



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 1587 OF 2014**

**MILDRED ASEYO &**

**KENNETH IDULANI NDENGA**

**(Suing as administrators**

**of the estate of Harun Ndenga Bwondondo).....PLAINTIFFS**

**VERSUS**

**JOHN NJOROGE.....1<sup>ST</sup> DEFENDANT**

**ELIZABETH NJERI.....2<sup>ND</sup> DEFENDANT**

**THE CHIEF LANDS REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs brought this suit against the Defendants through a plaint dated 22<sup>nd</sup> December, 2014 seeking for the following reliefs;
  - a) A permanent injunction to issue against the defendants by themselves or through their agents restraining them from trespassing, or evicting or erecting any structure or building, charging, selling or offering for sale, alienating or in any way interfering with the plaintiffs' property known as L.R No.36/1/180.
  - b) A cancellation of the alleged title to L.R No.36/1/180 held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  - c) Cost of the suit
  - d) Such further orders as the court may deem fit and just to so grant.
2. The Plaintiffs averred that Harun Ndenga Bwondondo, deceased (hereinafter referred to only as "the deceased") was at all material times the registered freehold proprietor of all that property known as L.R No.36/1/180 situated in Eastleigh area, Nairobi (hereinafter referred to as "the suit property") by virtue of an Indenture dated 8<sup>th</sup> June, 1973.
3. The Plaintiffs averred that the deceased died on 13<sup>th</sup> August, 2011 and they obtained a Grant of Letters of Administration in respect of his estate on 2<sup>nd</sup> April, 2014.
4. The Plaintiffs averred that on 19<sup>th</sup> December, 2014, they were summoned by the Assistant Chief Eastleigh Location on the instructions from the law firm of S.Ndege & Company Advocates.
5. The Plaintiffs averred that the said Assistant Chief informed them that he had been asked by the said law firm on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who claimed to own the suit property to evict the tenants who were in occupation of the property.
6. The Plaintiffs averred further that neither the deceased nor the Plaintiffs sold the suit property and that they still had in their possession the original title which had not been transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or to any other person.

7. The Plaintiffs averred that they had been in occupation of the suit property since their deceased father acquired it in 1973 and that they had leased the premises to 20 tenants who risked being evicted without any lawful excuse by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

8. The Plaintiffs averred that the alleged title held by 1<sup>st</sup> and 2<sup>nd</sup> Defendants was either a forgery or was obtained fraudulently with connivance of the officers of the 3<sup>rd</sup> Defendant.

9. All the Defendants entered appearance but failed to file their defences to the Plaintiffs' claim despite having actively participated in the interlocutory application for injunction.

10. In her replying affidavit sworn on 21<sup>st</sup> January, 2015 in reply to the plaintiffs' application for interlocutory injunction, the 2<sup>nd</sup> Defendant contended that she was the leasehold proprietor of the suit property the same having been leased to her by the City Council of Nairobi on 26<sup>th</sup> June, 2001.

11. At the trial, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not attend court. The Attorney General attended court for the hearing but did not tender evidence. Mildred Aseyo (hereinafter referred to only as "PW1") who is one of the Plaintiffs gave evidence on behalf of the Plaintiffs. PW1 told the court that she was a daughter and a co-administrator of the estate of the deceased. She adopted her witness statement dated 22<sup>nd</sup> December, 2014 as her evidence in chief.

12. PW1 stated that the deceased acquired the suit property in 1973 through a mortgage loan that he obtained from Kenya Commercial Bank. She stated that they had occupied the suit property since 1973. PW1 stated that they had let out the property to tenants.

13. PW1 produced documents attached to the Plaintiffs' list of documents dated 10<sup>th</sup> May, 2017 comprising of ; Indenture dated 8<sup>th</sup> June, 1973 in respect of the suit property, certified extracts from the Land Register for the suit property, City Council of Nairobi land rates bills in the name of the deceased, instrument of mortgage dated 8<sup>th</sup> June, 1973 executed by the deceased in favour of Kenya Commercial Bank Limited, correspondence between the deceased and Francis da Gama Rose & Co. Advocates in relation to the suit property, a letter from the Assistant Chief Eastleigh Location dated 19<sup>th</sup> December, 2014 and a purported letter of allotment of the suit property dated 21<sup>st</sup> September, 2001. The documents were produced as Plaintiffs' Exhibits 1 to 8 respectively. PW1 also produced a hand written statement of rent that was being collected from the tenants on the suit property as Plaintiffs' Exhibit 9. PW1 stated that they were all along paying land rates for the suit property to the City Council of Nairobi until 2014 when they went to pay rates and found that the name of deceased had been expunged from the City Council of Nairobi records and replaced with the name of the 2<sup>nd</sup> Defendant.

14. PW1 stated that the 2<sup>nd</sup> Defendant claimed to have owned the suit property since 2001 by virtue of a lease dated 26<sup>th</sup> June, 2001 that was allegedly issued to her by the defunct City Council of Nairobi and registered as I.R No. 148902 at the Land Titles Registry in Nairobi on 21<sup>st</sup> August 2013. PW1 reiterated that the Plaintiffs had not sold nor transferred the suit property to anyone. PW1 stated that in any event the suit property was freehold and not leasehold.

15. PW1 stated further that they tried to conduct a search on the suit property in 2014 without success but a previous search they had undertaken on 26<sup>th</sup> November, 2008 showed that the deceased was the owner of the suit property. On examination by the court, PW1 confirmed that she had the original indenture in respect of the suit property.

16. On 28<sup>th</sup> July, 2020, the Plaintiffs on the direction from the court conducted a search on the register of title I.R No. 148902 which the 2<sup>nd</sup> Defendant claimed to have over the suit property. The search confirmed that the said title I.R No. 148902 is in respect of L.R No. 17564/294 owned by Juja South Estate Limited. The title has nothing to do with L.R No 36/I/180(the suit property).

17. The Plaintiffs filed their submissions dated 26<sup>th</sup> November, 2020 in which they submitted that they held a title over the suit property and that they had been in possession and uninterrupted occupation of the property since the same was registered in the name of the deceased 1973.

18. The Plaintiffs submitted that the deceased created a mortgage over the suit property in favour of Kenya Commercial Bank Limited on 8<sup>th</sup> June, 1973 and the original indenture was still held by the bank since the property had not been discharged as shown in the records held by the Government Lands Registry which they produced in evidence.

19. The Plaintiffs submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' claim over the suit property had no basis since a search over Land Title Number I.R 148902 revealed that the title was in respect of a different parcel of land which left no doubt that the documents held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were forgeries.

20. In support of their submissions, the Plaintiffs cited Republic v Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collectors & 15 Others [2006] 1 KLR (E&L) 563 where the court stated that:

**“Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefensibility of title deed.”**

21. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not file submissions. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their submissions dated 9<sup>th</sup> February, 2021. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the Plaintiffs did not prove that the suit property was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and that the 3<sup>rd</sup> Defendant was involved in the alleged fraudulent transfer of the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants cited Gichinga Kibutha v Caroline Nduku [2018] eKLR where the court stated that:

**“13. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt”.**

22. From the plaint, the following in my view are the issues arising for determination in this suit.

- a) Whether the deceased is the lawful owner of the suit property.
- b) Whether the suit property was fraudulently transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
- c) Whether the Plaintiffs are entitled to the reliefs sought.
- d) Who is liable for the costs of the suit?

23. Section 26 of the Land Registration Act, Act No. 3 of 2012, provides as follows:

**26. (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.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.**

24. I am satisfied that the Plaintiffs have proved that the suit property is and has always been registered in the name of the deceased as the owner thereof. The Plaintiffs placed before the court evidence showing that the deceased purchased the suit property through a mortgage loan that he obtained from Kenya Commercial Bank Limited. The Plaintiffs produced in evidence a copy of the mortgage instrument that was executed by the deceased in favour of the said bank. The Plaintiffs also produced in evidence the Indenture dated 8<sup>th</sup> June, 1973 through which the deceased acquired the suit property from the previous owner, Antonia Matilda Braganza. The Plaintiffs also placed evidence before the court showing that the deceased was all along the one on the records of the City Council of Nairobi as the rate payer for the suit property. The Plaintiffs also demonstrated that they are and have always been in possession of the suit property.

25. As I have observed earlier, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants neither filed a defence nor tendered evidence. The evidence that was adduced by the Plaintiffs regarding the ownership of the suit property was therefore not controverted. The 2<sup>nd</sup> Defendant had claimed in the earlier proceedings to have acquired the suit property from the City Council of Nairobi through a lease dated 26<sup>th</sup> June, 2001 that was issued to her by the said Council. The 2<sup>nd</sup> Defendant claimed that the said lease was registered on 21<sup>st</sup> August, 2013 under Grant I.R No. 148902. A search that was conducted by the Plaintiffs on Grant I.R No. 148902 showed that that title has no relationship with the suit property. The title is for L.R No. 17564/294 owned by Juja South Estate Limited. It is my finding from the foregoing that the deceased is the lawful registered owner of the suit property.

26. On whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired the suit property fraudulently, the Plaintiffs have placed overwhelming evidence before the court showing that the deceased is the owner of the suit property. The Plaintiffs have also demonstrated that the purported lease held by the 2<sup>nd</sup> Defendant in respect of the suit property is a forgery since the title in respect of which the lease was issued is for another parcel of land which is owned by a third party. Once again, it is my finding that the 2<sup>nd</sup> Defendant acquired the suit property fraudulently.

27. On whether the Plaintiffs are entitled to the orders sought, it has been proved by the Plaintiffs that the deceased is the lawful owner of the suit property and that the purported lease or title held by the 2<sup>nd</sup> Defendant in respect of the suit property is fraudulent and as such the same is illegal null and void. Since the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have no valid interest in the suit property they had no right to demand possession of the property from the Plaintiffs. The letter dated 1<sup>st</sup> September, 2014 that was addressed to the Plaintiffs by the 2<sup>nd</sup> Defendant's advocates demanding possession of the suit property by 31<sup>st</sup> December, 2014 was in the circumstances without any basis. The Plaintiffs are therefore entitled to an injunction restraining the Defendants from interfering with their possession and enjoyment of the suit property as administrators of the estate of the deceased. The Plaintiffs are also entitled to an order cancelling the fraudulent title held by the 2<sup>nd</sup> Defendant together with the costs of the suit.

28. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants had contended that the Plaintiffs did not prove any wrong doing on their part. I am of the view that the 2<sup>nd</sup> Defendant could not have acquired the fraudulent stamped and registered lease that she purports to give her title to the suit property if the officers of the of the 3<sup>rd</sup> Defendant were not involved in the scheme. I am satisfied that a case of connivance on the part of the 3<sup>rd</sup> Defendant in the 2<sup>nd</sup> Defendant's fraudulent scheme to acquire the suit property has been established.

29. In conclusion, I hereby enter judgment for the Plaintiffs against the Defendants as follows:

- a) A permanent injunction is issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves or through their agents or anyone claiming under them from trespassing, erecting any structure or building, charging, selling, offering for sale, alienating, evicting the Plaintiffs

or in any way interfering with all that property known as L.R No.36/1/180.

b) The lease dated 26<sup>th</sup> June, 2001 issued by the City Council of Nairobi in respect of L.R No. 36/I/180, Grant No. 148902 registered on 21<sup>st</sup> August, 2013 at the Land Titles Registry as No. I.R 148902/1 is cancelled and the 3<sup>rd</sup> Defendant shall forthwith cancel it from the register.

c) The Plaintiffs shall have the costs of the suit to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.

**DELIVERED AND DATED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2021**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Chelule for the Plaintiffs

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

N/A for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Ms. C. Nyokabi - Court Assistant