



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.649 OF 2017

PROPWA COMPANY LIMITED.....PLAINTIFF

VERSUS

JUSTUS NYAMO GATONDO.....1ST DEFENDANT

LAND REGISTRAR KIAMBU.....2ND DEFENDANT

JUDGMENT

By a **Plaint** dated **6th July 2017**, the Plaintiff herein sought for the following orders against the Defendants;

- a) A declaration that the Plaintiff is the Lawful proprietor of all that property known as LR.No.Kiambaa/Thimbigua /5754.*
- b) A permanent injunction to restrain the 1st Defendant by himself, his servant or agents from entering, or remaining upon, alienating, encumbering, charging, interfering, transferring and/or in any other way howsoever dealing with all that property known as LR.No.Kiambaa/Thimbigua /5754.*
- c) An order directing the 2nd Defendant to cancel the Title deed issued to the 1st Defendant on 16th November 2011.*
- d) An order directing the 2nd Defendant to restore the Green Card relating to the Plaintiffs proprietorship.*
- e) General Damages for wrongful deprivation of property.*
- f) Costs of the suit on full indemnity basis.*
- g) Interest on (d) and (e) above at Courts rates.*
- h) Any other relief as the Court may deem just and expedient to grant.*

In its **Statement of Claim** the Plaintiff averred that it is the registered proprietor of the suit property having purchased it from one **Wangui Kanugu** at a purchase price of **Twenty Three Million Kenya Shillings(Kshs.23,000,000/=)** in terms of a **Sale Agreement** executed on **25th November 2010**, and issued with a title deed. It is its contention that upon purchase of the property, it enjoyed uninterrupted occupation until **12th March 2015**, when it learnt that strangers were clearing the property with a view of bringing construction materials on the site. That it reported the matter to the police who informed its Director that they had identified a suspect who claimed to have entered onto the suit property on the strength of a title deed dated **16th November 2011** registered in the name of the 1st Defendant. That it then conducted a search and it was informed that the green card relating to the suit property could not be traced.

It averred that it further reported the matter to the Directorate of Criminal Investigations and on the **20th of November 2015**, the 1st Defendant was charged with forgery of a document in **Criminal Case No. 344 of 2015** and that the case is still ongoing.

The Plaintiff particularized fraud by the Defendants under **paragraph 9** of the **Plaint** and contended that owing to the fraud perpetuated, it had been denied the right to peaceful and quiet enjoyment of the property and particularized loss and damage under **paragraph 11** of the **Plaint**.

The suit is contested and the 2nd Defendant filed a **Statement of Defence** dated **24th April 2019**, and denied all the allegations made in the **Plaint**. It was its contention that the criminal case is independent of the civil case and that its outcome shall be persuasive of the proceedings.

It further averred that if there was any issuance of any title to the 1st Defendant, then the same was issued on the strength and genuine belief that there was a genuine transaction that was launched for registration and if the transaction was launched, then it shall seek indemnity from the 1st Defendant from the costs it will be condemned to bear.

Despite being served by way of registered post, the 1st Defendant failed to enter appearance and thereby defend the suit. The 2nd Defendant also did not appear during trial despite being served and the matter proceeded for hearing by way of formal proof wherein the Plaintiff called one witness and closed its case.

PLAINTIFF'S CASE

PW1 - James Gathecha Waweru adopted his witness statement and testified that he is the Director of the Plaintiff. He produced his list of documents as exhibit. It was his testimony that the Plaintiff purchased the suit property from the owner at a consideration of **Twenty Three Million Kenya Shillings (Kshs.23,000,000/=)** and a title deed was issued on the **12th January 2011**. He further testified that the Defendant encroached onto the property and dumped materials and that he had a title deed issued on the **16th of November 2011**. He urged the Court to allow their claim and cancel the Defendants Title.

After close of pleadings, the Court directed the Plaintiff to file written submissions which the Court has now carefully read and considered together with the cited authorities and the relevant provisions of law.

The Court has also considered the pleadings, evidence adduced and the exhibits thereto and renders itself as follows;

Though the Defendants were duly served, the 1st Defendant did not enter appearance nor defend the suit. The 2nd Defendant however only filed a defence but did not call any witness to advance its defence. The fact that the suit has not been defended means that the Plaintiff's evidence remained unchallenged and uncontroverted. However, the Court will not just enter Judgment without interrogating the veracity of the evidence placed before it by the Plaintiff as the Plaintiff is still required to prove his case on the required standard of balance of probabilities. See the case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR**, where the Court cited the case of **Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988**, where the Court held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

The fact that the evidence is not challenged does not entirely mean that the Court will not interrogate the evidence tendered by the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with logical conclusion as exparte evidence is not automatic prove of a case on the required standard. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited... Vs...Nathan Karanja Gachoka & another [2016] eKLR**, the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further the case of **Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR**, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponnet has not made a presence in the contest.”

Having considered the available evidence, the Court finds the issue for determination is whether the **Plaintiff is entitled to the orders sought**.

The Plaintiff has sought for an order to have it declared as the legal proprietor of the suit land and to prove its ownership. In that regard, the Plaintiff produced a **Sale Agreement** which evidenced that it bought the suit land from one **Wangui Kanugu**. The Plaintiff further produced a title deed that proves its ownership over the suit property. The said title deed was issued on **12th January 2011** under **Cap 300(now repealed)**. Under **Section 27** of the above **Cap 300**, then the Plaintiff acquired all the rights and privileges appurtenant thereto. Further under Section 28 of the repealed Act, such rights could not be defeated except by operation of law. See **Section 28** of the **Registered Land Act, Cap 300(now repealed)** which states:-

“The rights of a proprietor, whether acquired on first registration or whether acquired 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.”

Therefore *prima-faciely*, the Plaintiff is the owner of the suit property.

Without any evidence to controvert the same, this Court finds and holds that the Plaintiff is indeed the legal owner of the suit property. This is so as registration of a person over a suit property gives that person the rights and privileges over the property. Further the registration of a person as a proprietor of the property is a *prima facie* evidence that the person is the owner of the suit property. Without any evidence to controvert it, then this Court finds and holds that the Plaintiff is the legal proprietor of the suit property.

The Plaintiff has also alleged that the 1st Defendant fraudulently forged documents purported to transfer the suit land to his name. Once again it is important to note that these allegations by the Plaintiff have not been controverted. This Court has seen the official search that indicates that the 1st Defendant is the owner of the suit property. It is trite that when Certificate of title granted to someone has been called to question, then it becomes the burden of that person to explain the root of the title. In this instant case, by failing to attend court and defend the suit, the 1st Defendant has failed to explain the root of his title and given that the root of the title and the process through which the title was acquired cannot be explained, then that can only mean that the suit property was acquired by the 1st Defendant fraudulently. Further the Plaintiff still held the title over the suit property and in no way could there be two titles over the same property. Further there was no way that the suit could have been transferred without the Plaintiff relinquishing its title.

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, or in some manner to cause him an injury.”

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”

With the definition of fraud in mind and having held that the process that was used to transfer the suit property to the 1st Defendant was not explained then this Court finds that there were deceitful acts of providing documentation that are not genuine or not explained and that amounts to fraud.

As the 1st Defendant herein used forged documents and must have misrepresented facts that necessitated the transfer of the suit property from the name of the deceased to that of the 1st Defendant therefore the transfer was fraudulent. Therefore the Court finds that the transfer of the suit land to the 1st Defendant was fraudulent and illegal and therefore ***null*** and ***void ab initio***.

It is trite 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 maybe 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.

This Court having held and found that the transfer of the suit property to the 1st Defendant was done through ***fraud*** as the process to which the 1st Defendant used to procure the title deed was not proper, and could not be explained, then the Court’s further finds that the titles held by the 1st Defendants 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.”

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 it is in a position to cancel the said title. ***Section 143(1) Registered Land Act, Cap 300(now repealed)*** and which is repeated in ***Section 80(1)*** of the ***Land Registration Act*** comes into play. 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.”

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 Plaintiff is the legal owner 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 rightfully owner who has demonstrated how he purchased or earned the same.

Consequently, the Court finds that the Plaintiff has proved its case on the required standard of balance of probability and that its prayers as sought in the **Plaint** are merited.

Having now carefully read and considered the pleadings, the exhibits before Court and the written submissions by the Plaintiff, the Court enters Judgment for the Plaintiff against the Defendants jointly and severally as prayed in the **Plaint** in terms of prayers **No.(a), (b), (c), (d), (f) and (g)**.

On prayer **No.(e)** the Plaintiff is entitled to nominal general damages of **Kshs.1,500,000/=** for trespass.

It is so ordered.

Dated, Signed and Delivered at Thika this 30th day of January 2020.

L. GACHERU

JUDGE

30/01/2020

In the presence of

No appearance for Plaintiff though date taken in court in the presence of the advocate

No appearance for 1st Defendant

No appearance for 2nd Defendant

Lucy - Court Assistant.

L. GACHERU

JUDGE

30/01/2020