



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO 526 OF 2017

MOSES GITHUA KARIUKI.....PLAINTIFF

VS

MARY WAMBUI MACHARIA.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR, KIAMBU COUNTY.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed suit against the Defendants seeking orders as follows;

- a. A declaration that the transfer of the said plot was fraudulently done and hence illegal.
- b. A declaration that the title issued to Mary Wambui Macharia is null and void and has no effect.
- c. Rectification of the register in respect of the suit land by cancellation of the name of the Defendant in the register.
- d. An order vesting the suit land solely to the Plaintiff.
- e. Costs of the suit to be awarded to the Plaintiff.
- f. Any other reliefs as the Court may deem fit.

2. It was the Plaintiffs case that he was the registered owner of the suit land until 2016 when he discovered through a search at the Lands office that the land had been illegally and fraudulently transferred to the 1st Defendant. Under para 10 he pleaded particulars of fraud against the 1st Defendant.

3. The 1st Defendant was served vide substituted services on the 12/3/2018 but failed to enter appearance nor file a statement of defence.

4. Despite entering a memorandum of appearance the 2nd Defendant failed to file defence but cross examined the witness of the Plaintiff.

5. The Plaintiff testified solely during the hearing and adopted his witness statement dated the 11/5/2017 and produced the list of documents marked PEX Nos 1-4. He reiterated the contents of his pleadings and stated that he purchased the suit land in 1989 from Joseph Gichanga Kimani , deceased and became registered as owner on the 4/9/1989. In 1994 he travelled to the United States of America for studies and would visit the country and the property annually until 2000 and he had a break upto 2010. That in his absence he left the land under the care of his neighbor Mrs Muthoni Gichangi who was cultivating subsistence crops thereon. That he relocated to the country in 2015 and got employed at Kenyatta University as a lecturer where he still works. That in February of 2016 he conducted a search and to his shock the suit land had changed hands and had been transferred to the 1st Defendant on the 20/2/2008. He stated that he neither sold nor transferred the land to the 1st Defendant nor was he aware of the fraudulent disposal of the same. Immediately he states that he reported the matter to the Police vide OB No 37/15/03/2016 as a result of which a restriction was placed on the register on the 16/2/16 restricting all dealings.

6. In cross examination by Mr Mulili counsel for the 2nd Defendant, the witness stated that he does not know the 1st Defendant neither did he transfer the land to her. That he has the original title in his custody. That he was out of the country in 2008 when the said transfer is purported to have taken place.

7. Parties elected to file written submissions however by the time of writing this judgement none are on record.

8. The key issue for determination is whether the Plaintiff has proven his claim.

9. Although the 1st Defendant failed to file defence and rebut the case of the Plaintiff, the Plaintiff retains the burden to proof his case however much it has not been challenged by the Defendant.

10. The Court of Appeal in the case of **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR** stated that the evidential burden is the burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence. That is captured in Sections 109 and 112 of the Evidence Act, thus:

“109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

11. Similarly in the Court of Appeal case of **Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR** the Court explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned Judges cited with approval the same principle of law as amplified by the learned authors of **The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14:**

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

12. I have examined the green card for the suit land and it is evident that the Plaintiff became registered as owner of the suit land on the 4/9/1989. He led unchallenged evidence that in 1994 he left for the United States of America and left the land in the care of his neighbor Muthoni Gichanga. That on his return he discovered in 2016 that the land had been transferred to the 1st Defendant illegally and without his authority and consent.

13. Black’s Law Dictionary, 9th Edition defines fraud as thus;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

14. The former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.” See also the case of **Koinange & 13 others v Koinange [1968] KLR 23**

15. Section 43 (1), (2), and (3) of the Land Act provides as follows;

“(1) In this part, “transfer” includes a conveyance, an assignment, a transfer of land, a transfer of lease or other instrument used in the disposition of an interest in land by way of transfer.

(2) A proprietor may transfer land, a lease or a charge to any person (including himself or herself), with or without consideration, by an instrument in the prescribed form.

(3) The transfer shall be completed by the registration of the transferee as proprietor of the land, lease or charge.”

16. It is unfortunate that the Land Registrar was not called to explain how the land became registered in the name of the 1st Defendant. That said, it is deemed that the Land was registered in favour of the 1st Defendant devoid of any documents otherwise the Learned Counsel of the 2nd Defendant would have produced evidence to the contrary if the same was in their possession.

17. The Plaintiff has pleaded that he never sold the suit land to the 1st Defendant. That the suit land was transferred without his knowledge, consent and approval. In support of this title he produced the following documents; the transfer document duly executed dated the 4/9/89, land control board consent dated the 18/8/89, original title issued on the 4/9/89. No such documents were produced by the 1st Defendant nor the 2nd Defendant being the custodian of the title.

18. Section 80 of the Land Registration Act mandates the Court to rectify the register by directing that any registration be cancelled or amended if it is satisfied that the said registration was obtained made or omitted by fraud or mistake. It is the law under Section 26(a) and (b)

of the Act that where a title is acquired through fraud, misrepresentation to which the person is proved to be a party or illegally unprocedurally or through a corrupt scheme, the said title is subject to rectification under Section 80 of the Act.

19. It is the finding of the Court that the Plaintiff has explained the root of his title and in the absence of evidence to the contrary, the Court finds in his favour. The conclusion of the Court is that the title of the Plaintiff was transferred fraudulently and illegally and above all in unclear circumstances to the 1st Defendant.

20. Having considered the pleadings, the evidence on record and all the material placed before me I enter judgement in favour of the Plaintiff as prayed.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 9TH DAY OF DECEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ms Gachugu holding brief for Kimathi

No appearance for 1st Defendant

2nd Defendant – absent

Ms. Phyllis – Court Assistant