



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 501 OF 2017

ELIAS BARAGU WAI THANJI PLAINTIFF

VERSUS

THE CHIEF LAND REGISTRAR MINISTRY OF LANDS.....1ST DEFENDANT

JOSEPH MWANGI MAINA.....2ND DEFENDANT

JUDGMENT

Background/History

1. “Anything that can go wrong will go wrong” so goes the Murphy’s law. Indeed things appear to have gone awfully wrong courtesy of a purported consent entered into between one **Joseph Mwangi Maina** and **Jayendra Kumar Lakhamshibhai Shah** in year 2000. First forward, the suit **ELC No. 501 of 2017 (Elias Baragu Waithanji Vs. Chief Land Registrar Ministry of Lands AND Joseph Mwangi Maina)** is closely intertwined with **ELC 221 of 1999 (Joseph Mwangi Maina Vs. Jayendra Kumar Lakhamshibhai Shah AND Elias Baragu Waithanji)** to the extent that the two suits were consolidated and were to be heard together. Not anymore. The consolidated matters came up for hearing on **15.10.2021** when **ELC No. 221 of 2021** was dismissed thus the determination in this judgment is in relation to the claim of the Plaintiff in **ELC No. 501 of 2017**. However, it would not be possible to give a full and proper determination of that claim without analyzing the proceedings in **ELC. 221 of 1999**.

2. At the heart of the dispute is **Land Parcel No. 209/2279 Cross Road Nairobi (herein after, the suit land)** in which **Jayendra Kumar Lakhamshibhai Shah** apparently sold to **Elias Baragu Waithanji** in year 2000 and the latter acquired title and possession to that effect. **Jayendra Kumar Lakhamshibhai Shah**, is alleged to have entered into a consent in the suit **ELC 221 OF 1999** in the year 2000, whereby he was to transfer the suit land to **Joseph Mwangi Maina**. The said consent formed a Gordian knot which over the decades, choked the rights of ownership and interests thereof appertaining to the suit land.

Proceedings in ELC No. 221 of 1999

3. This case was filed by one **Joseph Mwangi Maina** against **Jayendra Kumar Lakhamshibhai Shah** where he was seeking orders *inter alia* that the transfer of **Land parcel No. 209/2279 cross road Nairobi** to the Defendant (**Jayendra Kumar Lakhamshibhai Shah**) be cancelled and that a transfer be effected in his favour. In the alternative, Plaintiff was seeking to be compensated the value of that property. It is noted that for the better part of the lifespan of that suit (**ELC 221 OF 1991**), **Elias Baragu Waithanji** was not a party. He was only brought on board in year 2018 precisely on 23.4.2018 via a court order.

4. Sometime in year 2000 the two parties (**Joseph Mwangi Maina** and **Jayendra Kumar Lakhamshibhai Shah**) allegedly entered into a consent dated 13.12.2000 issued on 20.12.2000, whereby the Defendant, **Jayendra Kumar Lakhamshibhai Shah** agreed to transfer the suit land to the Plaintiff, **Joseph Mwangi Maina**. Years later the Plaintiff (**Joseph Mwangi Maina**) filed an application dated **31.10.2014** seeking orders that the Deputy Registrar of the Court be directed to execute transfer of the suit land in place of the Defendant. He also prayed for the land Registrar of titles to effect the said transfer and register him as the owner of the suit land. The application came up in court on 26.11.2014 and the orders sought were granted.

5. The Plaintiff (**Joseph Mwangi Maina**) was to file another application dated **28.3.2017** in which he sought orders for the land Registrar “*to cancel or expunge from the register entry No. 2 relating to the transfer to one Elias Baragu Waithanji, (Plaintiff in ELC 501 of 2017)* and an order “*for the OCS central Police station upon issuance of the certificate of title to supervise the removal and/or eviction of any trespassers on the suit land*”. That application was allowed by the court on **19.4.2017**.

6. Armed with these two court orders, the Plaintiff in the suit **ELC. No.221 of 1999 (Joseph Mwangi Maina)** evicted the Plaintiff in **ELC. No. 501 of 2017 (Elias Baragu Waithanji)** from the suit premises. **Joseph Mwangi Maina** also became the registered owner of the suit

land.

7. It is pertinent to note that by the time the orders were issued on **26.11.2014** and on **19.4.2017** in the suit **ELC 221 OF 1999, Elias Baragu Waithanji** was not a party in that suit. These events appear to have been the precursor in the filing of the suit **ELC 501 of 2017** on **28.7.2017**. Thus it would be in order to state that the events in **ELC 221 OF 1999** gave birth to the Case **ELC 501 OF 2017**.

8. It came to be that that **Jayendra Kumar Lakhmshibhai Shah** (Defendant in **ELC 221 OF 1999**) had filed an application dated **1.2.2001** in that suit seeking orders that the consent order made on **13.12.2000** and issued on **20.12.2000** be vacated and set aside. He also sought orders that the Commissioner of Lands be restrained from acting upon the purported court order of **20.12.2000**. The 1st Defendant (**Jayendra Kumar Lakhmshibhai Shah**) still had another application dated **13.2.2018** where he sought orders of setting aside the orders given on **26.11.2014** and those given on **19.4.2017** by the ELC Court (different judges). He also sought conservatory orders to stop **Joseph Mwangi Maina** from any further dealing in the suit property. It appears that this is the time **Elias Baragu Waithanji** was coming on board in the suit **ELC 221 of 1999** albeit as a proposed interested party, where he filed an application dated **19.12.2017**. He was seeking several orders *inter-alia* to be restored back into the suit property, the setting aside of the court orders of **19.4.2017** as well as the setting aside of the purported consent order dated **13.12.2000**.

9. Vide a ruling delivered by the court in **ELC 221 OF 1999** dated **20.12.2018**, the judge stated that the consent order of **13.12.2000** was obtained fraudulently and thus the subsequent orders could not stand. In paragraph 18 of the said ruling the Judge stated as follows:

“ The setting aside of the consent order of 13.12.2000 means that all other consequential orders based on it have no basis and have naturally collapsed (Emphasize added). This includes the orders which were granted on 19.4.2018 which were based on the consent which has already been set aside.”

10. The Judge also noted that in so far as the issue of conservatory orders were concerned, the suit property had already been secured by a consent filed in **ELC 501 of 2017** in which the parties had agreed that there would be no further dealings in respect of the suit property.

Dismissal of ELC No. 221 of 1999

11. My first encounter with the two consolidated files was on **16.9.2021** which happened to be my 2nd day upon deployment at Milimani ELC Court. The said matters were scheduled for hearing on that day. The lead file was **ELC 501 OF 2017** hence proceedings were recorded in that file. Present in court were Mr. Kinoti, Mr. Kibe and Mr. Mwathe appearing for Plaintiff in **ELC 501 of 2017** and for 2nd Defendant in **ELC 221 of 1999**, Ms. Kerubo was holding brief for Ms. Ndundu for the 1st Defendant in **ELC 501 of 2017** (The Attorney General), Mr. MacRonald appeared for the Plaintiff in **ELC 221 of 1999 (Joseph Mwangi Maina)** who is the 2nd Defendant in **ELC 501 of 2017**, while Mr. Philip Ongondi appeared for the 1st Defendant in **ELC 221 of 1999 (Jayendra Kumar Lakhmshibhai Shah)**.

12. While seeking an adjournment of the matters, Mr. MacRonald had addressed the court as follows:

“ I am having difficulties tracing my client but my partner (Gatheru) is assisting me to trace him via his wife and he confirms that my client Mr. Mwangi was rushed to hospital this morning. I can produce the medical report. I hence pray for adjournment”.

13. On the same date of **16.9.2021**, it emerged that the firm of Gatheru Gathemia, advocate for **Joseph Mwangi Maina** had not filed their trial bundle of documents. Consequently, the court gave pre-trial directions *inter-alia* as follows;

- Clause 2- The firm of Gatheru Gathemia Advocates to serve their bundle of documents to all other parties within 7 days (by 23.9.2021) otherwise the said documents shall stand as expunged from the record.

- Clause 4 – The firm of Gatheru Gathemia to avail their statement of defence which apparently has been filed in 501 of 2017 by the next court date. In the even the document, (the defence) is none existent, then the said firm is to file and serve their statement of defence by 23/9/2021.

-Clause 5 – By consent case to proceed on 15.10.2021 and 22.10.2021. The case shall not be adjourned. Hearing at 9.00 o'clock in open court.

14. Come the date of **15.10.2021** and there was no representation from the firm of Gatheru Gathemia for the Plaintiff in **ELC 221 of 1999**. Their client, **Joseph Mwangi Maina** too was absent. As the counsels for the other parties were submitting as to why the matter should not be adjourned, a counsel by the name Mr. Mwangi appeared holding brief for MacRonald for Plaintiff in **ELC 221 of 1999**. He averred that the advocate for the Plaintiff was sick with Covid-19 and that the issue had been communicated to the other parties.

15. However, it emerged that the purported medical sheet was signed on **6.10.2021** while the communication to the other advocates was done on **14.10.2021**, just a day before the scheduled hearing date. The court considered that the information had not been relayed in good faith. Further, the court considered that there was not the slightest information as to why the Plaintiff in **ELC No. 221 of 1999** was not present in court, yet he had been around and about signing his witness statement the previous day on **14.10.2021**. The court also noted that the firm of Gatheru Gathemia had been undertaking their process of filing their statements and defence the previous day (**14.10.2021**) which meant that they were able to carry out their duties. Finally, the court considered the age of the matter. Against this background the court dismissed **Case No. ELC 221 of 1999**. The other counsels stated that they had prepared to start with the trial in **ELC 221 of 1999**. In that regard, the court directed

Case	No.	501	of	2017	to	proceed	on	5.11.2021.
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16. On **5.11.2021**, the court noted the presence of Mr. MacRonal, counsel for the 2nd Defendant in **ELC 501 OF 2017**. The file **ELC 221 of 1999** was no longer attached to this other file, the same having been dismissed. However, the court directed the court assistant to avail the **File No. 221 of 1999**, the court also requested Mr. MacRonal to wait.

17. The file **ELC NO. 221 of 1999** was brought to open court at 9.45 am, but by then, Mr. MacRonal had walked out of the court room. He did not return. The court noted that an application had been filed by the firm of Gatheru Gathemia dated **3.11.2021** seeking a review or setting aside the orders of dismissal of suit **No. ELC 221 of 1999** given on **15.10.2021**. The court also noted that the said application had been presented to me in the digital platform (CTS) on **4.11.2021** where the court had given the following directions;

1. That the hearing slated for 5.11.2021 shall proceed as earlier scheduled.

2. That directions on the current application shall be given on 5.11.2021.

18. There being no one to prosecute the application dated 3.11.2021, the court proceeded to dismiss the said application with no orders as to costs and the file **ELC 221 of 1999** was marked as closed.

The hearing and determination in ELC Case No. 501 of 2017

19. As earlier stated herein, the 1st Defendant was represented in court on **16.9.2021** by M/S Kerubo holding brief for M/S Ndundu. On **15.10.2021**, again M/s Ndundu was present when the court gave directions for the matter to be heard on **5.11.2021**. Come that date of **5.11.2021** and the 1st Defendant was nowhere to be found. Thus the hearing in **File No. 501 of 2017** proceeded as an undefended claim.

20. When the trial in **ELC No. 501 of 2017** commenced on **5.11.2021**, counsel for the Plaintiff, **Elias Baragu Waithanji** informed the court that in view of the dismissal of the suit **ELC 221 of 1999**, they were proceeding to abandon prayers a), b), c) and f) in the plaint dated **28.7.2017** so as to be left with **prayers d) and e)** only.

21. The case for the Plaintiff was advanced by two witnesses. **PW1 Elias Baragu Waithanji** introduced himself as the Plaintiff and the claimant of the **suit Plot No. 209/2279** at crossroad Nairobi where he has built a house. He adopted his statement dated 28.7.2017 as his evidence. Therein he states that he is the owner of Land **Parcel Number LR. 209/2279 (the suit land)** having purchased the same from **Jayendra Kumar Lakhmshibhai Shah (PW2)** on 25.9.2000 at the price of Kshs 12,000,000. That due diligence was done which confirmed that the property was free from any encumbrances. There after, the vendor through his advocates availed all the completion documents and the land was duly registered in his name on 31.12.2012.

22. PW1 proceeded to develop the property, but the 2nd Defendant (**Joseph Mwangi Maina**) who was and is still a stranger to him filed a **Nairobi Case No. HCCC. 100 of 2001** against him and **Jayendra Kumar Lakhmshibhai Shah (PW2)** trying to obtain an injunction to restrain pw1 from developing the suit land. However, the application for the injunction was dismissed. That **Joseph Mwangi Maina** proceeded to withdraw the said case from the court only to file the **Judicial Review H. Misc. APP No. 803 of 2004** where he was trying to compel the Land Registrar to de-register the title held by PW1 and to register him (**Joseph Mwangi Maina**) instead. He was basing his argument on the court order from **ELC No. 221 of 1999** ordering PW2 (**Jayendra Kumar Lakhmshibhai Shah**) to transfer the plot to him. However, the Judicial Review suit was dismissed by the court of which **Joseph Mwangi Maina** filed a notice of appeal but he never filed the intended appeal to date.

23. PW1 further stated that sometime in February 2017, he went to the Country Government to pay rates for the suit property and that is when the bill was generated in the name of the 2nd Defendant- **Joseph Mwangi Maina**. Upon inquiries, from the County Government, he was told to write a formal complaint which he did through his advocates. He also tried to conduct an official search at the Land Registry but was told the records were not available.

24. PW1 was in panic prompting him to report the matter to C. I. D Land Anti-Fraud Unit who commenced investigations. They then called him sometimes in mid July 2017 and informed him that they had found the records at the lands office and that there was an order which had caused the registration of the suit land into the name of the 2nd defendant. They had also been shown a **Kenya Gazette Notice No. 8604** where the Registrar had gazetted the loss of a title of the 2nd Defendant and were in the process of issuing a provisional title deed.

25. Having gathered this information, PW1 instructed his advocates to write to the Registrar to put a restriction on the suit property, but the Registrar declined unless there was a court order. That is when he instructed his advocates to file this suit.

26. In his oral testimony, PW1 stated that he had bought the suit property when it had an old house, which he demolished and proceeded to build a five storey building. He was however chased away from the suit plot through a court order emanating from File No. **ELC 221 of 1999**. He contends that he has also been removed from the register through the same same court order. By the time PW1 was giving his testimony in court, he still had his original title in court. He therefore prays that he be reinstated back into the register as well as back into the suit property. He further prayed for losses he has incurred as well as costs.

27. In support of his case, pw1 produced the documents in his list dated 28.7.2017 which are 12 documents running from page 11 to 51 as Plaintiff's exhibits 1-12.

28. PW2 is Jayendra Kumar Lakhmshibhai Shah. He adopted his witness statement dated **27.7.2017** as his evidence. He confirms that he is the one who sold the suit land to Pw1 vide a sale agreement dated **25.9.2000** at a price of Kshs. 12,000,000. He first received a 10% deposit of Kshs. 1,200,000 on **18.9.2000** and was later paid the full balance of the purchase price. He proceeded to execute the transfer documents which were forwarded to Plaintiff's advocates together with all the other completion documents.

29. Thereafter, the suit land was transferred to the Plaintiff and therefore, he knows **Elias Baragu Waithanji** to be the owner of the suit land. He denies ever having sold the land to any other person.

30. PW2 further stated that when the Plaintiff started to develop the suit land, the 2nd Defendant, (**Joseph Mwangi Maina**) filed a **Case No. 100 of 2001** against him and PW1 where he was trying to get an injunction to restrain PW1 from developing the suit land. However, the application for injunction was dismissed. He then withdrew the said case from the court and instead filed a **Judicial Review Misc.App.No.803 of 2004** where he was trying to compel the Chief Land Registrar to de-register **Elius Baragu Waithanji** as the title holder and to register him (**Joseph Mwangi Maina**) as the owner of that land. He was claiming that he had a court order from the Case **ELC No. 221 of 1999** ordering PW2 to transfer the suit land to him. The JR application was however dismissed by the court.

31. In his oral testimony in court, Pw2 stated that he did get to know that the Plaintiff **Elias Baragu Waithanji** was eventually evicted by **Joseph Mwangi Maina Maina**.

Analysis and Determination

32. The issue for determination is **whether the Plaintiff Elias Baragu should be restored as the owner of the suit Parcel No. 209/2279 both in terms of registration and possession.**

33. This is a classic case of tables turning, where the ruling delivered on **20.12.2018** in file **ELC 221 of 1999** has rendered the consent which were allegedly entered into between **Joseph Mwangi Maina** and **Jayendra Kumar Lakhmshibhai Shah** impotent hence not capable of birthing the transfer and registration of the suit property into the name of the 2nd defendant, **Joseph Mwangi Maina**. The said ruling has not been set aside by way of a review or an appeal.

Litigation history

34. Both PW1 and PW2 have given a consistent account of the litigation relating to the disputed parcel. That it is when Pw1 started developing the suit land in year 2000 having bought the same from **Jayendra Kumar Lakhmshibhai Shah** that **Joseph Mwangi Maina** sued them in the case **Nairobi H.C.C. 100 OF 2001 (Joseph Mwangi Maina vs. Jayendra Kumar Lakhmshibhai Shah and Elias Baragu Waithanji)** as captured in the plaint dated **23.1.2001** availed as Plaintiff- exhibit 4(*page 24 of Plaintiff's bundle*). The single prayer sought therein by **Joseph Mwangi Maina** was;

“That the register in respect of the title L.R.No. 209/2279 Crossroad Nairobi be rectified by deleting the name of the 2nd defendant and inserting the name of the plaintiff as the registered proprietor”.

35. **Joseph Mwangi Maina** had then filed an application in that suit dated **25.1.2001** seeking temporary injunctive orders against **Elias Baragu Waithanji** in relation to the suit land. In a ruling delivered by the court on **8.3.2001**, the application was dismissed. With the denial of the injunctive orders, that suit **100 of 2001** appears to have fizzled away and was eventually withdrawn on **5.7.2004**, see Plaintiff exhibit 6 (*page 31 of plaintiff's bundle*). It is pertinent to note that the said suit was anchored on the averments set out in paragraph 8 of that plaint where **Joseph Mwangi Maina** was claiming that there was a **consent order** issued on **20.12.2000** in **ELC 221 OF 1999** in which **Jayendra Kumar Lakhmshibhai Shah** had allegedly consented to transfer the suit land to **Joseph Mwangi Maina**.

36. It is clearly evident that no sooner was the **Case No. Hccc 100 of 2001** withdrawn did, **Joseph Mwangi Maina** file a Judicial Review suit in **Nairobi 803 of 2004** (*see plaintiff exhibit 7 on page 32*). The Chief Land Registrar was the respondent while **Elias Baragu Waithanji** and **Jayendra Kumar Lakhmshibhai Shah** were the interested parties. This time round **Joseph Mwangi Maina** was seeking orders of mandamus to compel the Chief Land Registrar to cancel the name of **Elias Baragu Waithanji** in title of the suit land and register him (**Joseph Mwangi Maina**) as the proprietor of the suit land. The suit was however dismissed with costs on **28.5.2010**.

37. A perusal of the file **ELC 221 OF 1999** reveals that with the filing of the Judicial Review suit, the former suit which had been active upto **30.9.2004** went into a state of dormancy. It was refreshed 10 years later in 2014 when **Joseph Mwangi Maina** moved the court and obtained the orders in **ELC 221 OF 1999** on **26.11.2014** to have the land transferred to him by causing the Deputy Registrar to sign and execute transfer documents.

38. This litigation history depicts the cunning machinations of **Joseph Mwangi Maina** where he flaunted the consent order at every turn, in various litigation platforms through the decades. Eventually, he had his way through the orders of **26.11.2014** and **19.4.2017** where the land was registered in his name and he evicted **Elias Baragu Waithanji**.

39. The fact that **Joseph Mwangi Maina** was filing other suits when the case **ELC 221 OF 1999** was active is a clear manifestation of bad faith. If **Joseph Mwangi Maina** had acquired possession of the land after he bought it as he was claiming in the suit **Hccc 100 of 2001**, then why did he need to evict **Elias Baragu Waithanji** many years later. The logical conclusion to make is that **Joseph Mwangi Maina** had never taken possession of the suit land until he got the orders of **26.11.2014** and **19.4.2017**.

Registration History

40. The registration history of the suit land is captured in the title document availed as Plaintiff's exhibit No. 9 (page 47 of Plaintiff's trial bundle). Entry No. 2 thereof indicates that the suit land was transferred to **Elias Baragu Waithanji** on **31.12.2000**. Entry No. 3 is a caveat by the Registrar of titles dated **29.11.2001**. Entry No. 4 is the withdraw of the caveat on **10.11.2014**. Entry Nos. 5, and 6 captures the effects of the court orders of **30.10.2014** and **26.11.2014** in **Case No. 221 of 1999** in which the Deputy Registrar was directed to sign and execute transfer documents in place of the 1st Defendant (**Jayendra Kumar Lakhmshibhai Shah**). This paved way for entry No. 7 in which the suit land was transferred to **Joseph Mwangi Maina**.

41. In view of the ruling of **20.12.2018** in **ELC.221 of 1999**, it follows that the changes effected in the register of titles whereby the suit land was transferred to **Joseph Mwangi Maina**, have no effect and were set aside. That leaves entry No. 2 as the substantive registration of the suit land whereby the Plaintiff, **Elias Baragu Waithanji** in **Elc Case No. 501 of 2017** remains the registered owner of that land.

The law

42. The provisions of **Article 40 of the Constitution** stipulates that every person has the right to either individually or in association with others to own and acquire property. Further, the provisions of **Section 26** of the **Land Registration Act** stipulates that:

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..."

43. **Section 25** thereof provides that:

"(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—"

44. Having established that entry No. 2 in respect of the title document for the suit land is the substantive registration, then the above provisions of law comes into play and the rightful proprietor thereof is entitled under the law to be protected and to enjoy all the privileges and interests that comes with such proprietorship.

45. Borrowing the words of Justice Gikonyo in the Case of **Estate of Julius Ndubi Javan (Deceased) [2018] eKLR**, the 2nd Defendant has not acted in *"utmost good faith (uberimaefidei), causing justice to be undermined introducing festering waters into the pure streams of justice; Such must, immediately be subjected to serious reverse osmosis to purify the streams of justice."* This shall be done by restoring the plaintiff back into the position he held before he was evicted from the suit land by the 2nd Defendant.

Final Orders

46. In the final analysis, I find that the Plaintiff has proved his case against the Defendants and I proceed to give the following orders.

1. An order is hereby issued directed to the 1st Defendant to reinstate the Plaintiff Elias Baragu Waithanji as the registered owner of the suit land Land Parcel No. 209/2279 Cross Road Nairobi

2. An order is hereby issued reinstating the plaintiff Elias Baragu Waithanji back into the suit property.

3. In order to give effect to the implementation of this judgment, the Deputy Registrar of this court is hereby authorised to sign all requisite documents to facilitate the registration of the land back into the name of the Plaintiff Elias Baragu Waithanji.

4. Any orders of injunction & inhibition or any other caveat that may be subsisting in respect of the suit land is hereby discharged in order to give effect to this Judgement.

5. The 2nd Defendant Joseph Mwangi Maina is hereby condemned to pay the costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kinyua, Kibe and Mwathe for the Plaintiff

MacRonald for the 2nd Defendant

Ms Ndundu for the 1st Defendant

Court Assistant: Eddel Barasa