



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL CASE ELC NO. 293 OF 2011

ERASTUS KIGUTA KARANJA1ST PLAINTIFF

KARANJA KIGUTA2ND PLAINTIFF

-VERSUS-

BENSON NDERE MBARIA.....1ST DEFENDANT

PETER KURIA.....2ND DEFENDANT

ROBERT WAIRIGI.....3RD DEFENDANT

SUSAN WANJIRU.....4TH DEFENDANT

MWANA MUKIA HOUSING

COOPERATIVE SOCIETY LTD.....5TH DEFENDANT

JUDGMENT

Introduction

1. Erastus Kiguta Karanja and Karanja Kiguta (“the Plaintiffs”) are father and son. They claim to have purchased some property from the 5th Defendant scheme in 1980. The parcels of land that they bought were not registered then and the plaintiffs are in the process of obtaining titles of the same from the 5th Defendant. They were issued with certificates in 1980 as evidence of ownership, these are Plot Number 213 and Plot Number 214 under the 5th Defendant’s scheme. After paying the Surveyors fees, the plaintiffs were shown the plots. They then took possession of the plots which they retained till the filing of this suit. They have waited for their title documents to be processed by the Defendant since 1980.

2. The Plaintiffs aver that in 2011 some strangers under the instructions of the 1st Defendant visited the parcel of land and attempted to fence the plots belonging to the plaintiff and the matter was reported to the Githurai Kimbo Police Station through the OB No. 22/3/6/2011 as a result the fencing was halted after the OCS intervened. The Plaintiffs have paid for the process of having the parcel of land surveyed for identification of their plots and processing of titles by the 5th Defendant. The plaintiff has attached copies of the receipts of payment for the survey and processing of the title deed. Further the plaintiff avers that the 1st Defendant despite temporarily being restrained by the OCS Githurai Kimbo has vowed to evict the plaintiffs from their respective properties. There is therefore real danger that the Plaintiffs shall be evicted from the property unless the court intervenes.

Litigation

3. On 14/06/2011 the Plaintiffs commenced action. They filed a plaint. They also filed verifying affidavits, list of documents, list of witnesses and witness statement alongside a bundle of documents. They say they served the Defendants. The Plaintiff has always served the defendants and filed an affidavit of service starting with the first one dated 4/07/2011 which was served on all the Defendants plus the OCS of Githurai Kimbo Police Station. The 4th Defendant filed a Replying Affidavit dated 29/09/2011 and in it she states that she is the secretary of Mwana Mukia Cooperative Society Ltd and that she made the affidavit on her behalf and on behalf of the officials of Mwana Mukia Housing Cooperative Society Ltd who are the 5th Defendant herein. She avers that from the records, Plots No.213 and 214 belong to Erastus Kiguta Karanja and Karanja Kiguta respectively. Further that they were in the process of obtaining Titles for the said plots on behalf of the two owners.

4. The Plaintiffs filed an amended Plaint dated 26/02/2013 in which they state that they have established that the 1st defendant has unlawfully and through misrepresentation purported to transfer the Plaintiffs' plots to himself and thereafter through fraud obtained title No. Ruiru Kiu Block 1/214. The Plaintiffs allege fraud by the 1st Defendant. The particulars of fraud are representing to the land registrar Thika that the 1st defendant has a claim over the plots Nos 213 and 214 held under Mwana Mukia Housing Co-operative Scheme, that the 1st defendant represented that the bona fide member of the 5th defendant, that the 1st defendant is the bona fide owner of LR. No. Ruiru Kiu Block 1/214 and fraudulently and illegally processing and obtaining a title to LR. No. Ruiru Kiu Block 1/214.

5. When the Defendants did not enter appearance, the Plaintiff sought a date for formal proof. A date of 15/11/2021 was fixed. Again, the plaintiffs notified the Defendants of this date. The Defendants did not send representatives to attend court on the material date despite having been duly served by the plaintiff in person and through the office of the 5th Defendant as evidenced by the affidavit of service sworn on 1/11/2021 failed to enter appearance or file their Defences. The matter therefore proceeded undefended with the Plaintiff being the only witness. All along the Plaintiffs were represented by Counsel.

The claim

6. The Plaintiff prays for a permanent injunction to the defendants jointly and severally, **their servants or agents prohibiting them from entering taking possession, removing beacons, subdividing, selling and/or transferring any portion on parcels of land better known as Plot No. 213 and 214 under the 5th defendant scheme or interfering with the plaintiffs' possession of the same.**

7. **An order directing the 2nd -5th defendant to process and issue title deeds to the plaintiffs' plots no. 213 and 214. Further an order directed to the Chief Land Registrar Thika to cancel the title deeds issues to the 1st defendant in respect to LR No. RUIRU KIU BLOCK 1/2123 and LR. NO. RUIRU KIU BLOCK 1/214. Finally, an order directed to Chief Land Registrar Thika to issue to the Plaintiffs title deeds in respect to LR NO. Ruiru Kiu Block 1/213 and LR. No. Ruiru Kiu Block 1/214. Finally, they also want costs of this suit.**

The trial and evidence

8. The 2nd Defendant signed an affidavit giving authority to the 1st Plaintiff to sign affidavits on his behalf relating to the suit. Therefore the 1st Plaintiff is the one who testified ex parte on 15/11/2021. The 1st Plaintiff repeated basically what was in the Further Amended plaint dated 1st September 2015. PW1, the 1st Plaintiff, testified that the 2nd Plaintiff is his child. Further that he knows Mwana Mukia Housing Cooperative Society Ltd, the 5th Defendant. He bought shares for Plot No.213 and 214 at Githurai Kimbo in 1980. They have been in possession of he said parcels of land since they purchased them and are in the process of obtaining titles of the same from the 5th Defendant. They were shocked when the 1st Defendant threatened to fence off the said property and this was only stopped when they reported the incidence to the OCS Githurai Kimbo Police station vide OB No. 22/3/6/2011. He provided to the court a shareholder's certificate (EKKEExh.1 and EKKEExh2), and survey, identification and title processing fee certificate (EKKEExh-3 and EKKEExh 4). He asked the court to cancel the title issued and the 5th Defendant to recognize the Plaintiffs as the owners of the suit property.

9. The 2nd Plaintiff, did not testify since his story is the same as the one of PW1. They jointly paid the Defendant for plots in 1980. They were allocated plots. Someone threatened to fence off their properties. They thwarted the 1st Defendant's attempt to fence their plots by reporting to OCS Githurai Kimbo.

Analysis and Determination

10. The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.

11. The Court finds the issues for determination are as follows;

1. *Who is the Lawful owner of the suit property*
2. *Whether the Plaintiffs are entitled to the orders Sought*
3. *Who should bear the costs of this suit*

1. Who is the Lawful owner of the Suit property

12. The Plaintiffs have laid claim to the suit property and averred that they the owners of the suit property having bought shares from Mwana Mukia Housing Cooperative Society Ltd, and were issued with a share certificates and a survey payment fee receipt. In this regard, the plaintiffs averred that the registration of the suit property in favour of the 1st Defendant was fraudulently done and the same ought to be impeached. When a person's ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. See the case of **Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others [2016] eKLR, where the Court held that;**

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

13. In the case of Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Appeal Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

14. Who between the Plaintiffs and 1st Defendant has certainly shown the root of their title? The Plaintiff has averred that they bought the shares at Mwana Mukia Housing Co-operative Society they were given the share certificates issued on **01/01 1980**, being Share **803** and 804. Their evidence was however not corroborated since they did not call any witnesses. At the same time their evidence remains unchallenged since the Defendants did not defend the suit and therefore the Plaintiffs’ evidence against the Defendants remain uncontroverted. The Court is therefore satisfied that the Plaintiff has been able to explain the root of their title.

15. On the other hand, the 1st Defendant did not defend the suit and therefore the Plaintiffs’ evidence against him remains uncontroverted. The Plaintiffs hav averred that the 1st Defendant has fraudulently registered the suit property in his name.

16. Was the suit land therefore transferred fraudulently to the 1st Defendant? **‘Fraud’** has been defined in Blacks Laws Dictionary as;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, orin some manner to cause him an injury.”

17. Further Black’s Law Dictionary Ninth Edition at Page 731 also defines **‘fraud’** as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

18. With the definition of fraud in mind it then follows that the registration of the suit property to the 1st Defendant is not genuine, or its authenticity is in doubt and that amounts to fraud.

19. The plaintiff in their evidence have shown a co-relation of Plot number 214 to L.R. No. Ruiru Kiu Block 1/214. That the 1st Defendant has purported to fraudulently transfer one of the plots to himself and obtained title L.R Ruiru Kiu Block 1/214. The court issued an order on 20/06/2011to the effect that Defendants were restrained from taking possession of the suit property or transferring or selling it.

20. The Plaintiffs claim ownership of plots known as Plot No. 213 and Plot No. 214, two plots. The plots were allocated to them for a consideration paid to the 5th Defendant. PW1, in an endeavor to prove ownership to the plots they produced receipts, share certificates, identification and title processing fee certificates.

21. PW1 testified that the plaintiffs are the rightful owners of two plots No. 213 and No. 214 which they were allocated in 1980, as shareholders of 5th Defendant and they produced share certificates Nos 803 and 804 as evidence to show ownership. They produced share certificates marked as EKK Exh 1 and EKK Exh 2 dated 1/1/1980. The other receipts produced are receipts for processing the Title Deed marked as EKK Exh3 and receipt No. 963 and EKK Exh4 receipt No. 964 both dated 30/5/2011. The two receipts were for Kesh 35,000 each and they made reference to Plot No. 213 and Plot No. 214 respectively.

22. From the List of Members of Mwana Mukia Ruiru Kiu Block I the 5th Defendant herein, the 1st Defendant is not reflected on the membership list of the said Company as per their records. Since he did not enter appearance there is no evidence before the court to explain how the title document in the name of the 1st Defendant came about. The plaintiffs averred that the 1st Defendant’s actions were fraudulent for reasons that the 1st Defendant purported to be a shareholder of the Company and hence an allottee of the suit land whilst he was not, presenting forged documents to the Chief Lands Registrar Thika and acquiring a title in respect of the said land.

23. The Plaintiffs state that they have been in possession of the said parcel of land since they purchased the same and are in the process of obtaining titles of the same from the 5th Defendant.

24. In the amended plaint, the plaintiffs have averred that there was an occasion when there were attempts made to dispose them of the plots: in **2011**, where the 1st defendant threatened to fence off the said suit property but this was reported to the police. Despite being temporarily restrained by the OCS Githurai Kimbo Police Station the 1st Defendant has vowed to evict the plaintiffs from their respective properties. They also state that they established that the 1st Defendant had unlawfully and through misrepresentation purported to transfer the plaintiffs’ plots to himself eventually leading to obtaining through fraud title No. LR Ruiru Kiu Block 1/213.

25. The registration of the plaintiffs' plots to the 1st Defendant may lend credence to the Plaintiffs' claim of fraud. The law governing such a claim is well settled. In *Mutsonga v. Nyati* [1984] K.L.R. 425 it was thus held, on this point:

“Allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities, and it is a question for the trial judge to answer.”

26. Similarly, in *Koinange & 13 others v. Koinange* [1986] K.L.R. 23, it was held that:

“The party alleging fraud had the burden of proving it and they had to discharge that burden. Allegations of fraud must be strictly proved.”

27. The Plaintiffs have attached a copy of a title L.R. Ruiru Kiu Block 1/213 as proof to show fraud and/or deceit on the part of the defendant having acquired a title of a plot whose ownership was allocated by the 5th Defendant to the Plaintiffs who have not transferred it to the 1st Defendant. The High Court (*Kneller, J*) in *Mutsonga v. Nyati* [1984] KLR 425 (at p. 439) stated as follows:-

“Charges of fraud should not be lightly made or considered.....They must be strictly proved and although the standard of proof may not be so heavy as to require beyond reasonable doubt, something more than a mere balance of probabilities is required.....In fact a high degree of probability is requiredIt is very much a question for the trial judge.....Whether there isevidence to support an allegation of fraud is a question of fact.....”

28. In the absence of any evidence from the Defendants to challenge this allegation of fraud the court is persuaded that the plaintiffs were apprehensive of the fraud and therefore reported to the OCS Githurai Kimbo Police Station and have produced among their documents before this court a title purported to have been produced bearing the name of the 1st Defendant in relation to their plot No. 214. Again, this evidence remains uncontroverted since the Defendants individually did not file any defence or any pleadings despite having been served severally as was shown through the Affidavits of Service.

29. Having carefully analyzed the available evidence, the Court finds and holds that the Plaintiffs herein are the lawful owners of the suit property having satisfactorily explained the root of the title.

2. Whether the Plaintiffs are entitled to the orders Sought

30. The Plaintiffs have sought for the cancellation of the proprietorship of the 1st Defendant and reversion of the registration and proprietorship to them. The Court has already held and found that the Plaintiffs are the lawful owners of the suit property, the registration of the 1st defendant having been procured fraudulently and is therefore **null** and **void ab initio**.

31. It is trite law that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. However, the holding of such title is not absolute as the same may be impeached under certain circumstances. **Section 26 (1)** of the **Land Registration Act**, which provides;

“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.

32. This Court having held and found that the transfer of the suit property to the 1st Defendant was done through **fraud** as the root of his title could not be explained, the Court further finds that the title held by the 1st Defendant fall under the category of titles that must be impeached. The protection that was provided to the 1st Defendant by law must then be lifted once the Court holds that there was fraud and misrepresentation of facts. See the case of **Alice Chemutai Too ...Vs... Nickson Kipkurui Korir & 2 Others [2015] eKLR**, where the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

33. The Court having found and held that the Certificate of title held by the 1st Defendant was procured by fraud and therefore **null** and **void** must then determine whether the said title can be cancelled.

Section 80(1) of the **Land Registration Act** comes into play herein. It provides:-

“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.”

34. This Court is satisfied that the Certificate of title held by the 1st Defendant was procured by **fraud** and as such it is impeachable and ought to be cancelled. Further this Court has already held and found that the Plaintiffs are the legal owners of the suit property and it is only fair that the register be rectified to cure the fraud perpetrated by the 1st Defendant and return the suit property to its rightful owner who has demonstrated how they purchased or earned the same.

35. The plaintiffs’ prayers are for a permanent injunction directed to the defendants by themselves, agents and or servants from allocating, disposing alienating, occupying, taking possession of or entering or in any other way interfering with the plaintiffs’ ownership and possession of the subject land. Also, they pray for an order directing the 2nd- 5th Defendant to process and issue title deeds to the Plaintiffs, an order directing the Chief Land Registrar Thika to cancel the title deeds issued to the 1st Defendant in respect of L.R Ruiru Block 1/213 and LR No. Ruiru Kiu Block 1/214 and issue the rightful owners who are the Plaintiffs. An Affidavit of Service was filed by one Nephat Mukundi Waweru, Court Process Server on 01/11/2021. It shows that the defendants were served on 25/10/2021 and on 26/10/21.

36. A hearing date was taken on 18/10/2021 and the advocate for the Plaintiff Mr. Gachomo, informed court that the defendants have not participated in the matter despite being served every time the matter came up in court. Affidavits of service are in the court’s record. Service of a Hearing Notice was effected upon the defendants. However, there was no representation in court on behalf of the defendants at the hearing. Neither were the defendant’s witnesses present. The matter proceeded to formal proof on **15/11/2021**. One witness testified for the plaintiff’s and the case was closed. The plaintiff’s submission were filed on 2/12/2021.

37. As already indicated this suit is not opposed. There was therefore no contest regarding the validity of the documents produced in court. In any event the 1st plaintiff laid a proper ground for the production of copies of the Share Certificate **No.803, No.804**, and the surveying fees payments receipts of Kesh 35,000 for each plot attached to those Copies of Share Certificate. There was a good ground laid prior to the production of these documents and I allowed their production

38. It is the Court’s considered view that the Plaintiff is entitled to the orders sought.

3. Who should bear the Costs of the Suit

39. It is trite that costs usually follow the events. **Section 27** of the Civil Procedure Act gives the Court discretion to grants costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the Plaintiff(s) being the successful litigant is entitled to the costs of the suit.

40. Consequently, the Court finds that the Plaintiffs have proved their case on the required standard of balance of probability and are entitled to the prayers as sought in the Amended **Plaint** dated **1/09/2015**.

41. Having found that the Plaintiff has proved their case on the required standard, the court enters judgment for the Plaintiffs against the Defendant herein jointly and severally in terms of **prayers no. (a), (b), (c), and (d)** of the Amended **Plaint** herein. The Plaintiff is also entitled to the costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF DECEMBER, 2021.

.....

MOGENI J

Judgement read in virtual court in the presence of:

Mr Gachomo.....For 1st and 2nd Plaintiff

No appearance for the 1st – 5th Defendants

Mr. Vincent Owour- Court Assistant.