registered Act Cap No. 3 of 2012 states as follows; -

“A person who—

(a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;

(b) is entitled to a licence; or

(c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge,

may lodge a caution with the Registrar forbidding the

registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge”.

Section 73 of the aforementioned Act states as follows;

“(1) A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar.

(2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

(3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

(4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.

(5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the

chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any

dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.

(6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under Section 74 shall not be affected by the cancellation”.

The Plaintiff testified that he placed a caution on the suit property pending the hearing and determination of **Nairobi CMCC 315 of 2014**. The Plaintiff did so with the anticipation of getting a **favorable judgment and Decree** in the matter, which Decree he would then enforce by attaching the suit land which at the time, was duly owned and registered by one **Caroline Wambui Mwaniki**, who was the Defendant in **Nairobi CMCC 315 of 2014**.

The Court notes that at the time the Caution was placed on **18th October 2012**, the Plaintiff had no registrable interest in the suit land as described under **Section 71 of the Land Registration Act**, above mentioned. Therefore, the caution as placed at the above mentioned date served no purpose. The **Land Registration Act in Section 75 provides for wrongful cautions and states to wit as follows;**

“Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person.”

Further, in the case **Milkah Muthoni Wagoco...Vs...County Council of Kirinyaga & 2 Others [2017] eKLR**, the court held inter alia that:

“Further, a caution can only be lodged and maintained on a parcel of land by a party who can demonstrate a right or interest in the land, lease or charge. The 1st Respondent has not advanced any interest in the suit property or any reason why the caution lodged thereon should remain on the register. I would therefore make a finding that the 1st and 2nd Respondents have violated the Petitioner’s rights under Article 47 of the Constitution and further order the removal of the caution lodged on the suit property.”

Under **Section 73 (1) of the Land Registration Act**, a caution may be removed by the Cautioner or by the Registrar or by the Court. The Plaintiff testified in Court that the Caution he placed over the suit property was fraudulently removed by the 1st Defendant in collusion with the 2nd Defendant. In support of his testimony, the Plaintiff produced a Copy of **Green Card** abstract. The Defendants vehemently denied the allegations made by Plaintiff. However, since the 1st Defendant failed to appear in Court to table any evidence in Court to rebut or challenge the veracity of the Plaintiff’s evidence, the Court is unable to ascertain how the said caution was removed.

Be that as it may, this Court is called upon to find that the conduct of the 1st and 2nd Defendants is wrongful in line with **Section 73 of the Land Registration Act**. Other than the official search and a copy of the said Green Card, the Plaintiff has not brought before this Court any certified records indicating that indeed there was any involvement of the 2nd Defendant in causing the caution to be removed. The above notwithstanding, the Court is satisfied that the caution was indeed removed and though there was no evidence from the 1st Defendant that he followed the procedures laid down in **Section 73 of the Land Registration Act**, the Court finds that the Plaintiff had no registrable interest on the suit property and the said caution had been wrongfully placed. Therefore the Court cannot hold and find that the Plaintiff had lawfully placed a caution which was fraudulently removed by the 1st Defendant.

The Court notes that the Plaintiff has not sued **Caroline Wambui Mwaniki** in the instant suit even though he has on many occasions admitted that it is the said **Caroline** who owed him money and that she was the Judgment Debtor in **Nairobi CMCC 315 of 2014**. In addition, the court notes that, from the Plaintiff’s testimony, the said **Caroline** is deceased though no evidence to that effect was adduced before the Court. Based on the above, the Court finds and holds that the said **Caroline Wambui Mwaniki** and or her estate, if she is indeed deceased, are a necessary party to this suit. However, since the Plaintiff opted not to include them in the instant suit, then this Court shall not delve any further into that realm.

(ii) Whether the 2nd Defendant was a bonafide and/or innocent purchaser for value of the suit property?

The 2nd defendant in his evidence maintained that he had validly and procedurally acquired the suit property from **Martin Mwaniki Ndichu** and **John Nganga Ndichu**, who were the registered proprietors in **2014**, when he entered into a tripartite agreement dated **7th April 2014**, for transfer of Title Number **Githunguri/Nyaga/1637**. This was evidenced by a copy of the Title Deed for **GITHUNGURI/NYAGA/1637**, issued at Kiambu District Lands Registry on **13th March 2014**. The 2nd defendant was entitled to rely on the title register in executing and enforcing the aforementioned agreement dated **7th April 2014**. Once the caution that had been lodged against the register was removed, and the title to the suit property transferred to **Martin Mwaniki Ndichu** and **John Nganga Ndichu** (minor) the 2nd Defendant was entitled to proceed with the acquisition of the suit property. In any case, the 2nd Defendant testified under oath that at the time the agreement for transfer of title was executed and the transfer documents were lodged at the Land Registration Office, he was not aware of any Caution placed over the suit property and an official search that was done also failed to show the existence of a caution.

The 2nd Defendant was registered as proprietor of the suit property vide a **Title Deed** issued on **8th April, 2014**. Upon registration as the proprietor, the 2nd Defendant was vested with absolute rights of ownership in terms of Sections **24** and **25** of the **Land Registration Act, 2012**. His title could only be challenged under the limited instances set out under **section 26 (1) (a) and (b) of the Land Registration Act,**

2012, otherwise his title was indefeasible. *Section 26 (1) (a) & (b) provides:-*

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.

Therefore, was the 2nd Defendant a bonafide purchaser for value without notice? The 2nd Defendant's title can only be impeached if it is demonstrated and proved that he acquired the same fraudulently and/or he was privy to any fraudulent conduct of his predecessor. In the manner, he acquired the title that was transferred to him and/or that by exercise of due diligence, he would have become aware of such fraudulent conduct. In the case of *Samuel D Omwenga Agwenyi -vs- National Land Commission & 2 others (2019) eKLR*, where the Court sitting in Kisii considered the application of the doctrine of indefeasibility of title and relied on the Court of Appeal decision in the case of *Charles Kaaraathe Kiarie & 2 Others -Vs- Administrators of Estate of John Wallace Mathare (deceased) & 5 others (2013) eKLR*, where the Court held:-

“The Registration of Titles Act is entirely a product of the Torren system of registration. The Word “Torrens” is derived from Sir Robert Torrens, the third premier of South

Australia and Pioneer and authors of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register, which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss, arising from an error in registration the person affected is guaranteed of government compensation. This statutory; presumption of indefeasibility and conclusiveness of title under the Torrens system can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved”

In the *Omwenga Agwenyi* case (supra), the Court further stated that:-

“In my view section 26 1(a) & (b) is a codification of the principle of indefeasibility of title, such that where a person is registered as proprietor of a parcel of land his/her title can only be impugned on grounds of fraud and /or misrepresentation to which he is shown to have been involved in and/or party to.”

In the present case, the Plaintiff has not proved that the 2nd Defendant was registered as proprietor fraudulently. The 2nd Defendant has demonstrated that he entered into a sale agreement with *Martin Mwaniki Ndichu* and *John Nganga Ndichu* on **7th April 2014**, and after the transaction was completed, the suit property was transferred to him and a title issued in his favour on **8th April 2014**. As at the time he was registered, there was no encumbrance registered against the title. The abstract of title (**green card**) shows that a caution that had earlier been registered against the title was removed on **10th February 2014**.

There was no evidence that the 2nd Defendant had anything to do with the removal of the caution registered by the Plaintiff. It is never enough for a party to merely allege fraud and leave it up to the court to infer or deduce fraud from the facts. Fraud has to be pleaded and proved

by evidence. See the case of *Kinyanjui Kamau -Vs- George Kamau Njoroge (2015) eKLR*, where the Court of Appeal stated as follows: -

“In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In Vijay Morjaria -Vs- Nansingh Madhusingh Darbar & Another (2000) eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

In the present matter, the Plaintiff merely averred that the 1st Defendant fraudulently transferred the suit property to the 2nd Defendant. The onus of proving fraud rested on the Plaintiff and in the circumstances, the Court finds and holds that the Plaintiff did not prove any fraud on the part of either the 1st Defendant or the 2nd Defendant.

The upshot of the foregoing is that the Court finds and holds that the Plaintiff has failed to prove his case against the 2nd Defendant on the required standard of balance of probabilities.

(iii) Whether the 2nd Defendant acquired a valid title to the suit property?

The Court been satisfied that the 2nd Defendant was a bonafide purchaser for value without any notice of any defect in the title, finds and holds that he therefore acquired a valid title, which is **absolute** and **indefeasible**. The 2nd Defendant is thus entitled to enjoy the full rights of

a registered proprietor and the 2nd caution registered against the title by the Plaintiff is without any justification.

i. **Who should bear the costs of this suit?**

Section 27 of the **Civil Procedure Act** grants the Court 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 has been presented and therefore the 2nd Defendant 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 relevant provisions of law, the Court finds and holds that the Plaintiff has **not** proved his claim against the Defendants herein on the required standard of balance of probabilities.

For the above reasons, the Court finds the Plaintiff's claim as contained in the Plaint dated **15th February, 2017**, is **not merited** and the same is dismissed entirely with costs to the 2nd Defendant herein.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 30TH DAY OF NOVEMBER, 2021.

L. GACHERU

JUDGE

In the presence of;

Kuiyaki - Court Assistant

Present in person (Khayo) - the Plaintiff

N/A for the 1st Defendant

Mr. Muturi for the 2nd Defendant

L. GACHERU

JUDGE