



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 201 OF 2015

ZAKAYO GATHINYE NJOROGEPLAINTIFF

VERSUS

JOSEPH KARIUKI MUKUNGA.....1ST DEFENDANT

ANDREW GICHUKU NJURU..... 2ND DFENDANT

BEATRICE NJOKI NGANGA.....3RD DEFENDANT

JENIFFER WAMBUI GICHUKI..... 4TH DEFENDANT

GRACE WANJERI GICHUKI..... 5TH DEFENDANT

STELLA MURUGI GICHUKI..... 6TH DEFENDANT

SYMAR LIMITED.....7TH DEFENDANT

FREDRICK CHOMBA GITUKU..... 8TH DEFENDANT

FRIDA OBUCHELA HAGEMBE..... 9TH DEFENDANT

JERIOTH WAMBUI GATHUTHI..... 10TH DEFENDANT

ANNWANGUI NJUGUNA..... 11TH DEFENDANT

DISTRICT LAND REGISTRAR.....12TH DEFENDANT

JUDGMENT

INTRODUCTION

1. By an amended Plaint dated 12th March 2020 the plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -

a) A Declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the newly subdivided portions known as L. R. Number Ruiru/Kiu/Block 2 Githunguri 6998, 6999, 7000, 7001, 7002, 7003, 7004, 7005, 7006 and 7007 (formerly known as Ruiru/Kiu/Block 2 Githunguri 3119) situated within Kiambu County.

b) An order of Permanent Injunction restraining the defendants either by themselves, their employees, servants and/or agents from trespassing on, continuing being in occupation, purporting to sell, sub-dividing, erecting structures and/or in any other manner interfering with the plaintiff's quiet enjoyment and possession of L. R. Number Ruiru/Kiu/Block 2 Githunguri 6998, 6999, 7000, 7001, 7002, 7003, 7004, 7005, 7006 and 7007 (formerly Ruiru/Kiu/Block 2 Githunguri 3119) situated within Kiambu County.

c) An order cancelling the subdivision of L.R. Number Ruiru/Kiu/Block 2 Githunguri 3119 (initially registered in the name of Zakayo Gathinye Njoroge) into L.R Numbers Ruiru/Kiu/Block 2 Githunguri 6998, 6999, 7000, 7001, 7002, 7003, 7004, 7005, 7006 and 7007 and in place thereof the registration of the subject portions do revert back to Zakayo Gathinye Njoroge.

d) Costs of the suit.

e) General damages for trespass.

f) Further or other relief as may be just and expedient in the circumstances of the case.

PLAINTIFF'S CASE

2. It was the plaintiff's contention that he is a member of Githunguri Constituency Ranching Co. Ltd Ruiru which company allocated him the parcel of land known as Ruiru KIU Block 2/Githunguri/3119.

3. The Plaintiff avers that the aforesaid land buying company initiated the process of processing the Title Deed in favour of the plaintiff in respect of the parcel of land known as RUIRU KIU BLOCK 2/GITHUNGURI/3119 but did not hand over the title deed to him.

4. The Plaintiff avers that upon making inquiries from the company, he was advised that the company premises were broken into on or around 14 September 2009 and documents stolen part of which included the plaintiff's title deed.

5. It is his contention that he was at all material times registered as the absolute proprietor of all that parcel of land known as L.R Number RUIRU KIU BLOCK 2/GITHUNGURI/3119 situated within Kiambu County and a title deed was duly issued in his name on 9th August, 1993 under the provisions of the Registered Land Act Cap 300 Laws of Kenya but which title deed was not handed over to him by Githunguri Constituency Ranching Co. Ltd - Ruiru.

6. The Plaintiff avers that on or around 18/09/2010, the 1st defendant herein purportedly transferred the suit property to himself vide a fraudulent transfer which was purportedly registered by the 12th defendant on 22nd September 2010.

7. Furthermore, the 12th defendant on or around 1st April 2011 fraudulently and in collusion with the 1st defendant based on the fraudulent transfer purportedly cancelled the plaintiff's title deed on sub-division and gave the sub-divided plots new Numbers to wit Ruiru/Kiu/Block 2 Githunguri 6998, 6999, 7000, 7001, 7002, 7003, 7004, 7005, 7006 and 7007.

8. The Plaintiff contends that the 1st defendant in-turn fraudulently sold the subdivided portions to the 2nd to 11th defendants who bought the plots without conducting due diligence to ascertain who the registered owner of the parcel of land was.

9. The plaintiff contends that the 1st defendant conspired with the 12th defendant to fraudulently and unlawfully dispossess the plaintiff of his lawfully acquired land. In the month of July, 2014, the plaintiff visited Thika District land offices whereat he was supplied with a copy of the fraudulent transfer and copies of greencards.

10. The plaintiff avers that the particulars of fraud are as follows:

a. The 12th defendant fraudulently purported to register a transfer in favour of the 1st defendant whilst it knew or ought to have known that the ID card number, the pin certificate, photo affixed, and the signature are not the plaintiff's herein and that the 12th defendant lacked capacity to do so since the plaintiff was the registered owner.

b. The 12th defendant fraudulently conspired with the 1st defendant and purported to close the file for title deed from L. R. Number Ruiru/Kiu/Block 2 Githunguri 3119 to plot numbers 6998, 6999, 7000, 7001, 7002, 7003, 7004, 7005, 7006, and 7007 upon a fraudulent and unlawful sub-division.

c. The 1st and 12th defendants fraudulently conspired to unlawfully subdivide L. R. No 3119, issued new title numbers whereafter the 1st defendant sold them to 2nd to 11th defendants when he knew or ought to have known that he lacked capacity to deal with the subject parcel of land.

d. The 2nd to 11th defendants knew or ought to have known that the 1st defendant was not the registered proprietor of the parcel of land but nonetheless proceeded to fraudulently purport to buy the said plots.

11. Additionally, the plaintiff contends that by reason of the aforesaid acts of fraudulent dealings, the 1st to 11th defendants trespassed upon the plaintiff's parcel of land to the detriment of the plaintiff. By virtue of the defendants acts of trespass to the suit property, the defendants have misused, wasted, damaged and/or degraded the suit property by reason of use and enjoyment of the suit property.

12. Lastly, it is his contention that the defendants have threatened and intend to continue with their acts of trespass unless restrained by this Honourable Court. By reason of the aforesaid matters the plaintiff has suffered loss and damage.

13. All the Plaintiff's averments were collaborated by Daniel Gutu and John Maina Mburu.

EVIDENCE BY THE PLAINTIFF

14. **PW1 – Zakayo Gathinye Njoroge** adopted his witness statement dated **9/03/2015, and further statement dated 12/03/2021** including the list of documents dated 9/03/2015, the second list of documents dated 13/7/2021, another list of documents dated 21/09/2018 and a supplementary list of documents dated 12/3/2020. He testified that owned the suit property and never sold it. Those he has sued did forgery then they registered his identity card number xxxx. They used another identity card, another picture, another KRA pin to transfer. He reiterates that he never sold his land to Joseph Kariuki. He testified that they did forgery.

15. When he was cross examined, he testified that he did not have a copy of the title deed and when he went to follow up the same at the Registrar of Lands at Thika, he was informed that the title deed had been issued yet he was the only one with the documents concerning the suit property. He then went to the Githunguri Ranching where he was told that the offices of Githunguri Ranching Company were broken into and some title deeds were stolen including his. The officials informed him that they should wait for investigations to be carried out. He reiterated that he is the owner of the suit property and that he has ownership documents since 1966.

16. He testified that he went to the Registrar of Lands in Thika to get his title and he was informed that some people had taken out the title.

17. He reiterated that he did not sell the suit property. That he never went to any advocate, he did not sign nor get transfer forms and that the signature thereon is not his. He maintained that he has never seen Joseph Mukunga the 1st Defendant and that he never went to any lawyer. He also confirmed that he never signed the Land Control Board form. He further maintains that he has never been given the title deed although the green card shows transfer to one Joseph Mukunga.

18. Upon the close of his case, it was his evidence that he has never seen the title deed. He was and is still a member of Githunguri Ranching Company and therefore even if they prepared the affidavit swearing that he was applying for a title deed, they never gave it to him. He still maintains that he has never transferred the land to anyone, and the transfer documents do not bear his picture nor his signature.

19. He produced the list of documents as exhibits 1 to 9, 10 to 17 and 18 to 20 showing different documents.

20. **PW2 – Daniel Gutu, - Hand Writing Forensic Expert** adopted his witness statement dated 21/9/2018 together with a Report where he recorded that he had received two documents, that is; the transfer of land form and land control board consent form. It was his evidence that the questioned signatures which were purported to be by Zakayo Gathinye Njoroge the plaintiff herein were analyzed where he compared the same with known specimen and found that the two signatures were not similar. That the plaintiff herein did not sign those two documents. He produced the report dated 21/9/2018. It is his evidence that the questioned signatures don't share any writing characteristics when compared with known signature specimens of the plaintiff.

21. **PW3 – John Maina Mburu**, informed the court that he is the chairman of Githunguri Constituency Ranching Co. Ltd and went ahead and adopted his witness statement dated 21/2/2020. He has been the chairman since 12/9/2009 to date. He confirmed that the plaintiff is a member of the company and the owner of the suit property. He confirmed that the plaintiff had not collected his title, but the company had initiated the process of processing a title in favour of the plaintiff. They did not finalize the process as on or about 14/9/2009 their offices were broken into and the incident was reported vide OB Number 19 of 15/9/2009. It is his further evidence that the plaintiff later visited the lands office at Thika where he discovered that the land had been transferred to a 3rd party without his consent. It is his further evidence that he has the original register that indicates when one collects the title and in respect of the plaintiff, the register shows that the title was issued and that it was the company that collected it.

22. With that evidence, the Plaintiff closed its case.

DEFENDANTS' CASE

23. The 1st defendant did not enter appearance and neither did they file any defence nor any written submissions.

24. The Plaintiff's case is however challenged and controverted by the 2nd to 12th defendants.

2nd to 11th Defendants

25. The 2nd to 11th defendants filed an amended statement of defence dated 26/6/2021 wherein they pray that the Plaintiff's suit be dismissed with costs.

26. The 2nd to 11th Defendants avers that they did carry out a search for the Title Number: Ruiru Kiu Block 2/3119 with the Thika District Lands Office which search indicated that the 1st Defendant was the registered owner of the parcel of land.

27. That further to the verification of title and inspection of the premises, the 2nd to 11th Defendants confirmed that the parcel of land corresponded with that on the survey map held by the Survey of Kenya and that it was vacant and free from any encumbrances.

28. That on such verification, the 2nd to 11th Defendants did enter into a sale agreement with the 1st Defendant for sale of the parcel of land for Kshs. 3,350,000/- which agreement provided for payment of Kshs. 1,000,000/- on execution of the sale agreement which payment was effected and the entire parcel of land fenced.

29. Further to that the agreement provided for subdivision of the parcel of land into 10 units one for each Defendant which subdivision was

effected by the 12th Defendant and the subsequent units being Title Number Ruiru/Kiu Block 2 6698, 6699, 7000, 7001, 7002, 7003, 7004, 7005, 7006 and 7007 were registered under the 1st Defendant.

30. Once the beacons were in place and consents to transfer attained for the subdivision, the 2nd to 11th Defendants proceeded to pay the balance of the purchase price to the 1st Defendant and took possession of their respective parcels of land.

31. To the contrary, they aver that the plaintiff is the party that trespassed and wasted the 2nd to the 11th Defendants' parcels of land by demolishing the boundary wall erected by the 2nd to 11th Defendants and constructing therein a shed using the 2nd to 11th Defendants' materials. That the Plaintiff then purposefully abandoned the premises leaving it susceptible to fraudulent dealings and hampered any attempts by the 2nd to 11th Defendants to maintain and re-establish the demolished perimeter wall.

32. It is their contention that they are the ones who have suffered loss and damages as they are now unable to use the premises as they had earlier intended and have watched their investment lie to waste due to the demolition by the Plaintiff who seeks to reap profits from what he had already disposed of to the 1st Defendant.

33. That without prejudice to the above and in any event, the 2nd to the 11th Defendants aver that the Plaintiff has failed to show that neither the 2nd to 11th Defendants were party to fraud, if any, nor that there were any other grounds to support his assertion that the 2nd to 11th Defendants' rights, as bona fide purchasers of the land should be extinguished by this Honourable Court.

12th Defendant

34. The 12th Defendant filed a statement of defence dated 9/03/2020 wherein they pray that the Plaintiff's suit against them be dismissed with costs.

35. The 12th defendant denies the contents of the plaint. It particularly denies that the plaintiff is or ever was the registered proprietor of the suit property known as L.R. No. RUIRU/KIU/ BLOCK 2 GITHUNGURI 3119 and or that the plaintiff was issued with a title deed on 9th August 1993 as alleged or at all.

36. The 12th defendant avers that if at all the suit property was registered in the names of the 1st defendant and thereafter sub-divided, then the same was based on documents presented before the 12th Defendant's offices who exercised due diligence and the said documents being believed to be genuine were thus registered. The 12th Defendant thus performed their duties as prescribed by the law without any unprofessionalism as alleged or at all.

37. The 12th Defendant denies that the plaintiff has suffered loss or damage as alleged.

38. The 12th defendant avers that the plaintiff is not entitled to costs of the suit against the 12th defendant.

39. Without prejudice to the generality of the above paragraphs, the 12th Defendant states that should they be found culpable by the court for the registration of the 1st defendant and consequent sub-division on reliance on the information or misrepresentation of the 1st defendant and the plaintiff will have suffered loss, it shall seek indemnity under Order 1 Rule 24 of the Civil Procedure Rules as against the 1st defendant herein.

EVIDENCE BY THE DEFENDANTS

2nd to 11th Defendants

40. DW1 – Francis Njuguna adopted his witness statement dated 26/06/2021 and 27/06/2021 together with a list and bundle of documents dated 7/01/2016. It is his evidence that when the defendants carried out a search, it indicated that the suit property belonged to the 1st defendant. He produced the official search for Ruiru. They then entered into an agreement and had done their due diligence. After buying the suit land, they decided to sub-divide the same and each was issued with their titles.

41. It is also his evidence that since this case was lodged, they called the CID who showed them that the transfer to the 1st defendant was irregular. He contends that he has never seen the plaintiff or even dealt with him. That when they bought the suit premises, they put beacons and fenced the area. They then found a broker in Ruiru who was the one who introduced them to the 1st defendant. He added that once he bought the land from the 1st defendant he never saw him again and they also did not keep in touch.

42. The 2nd to 11th defendants closed their case.

12th Defendant

43. The 12th defendant adopted its list of documents filed on 10/03/2020. They filed the green card of the land and the subdivisions and adopted them as their documents marked as exhibits 1 to 11. The documents that were adopted were a mutation from 0377531 and was marked as doc. No. 1 of January 2011. Annexed to the mutation was the original title deeds in the name of the 1st defendant, the original consent to subdivide the suit property serial number 460599 and other documents annexed to the mutation is the original application form of

the Land Control Board for the consent to subdivide the suit property. The last document is the receipt for payment for Kshs. 3,500.00 serial number 2146655.

44. DW2 – Robert Mugandi Mbuba, is the Land Registrar currently stationed at Ruiru Land Registry. It is his evidence that the last registered owner of the suit property was the 1st defendant, Joseph Kariuki Mukunga of ID Number 1818250 which got registered on 22/9/2010. He was registered as transferee from the plaintiff, Zakayo Gathinga Njoroge of ID No. 1840587164. He contends that the 1st defendant subdivided the suit property on 4/10/2011 to produce new parcels titles no. Ruiru/Q Block Z/ Githunguri/6998 to 7007. Number 6998 was transferred on 7/03/2011 to the 2nd defendant, 6999 was transferred to the 3rd defendant and so on.

45. The 12th defendant closed its case.

PLAINTIFF'S FURTHER RESPONSE

46. The plaintiff filed a reply to defence dated 2/2/2016 whereby he reiterated the contents of his amended plaint.

47. The plaintiff contends that the 1st defendant lacked capacity to pass title over a parcel of land which the 1st defendant had acquired illegally and through a fraudulent transaction.

48. The plaintiff avers that he has never parted with possession of any portion of the land formerly known as Ruiru/KIU/Block 2 Githunguri 3119. The plaintiff denies that the defendants had erected a boundary wall as alleged.

49. Further to the foregoing, the plaintiff avers that he cannot trespass on his own land.

50. Lastly, it is the plaintiff's contention that plaintiff avers that the 1st defendant lacked capacity to dispose of the plaintiff's land and any transaction entered into between the 1st defendant and the other defendants touching on the suit premises was fraudulent and consequently, void ab initio.

51. The plaintiff prays that the defendants' statement of defence be struck out with costs and judgment be entered in the plaintiff's favour as prayed for in the plaint.

52. The plaintiff was given 3 days to file his written submissions and the defendants had 3 days thereafter to file their written submissions.

THE PLAINTIFF'S SUBMISSIONS

53. The Plaintiff's submissions are dated 5 /11/2021. Their claim is against the defendant as outlined in the amended plaint dated 12 /03/2020 and sought the orders stated therein. The plaintiff testified by adopting his witness statement dated 9th March 2015 and list of documents dated 9th March 2015. That The 1st defendant did not enter appearance nor file a defence in this matter. That The 2nd to 11th Defendants filed their respective defence and a list of documents dated 7th January 2016.

54. It is the plaintiff's advocate's submission that from the parties' evidence, pleadings and documents the following issues can be discerned:

a. Whether the plaintiff transferred land parcel RUIRU /KIU BLOCK 2(GITHUNGURI) 3119 to the 1st defendant?

b. Whether the 1st defendant had a legal title to transfer to the 2nd -11th defendants.

c. Whether the plaintiff has proven his case.

d. Costs

Whether the plaintiff transferred the land parcel RUIRU /KIU BLOCK 2(GITHUNGURI) 3119 to the 1st defendant?

55. It is the plaintiff's advocate's contention that he is a bona fide shareholder in a company known as GITHUNGURI CONSTITUENCY RANCHING CO. LTD (Hereinafter called the company) which company is a land buying company.

56. The plaintiff denied ever selling the land to the 1st defendant and ever collecting the title deed from the company offices. It is his submission that as per the plaintiff documents, we have a title deed in the name of the plaintiff with an identity card written as Zakayo Gathingye Njoroge. The plaintiff's identity card is also attached to the list of documents and his identity card is 0710866.

57. He submitted that he has a transfer form that states that the plaintiff identity card and PIN are 1840587/64 and A000124791M respectively. That the plaintiff PIN Certificate as shown in the list of documents is A003647486. Hence again contradicting the details on the transfer forms.

58. Further, he submitted that the photos attached to the transfer forms did not belong to the plaintiff. The document examiner testified and produced a report dated 4th March 2015 and confirmed that the plaintiff did not sign the transfer forms but the above were a forgery.

59. The 1st defendant failed to enter appearance or controvert the plaintiff's assertions hence the plaintiff's evidence remains unchallenged.

60. It is not in contention that the plaintiff's identity card is erroneous, the PIN used in the transfer is erroneous, the photo on the transfer form does not belong to the plaintiff, the signature on the transfer form does not belong to the plaintiff.

61. The plaintiff submits that he can therefore conclusively state that he did not transfer the parcel of land to the 1st defendant.

Whether the 1st defendant title had a legit title to transfer to the 2nd -11th defendants?

62. The plaintiff's advocate's relied on section 26(1) of the Land Registration Act 2012 on grounds for cancellation of a certificate of title.

63. It is his submission that the 1st defendant fraudulently acquired his title deed from the plaintiff. Having acquired it fraudulently, it can only then be said that he had nothing capable of transferring to the 2nd -11th defendant.

64. It is the plaintiff's advocate's submission that the 1st defendant having forged all documents pertaining to the Suitland, then the 2nd-11th defendant titles should be impeached and cancelled. He relied on the cases of *Teresia Wangari Mbugua versus Jane Njeri Nduati & another (2020) eKLR ELC CASE NO. 32 OF 2018* and *Alice Chemutai Too ...Vs... Nickson Kipkurui Korir & 2 Others (20151 eKLR.*

Whether the plaintiff has proven the case.?

65. The plaintiff's advocate submits that he prayed for annulment of the defendant's title deed and re-issue of the same to him. He contends that Having come to the conclusion that the plaintiff did not sell the land to the 1st defendant and that the 1st defendant title was fraudulently acquired only infers that the 1st defendant title is *in limine* for cancellation.

66. The 1st defendant title having been cancelled means there is nothing he had to transfer to the rest of the defendants.

Costs

67. It is the plaintiff's submission that Costs should always follow the event and its thus their humble plea that the Plaintiff's case be allowed as prayed for in the plaint with costs.

THE DEFENDANTS' SUBMISSIONS

The 2nd to 11th Defendant's submissions

68. The 2nd to 11th defendants' submissions are dated 16/11/2021. They submitted that the issues for determination are: -

a. Has the Plaintiff satisfied the principle of the indefeasible title?

b. Whether the Plaintiff is entitled to the relief sought?

Has the Plaintiff satisfied the principle of the indefeasible title?

69. It is the 2nd to 11th defendants' submission that vide a sale agreement dated 21/09/2010, they entered into a sale agreement with the 1st Defendant for purchase of the property known as RUIRU KIU BLOCK 2/3119 for the sum of Kshs. 3,350,000/-. The 2nd to 11th Defendants, did their due diligence by conducting an official search of the suit premises with the 12th Defendant. It was established that the suit premises was in the name of the 1st Defendant, and it was free from any encumbrances. Upon completion of the payment of the purchase price, the title of suit property was passed from the 1st Defendant. The suit property subsequently was subdivided and distributed between 2nd Defendant to the 11th Defendant.

70. It is their submission that as per the evidence adduced by the 2nd to 11th Defendant's representative, Mr. Francis Njuguna, he indicated that the 2nd to 11th Defendants did not fraudulently purchase the suit property which was purportedly in the name of the Plaintiff.

71. The 2nd to 11th Defendants were neither aware nor privy of the purported fraud. The records with the 12th Defendant showed that the title was in the 1st Defendants name. The 2nd -11th Defendants are bona fide purchasers for value from the 1st Defendant. They relied on the case of *Katende v Haridar & Co Lid 2 EACA 173* and *section 26 of the Land Registration Act.*

72. It is the 2nd to 11th defendants' submission that the Plaintiff has failed to implicate the 2nd to 11th Defendants on this front. It is uncontroverted that the 2nd to 11th Defendants did not know of the Plaintiff (nor met the Plaintiff) and they only heard of him upon the institution of these proceedings. It is the plaintiff to show that 2nd to 11th Defendants were the ones who took part in the purported fraud and that they had acquired the property unlawfully. They relied on the case of *Isaac Gathungu Wanjohi & Another -vs- Attorney General & 6*

Others [2012] eKLR.

73. In respect to whether the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme, the 2nd to 11th Defendant had proved that they followed the due and proper process of acquiring the property known as RUIRU KIU BLOCK 2/3119 as they did their due diligence by conducting an official search on the property known as RUIRU KIU BLOCK 2/3119 with the 12th Defendant which was established that it was in the name of the 1st Defendant and it was free from any encumbrances. It is on this premise that it is of the view that 2nd to the 11th defendants are bona fide purchasers of the suit property known RUIRU KIU BLOCK 2/3119. They relied on the case of ***Peterson Kiengo & 2 Others -vs- Kariuki Thuo [2012] (eKLR).***

74. It is their submission that, the Plaintiff has failed to satisfy the principle of the indefeasible title.

Whether the Plaintiff is entitled to the relief sought?

75. It is the 2nd to 11th defendants' submission that the Plaintiff, during the hearing of the main suit, stated that he was not issued with a title deed from Githunguri Constituency Ranching Co. Limited which is contradictory to his re-amended plaint dated 12/03/2020 together with his initial statement dated 9/03/2015 and his supplementary statement dated 12/03/ 2020 where he states that he had title deed locked up.

76. It is their contention that The Plaintiff is bound by his own pleadings. It is trite law that parties are bound by its pleadings. They relied on the case of ***Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR.***

77. The 2nd to 11th defendants submits that the Plaintiff has not come to this court with clean hands. That The Plaintiff was sleeping on his rights as he did not actively follow up on the issuance of the title of the property. The Court in this regard should not aide an indolent person who has slept on their rights.

78. They submit that the plaintiff should not be entitled to the prayers sought in the plaint.

79. In view of the above, they pray that Plaintiff's suit be dismissed with costs to the 2nd to 11th Defendants.

The 12th Defendant's submissions

80. The 12th defendant did not file any written submissions.

ISSUES FOR DETERMINATION

81. Having considered all the pleadings filed in this matter, the following arise as the issues for determination before this court.

a. Whether the plaintiff transferred the title to the 1st defendant?

b. whether the 2nd to 11th defendants are bona fide purchasers for value?

ANALYSIS AND DETERMINATION

a. Whether the plaintiff transferred the title to the 1st defendant?

82. The plaintiff, PW1 informed the court that he was a member and a bona fide shareholder of Githunguri Constituency Ranching Co. Ltd which is a land buying company. According to PW1, he was allocated the parcel of land known as Ruiru Kiu Block 2/Githunguri/3119 (*the suit property*).

83. PW1 also alleges that the aforesaid land buying company initiated the process of processing the Title Deed in favour of the plaintiff in respect of the suit property but did not hand over the title deed to him. However, it is his contention that he was at all material times registered as the absolute proprietor of the suit property.

84. To prove that he was a member of the company, the plaintiff produced in evidence the share certificate no. B 148 of 100 shares and the receipt no. 369 dated 24/04/2015 in the amount Kshs. 10,000.00 which was issued to him by the Company for payment of "transfer of the shamba ballot no. 50 A". the chairman of the company informed the court that the plaintiff was indeed a member of the company as well.

85. The evidence before the court shows that the Plaintiff balloted for a plot as a member of the company. It was the evidence of the plaintiff that he is the proprietor of the suit property vide a share certificate no. B 1430 of "1 1/4-acre shamba ballot 50A". Additionally, the plaintiff produced the green card for Ruiru Kiu Block 2 (Githunguri)/3119 indicating that he was the 1st registered owner of the suit property.

86. The plaintiff alleges that he has never sold his property. He alleges that he never went to any advocate, he did not sign or get transfer forms and that the signature thereon is not his. He alleges that he has never seen Joseph Mukunga, the 1st defendant herein. He further alleges that he never signed the Land Control Board form and that he has never been given the title deed although the green card indicates transfer to one Joseph Kariuki.

87. Additionally, PW2 adopted his report dated 21/9/2018 bringing evidence to this court that questioned the signatures in the Land Control Board consent form and the transfer documents from the plaintiff to the 1st defendant herein were not similar to the specimen that the plaintiff provided to the DCI.

88. The evidence by PW2 is believable. I say so because an examination by way of looking at the purported signature on the transfer document and the Land Control Board Consent form, it can be seen that the picture that has been annexed on the transfer form is not the one that appears on the plaintiff's National ID card, the ID Number on the transfer form is not the one that appears on the plaintiff's National ID card and the KRA pin indicated on the transfer form is also not the correct one as per the KRA Pin Certificate produced in court by the Plaintiff. The signatures annexed on the two documents are not similar to the one that appears on the plaintiff's National ID card.

89. Section 80 of the Land Registration Act provides that: "80. (1) Subject to subsection (2), 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.

(2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default."

90. Therefore, from the foregoing, I find that the plaintiff did not transfer the suit property to the 1st defendant.

b. Whether the 2nd to 11th defendants are bona fide purchasers for value?

91. We shall start by considering the provisions of section 26 (1) of the Land Registration Act. The title deed to the suit property before subdivision is challengeable because there was evidence that the same was acquired unprocedurally.

92. The 2nd to 11th defendants admitted that they entered into a written sale agreement dated 21/9/2010 with the 1st defendant for the purchase of the suit property, after carrying out a search which indicated that the 1st defendant was the registered proprietor of the suit property and further due diligence.

93. However, it was the evidence of DW1 that since this case, they were called by directors of CID and they were showed documents that showed that the transfer to the 1st defendant was irregular. He admitted that they did not give him more details but that the 1st defendant was not the owner. The court notes that this suit was instituted on 10th March 2015 when it was filed in court. There is no record that the 2nd to 11th defendants tried to rectify the situation since then.

94. **Black's law Dictionary 8th Edition** defines "bona fide purchaser" as: "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

95. In the recent case of *Elizabeth Githinji & 20 Others .V. Kenya Urban Roads Authority & Others 2019 eKLR* the Court of Appeal described the rights of such a person as follows: -

"The Courts have indeed been consistent that a bona fide purchaser will not be bound by any interests of which he or she does not have actual, constructive or imputed notice, as long as he or she did reasonable due diligence before purchasing." Emphasis added.

96. In *Katende (supra)*, the Court of Appeal in Uganda described a diligent bona fide purchaser for value as: "***For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:***

(a) he holds a certificate of title;

(b) he purchased the property in good faith;

(c) he had no knowledge of the fraud;

(d) he purchased for valuable consideration;

(e) the vendors had apparent valid title;

(f) he purchased without notice of any fraud;

(g) he was not party to any fraud."

97. In my view, from the evidence adduced by the 2nd to 11th defendants, they could be described a *bona fide* purchaser for value at the time of purchase of the suit property if only they had followed up on the CID report to which they were very much aware about. However, when they were notified about the fraud, they did not follow up with the CID even after they were informed that the 1st defendant was not the

owner of the suit property as the transfer was irregular. Therefore, they have not proven that they were not aware of any fraud in respect to how the 1st defendant got his title. **Section 80 (2) of the Land Registration Act** provides that: “(2). *The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.*”

98. I doubt whether the Defendants can claim ignorance and innocence of the long running dispute since the plaintiff herein filed a claim against them. There is therefore no basis of law or fact for me to make a finding that the Defendants are innocent purchasers for value and without notice. In any case, the defendants herein can claim indemnity against the 1st defendant. See Section 81 of the Land Registration Act.

99. The upshot of the foregoing is that the plaintiff has proved their case on a balance of probabilities. Ultimately therefore, there shall be Judgment for the plaintiff as prayed in the Amended Plaint against the defendants in the following terms:-

a. A declaration be and is hereby issued that the transfer and the registration of Ruiru/Kiu/Block 2 Githunguri 3119 to the 1st defendant is null and void “ab initio’ and is hereby cancelled forthwith.

b. A declaration be and is hereby issued that the plaintiff is the duly registered proprietor of the parcel of land known as Ruiru/Kiu/Block 2 Githunguri 3119.

c. An order of rectification of the Register of Titles and reinstatement of the Plaintiff’s name in the Register of Titles at Thika District Land Registry as the proprietor of Ruiru/Kiu/Block 2 Githunguri 3119 be and is hereby issued.

d. A declaration be and is hereby issued that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of Ruiru/Kiu/Block 2 Githunguri 3119 situated within Kiambu County.

e. An order of permanent injunction be and is hereby issued restraining the defendants by themselves, their employees, servants and/or agents from trespassing on, continuing being in occupation, purporting to sell, sub-dividing, erecting structures and/or in any other manner interfering with the plaintiff’s quiet enjoyment and possession of Ruiru/Kiu/Block 2 Githunguri 3119 situated within Kiambu County.

f. An order is hereby issued cancelling the subdivision of L.R. Number Ruiru/Kiu/Block 2 Githunguri 3119 (initially registered in the name of Zakayo Gathinye Njoroge) into L.R Numbers Ruiru/Kiu/Block 2 Githunguri 6998, 6999, 7000, 7001, 7002, 7003, 7004, 7005, 7006 and 7007 and in place thereof the registration of the subject portions do revert back to Zakayo Gathinye Njoroge.

g. The Defendants shall meet the costs of the suit to the Plaintiff.

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF NOVEMBER 2021

.....

MOGENI J

JUDGE

In the presence of:

Mr. Waweru holding /brief Mr. Kanyi - for the plaintiff/applicant

No appearance - for the 1st Defendant

Ms Kihara holding brief Mr. Chege for the 2nd -11th Defendants

No appearance for the 12th Defendant

Mr Vincent Owour - Court Assistant