



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 35 OF 2016**

**PETER MUIGAI KIHARA.....PLAINTIFF**

**VERSUS**

**THE CHAIRMAN, SECRETARY AND TREASURER OF PCEA MUTEERO**

**CONGREGATION KAREN PARISH, MILIMANI SOUTH PRESBYTERY ....1<sup>ST</sup> DEFENDANT**

**KIRINYAGA COUNTY LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**NYAWIRA WANGECHI & WANGAI MUHIU MAINA**

**(The Administrators of the Estate of FRANCIS GICHAMBA**

**MAINA ALIAS F.G. MAINA Alias FRANCIS MAINA MUGOIYO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

By a plaint dated 7<sup>th</sup> March 2016, the plaintiff sought against the defendants the following orders:

- a. A permanent injunction be issued restraining the 1<sup>st</sup> defendant, its agents and/or servants from encroaching, trespassing, constructing, occupying, fencing or dealing in any other manner with the plaintiff's land Title No. KIINE/RUKANGA/1178.**
- b. The 2<sup>nd</sup> defendant be ordered to safeguard the plaintiff's land Title No. KIINE/RUKANGA/1178 and reject any attempts by the 1<sup>st</sup> defendant or any other entity manipulating or altering the plaintiff's green book or other land registration details.**
- c. Costs of this suit.**

The plaint is filed simultaneously with a Notice of Motion application under certificate of urgency seeking temporary conservatory orders pending the hearing of the said application interparties and the main suit.

On 16<sup>th</sup> March 2016, the 1<sup>st</sup> defendant through the firm of Mahida & Maina Company Advocates filed her defence and on 1<sup>st</sup> April 2016, the 3<sup>rd</sup> defendant filed her statement of defence. On 5<sup>th</sup> October 2016, the plaintiff filed an amended plaint in which an additional prayer was sought for a declaration that L.R. No. KIINE/RUKANGA/1178 belongs to the plaintiff and that there is no parcel of land known as KIINE/RUKANGA/47.

**PLAINTIFF'S CASE**

The plaintiff stated that on 22<sup>nd</sup> July 2010, he bought a parcel of land Title No. KIINE/RUKANGA/1178 measuring 19.46 Ha from one Abraham Muchugu Mwangi at a price of Ksh. 24,500,000/=. He went through all the legal conveyancing procedures to have the property transferred to his name and on 7<sup>th</sup> September 2010, he was issued with a title deed. Immediately thereafter, he took possession and started tilling a portion of the land. In August 2015, he decided to sell ten (10) acres of the land to one David Kangethe Gitari. Prior to purchasing the said portion of land, the buyer conducted due diligence by seeking to be supplied with a certificate of official search on 21<sup>st</sup> August 2015

which confirmed his proprietorship of the land. Thereafter, the purchaser paid him the purchase price. In July 2015 or thereabout, the plaintiff's lawyers requested to be supplied with a certified copy of the green card just to assure the purchaser. On 22<sup>nd</sup> October 2015, the plaintiff was furnished with the green card together with another certificate confirming the plaintiff's ownership. He stated that in October 2015, the purchaser with his workers went to the land to till and prepare for planting during the El-Nino rains but they were confronted by a violent group which chased them away using crude weapons claiming that the land belonged to them. The plaintiff was called and was surprised at the turn of events as nobody had laid claim to the land since he bought it in the year 2010. He was again called and informed that there was a group of people on his land who came and placed a container therein and immediately thereafter started constructing a perimeter wall with concrete posts and barbed wire. The plaintiff stated that he went to the scene and saw people constructing a fence who said that they had been instructed to continue putting up the fence unless a Court order was issued stopping them claiming that the land belonged to them. The plaintiff was surprised to see sign posts of the 1<sup>st</sup> defendant placed on his land which he took photographs. He made a report to the DCIO Wanguru Police Station where he also recorded his statement. He stated that he also recorded his statement at the CID Headquarters.

The plaintiff also visited the 2<sup>nd</sup> defendant's offices where he checked on the land title and confirmed that he was still the registered owner of the suit land.

#### DEFENCE CASE

The defence called a total of five witnesses. DW1 was Joseph Kirundi Muraya who works with Plotters Surveyors Sagana branch. He recalled that sometime in February 2015, a client by the name Stephen Muthama came to their offices seeking to sell his land parcel No. SAGANA/RUKANGA/1178. The client wanted to give him instructions to sell the land for him. He accompanied him to the land and saw that it was a good land. The land was measuring 47 acres. He asked the client to supply him with documents. However, the client only gave him the number of the land. He visited the Lands office and conducted a search and found that the registered owner was one Francis Maina Mugoioyo. He told him to come with the owner. The client came with someone known as Maina Mukoiyo. He went to the land where he found a caretaker who told him that the owner was dead. He did not proceed with the matter. In October 2015 or thereabouts, one person came to his office in Sagana and introduced himself as a Mr. Wamae. He was accompanied by two ladies. They wanted to sell a piece of land. They were directed by one of their staff who had retired. They gave the parcel of land as L.R. No. KIINE/SAGANA/1178 which was the very same land another person had approached him wanting to sell earlier. He told them to bring him the documents of ownership. They gave him copies of green card, a certificate of official search and a receipt. They also brought him a letter from a lawyer. The certificate of official search shows that the land was registered in the name of Peter Mungai Kihara. He identified it as No. 4 in the plaintiff's list of documents. He told them to come with the owner. They left and later came back with a person who identified himself as Peter Mungai Kihara who told him that he was the owner. He took copies of the documents to the suit property and showed the caretaker. A few days later, CID Officers from Kiambu came to his offices and asked him some questions regarding what he knew about the land. He recorded his statement.

DW2 was Wangai Muhiu Maina who is an advocate of the High Court of Kenya practicing in the firm of Mahida & Maina Advocates specializing in conveyancing. He stated that his father was one Francis Maina Mugoioyo (deceased) who was the registered proprietor of land parcel No. KIINE/RUKANGA/471. He stated that he is one of the administrators of the Estate of his later father vide a succession cause No. 1226 of 201 (Nairobi). The witness stated that the grant in respect of the said cause was issued on 26<sup>th</sup> October 2011 and confirmed on 21<sup>st</sup> February 2013. The two documents were produced as Defence Exhibits No. 1. The witness stated that land parcel No. KIINE/RUKANGA/1178 does not exist and that the purported parcel would be a resultant of land parcel No. KIINE/RUKANGA/471 which was surrendered to the Government of Kenya in the year 1975 by way of compulsory acquisition through Kenya Gazette Notice 313 dated 31/1/75. He stated that the entire land parcel No. KIINE/SAGANA/471 was measuring 19.5 Ha and that the area acquired by the Government of Kenya through the Gazette Notice referred herein above was 0.045 Ha. The witness further stated that the title to land parcel No. KIINE/RUKANGA/471 was charged to Barclays Bank International Ltd on 5/10/1971 for a loan of Ksh. 80,000. When the property was being acquired by the Government through compulsory acquisition in 1975, the title was still being held as a security by Barclays Bank International Ltd and that in conveyancing practice, a title held as a security by a bank can only be released upon discharge. The witness stated that they are holding the original title to the suit property No. KIINE/RUKANGA/471 measuring 19.5 Ha which was issued on 9<sup>th</sup> September 1971 which has been in the custody of Barclays Bank International Ltd until recently when it was discharged after the loan was repaid. The witness further stated that as one of the administrators of his late father Francis Maina Mugoioya, he is aware that it was his late father's desire and wish to gift the P.C.E.A Muteero one acre of the suit land which has even been taken into account in the confirmation of grant.

DW3 was Police Constable No. 66561 Charles Muchuku attached to the Directorate of Criminal Investigations Headquarter Nairobi. He stated that on 5<sup>th</sup> November 2015, they received a complaint by one Wangai Muhiu Maina who claimed that he was the owner of land parcel No. KIINE/RUKANGA/471 situated at Sagana which he acquired through a succession of his late father one Francis Maina Mugoioyo but some people had acquired title fraudulently. Investigations were conducted by his colleague one P.C. Abdi before he took over. On 22<sup>nd</sup> February 2016, he received another complaint from one Peter Mungai Kihara who reported that he bought a parcel of land L.R. No. KIINE/RUKANGA/1178 and was issued with a title deed. The matter was minuted to him and he proceeded to Land Registry Kerugoya where he wrote a letter requesting to be supplied with documents in respect of the subject land No. KIINE/RUKANGA/1178. Upon perusal, he realized that the land was the same his colleague P.C. Abdi had commenced investigations. He also realized that the land emanated from land parcel L.R. No. KIINE/RUKANGA/471. He also realized that the same documents had been given to his colleague including a copy of green card, a copy of title and presentation book for L.R. No. KIINE/RUKANGA/1178. He called his colleague P.C. Abdi who confirmed that indeed he had collected the same documents from the Land Registrar. He went back to him and consolidated the two files. He concluded that land parcel No. KIINE/RUKANGA/1178 emanated from land parcel No. KIINE/RUKANGA/471 and that land parcel No. KIINE/RUKANGA/1178 was reserved awaiting the mother title which was charged to Barclays Bank International Ltd to be discharged. The witness also stated that he confirmed the mother title No. KIINE/RUKANGA/471 was not surrendered to the chargee for presentation to the Land Registrar for purposes of registration. After he was given the title deed for land parcel No. KIINE/RUKANGA/1178, his colleague prepared a memo form and took specimen signature and known signature of the Land Registrar one Silas Kironji which was sent to the document examiner to confirm whether he was the maker of the title deed and green card. He also took the known specimen stamp impression to the Document Examiner for analysis. He produced a report by the Document Examiner with the findings that the documents were not made by the same author and that the impressions were not also from the same stamp. In conclusion, it was the finding of the

Document Examiner that the documents presented by the plaintiff in respect of land parcel No. KIINE/RUKANGA/1178 was a forgery and that a warrant of arrest against the purported owner of the alleged land namely Peter Mungai Kihara was in force.

DW4 was Silas Muthike Kironji. He is a retired civil servant. He used to work at Kerugoya Land office as a Senior Assistant Land Registrar. He recalled that in the year 2016 or thereabouts, the C.I.D Officers showed him a copy of a title deed for parcel No. KIINE/RUKANGA/1178 purported to have been signed by him. The Police officers wanted him to confirm whether the signature appearing on the green card shown to him was signed by him. He was also shown a copy of a title deed and wanted him to confirm if the signature was signed by him. He told the Police that the signatures appearing in both the green card and the title deed did not belong to him. He stated that before a green card is issued, a mutation form must be drawn by a qualified Land Surveyor and presented to the Land Registrar.

DW5 was Muthee Julius Kilimo who is a Land Registrar attached to Kerugoya where he has worked since 1995. He was referred land parcel No. KIINE/RUKANGA/471 which he stated that according to their records, the registered owner is one F. Maina Mugoioyo who was registered on 25/5/1971. The witness further stated that sometime on 16/12/1980, a portion of the property was acquired by the Government of Kenya through a Gazette Notice No. 313 of 31/01/1975. He produced a green card as Defence Exhibit No. 7. He stated that the Government of Kenya acquired a small portion of the said land measuring 0.047 Ha. Upon acquisition, they placed a restriction to protect the interest of the Government to the extent of the said portion measuring approximately 0.047 Ha. He stated that the said acquisition was for purposes of expansion of a road. After the Gazettement, the Government received a catastral map showing the extent of the portion acquired which was then removed from the mother title and that a number was created and registered in the name of the Government of Kenya reserved for a road. He stated that the number created for the portion acquired was L.R. No. KIINE/RUKANGA/1179 with an area of 0.045 Ha. They reserved another number KIINE/RUKANGA/1178. He explained that they did not create parcel No. KIINE/RUKANGA/1178 because the original number KIINE/RUKANG/471 was still charged to Barclays Bank International Ltd. He stated that they only reserved the number awaiting the discharge by the bank and the title thereafter surrendered to the Land Registrar. The witness further explained that the conveyancing practice is that once the chargor clears with the bank, the bank prepares a discharge of charge and surrenders the title deed. Thereafter, the chargor presents the discharge of charge which is presented to them who will then discharge the charge from their register and thereafter create the parcel No. KIINE/RUKANGA/1178 and register it in the name of the owner F. Maina Mugoioyo and land parcel No. KIINE/RUKANGA/471 would then cease to exist. He stated that land title No. KIINE/RUKANGA/1178 is non-existence as it could not be possible to have such a title since the same was not created without discharging and surrendering the mother title No. KIINE/RUKANGA/471. He also stated that the green card for land parcel No. KIINE/RUKANGA/1178 is non-existence and that it could not have been possible to have a title for a parcel of land which was not created. He stated that every entry must be supported by a document which created it. He stated that they have conducted a search in their records and found no documents supporting that entry. He said that there are no transfer documents supported by a letter of consent to create entry No. 3. He referred to Defence Exhibit No. 6 which is a presentation book where all documents presented for registration are recorded on daily basis. He stated that there were no documents presented by Peter Mungai Kihara in respect of land parcel No. KIINE/RUKANGA/1178. The witness stated that a son to the owner of land parcel No. KIINE/RUKANGA/471 reported of interference of the land while the original title was held by the bank. They checked and realized that a register had been opened for parcel No. KIINE/RUKANGA/1178 which was suspicious. They decided to register a restriction to prevent further fraudulent transactions. The matter was also reported to the D.C.I which is still under investigations.

#### ISSUES FOR DETERMINATION

The issues for determination are as follows:

- 1. Whether the plaintiff acquired valid title to land parcel No. KIINE/RUKANGA/1178?**
- 2. Whether the plaintiff is a bona fide purchaser for value without notice?**
- 3. Who shall bear the costs of this suit?**

On the first issue whether the plaintiff acquired valid title to the suit land No. KIINE/RUKANGA/1178, the plaintiff himself in his evidence stated that he bought the suit property in 2010 or thereabouts. It is normal in conveyancing practice that where a party is buying a valuable property worth millions of shillings, he has to exercise due diligence by conducting a search at the Lands registry to establish the legal owner and whether there are any encumbrances. The plaintiff who had the benefit of a conveyancing lawyer who assisted in the sale transaction did not produce a certificate of official search giving the status of the property before buying it. The plaintiff also stated that he bought the suit property for a sum of twenty four million, five hundred thousand (Ksh. 24,500,000/=) paid in two phases of Kenya shillings ten million (Ksh. 10,000,000/=) before execution of the alleged agreement and the balance thirty days after the execution of the agreement. He also stated that he made the payments by cash and that he had no evidence of payment. I find it curious that the plaintiff could pay a whopping sum of Ksh. 24,500,000/= by cash without evidence of the transfer of funds from him to the vendor. It is even more curious that the plaintiff admitted in his evidence that he never saw the original title of land parcel No. KIINE/RUKANGA/1178. He only stated that the original title was presented at the Lands office by the vendor, one Muchogu Mwangi. I note that despite the high stakes in this case, the plaintiff did not find it necessary to call the said Muchogu Mwangi as a witness in this case. The other issue of concern in my view is that the practice in conveyancing which is also a requirement in law is that before a transfer of land is effected, an application for consent must be made to the Land Control Board which must be given and that the same must be presented together with the transfer form which contains the passport size photographs of both the vendor and the purchaser. Once a title to land is under challenge, it behoves the owner of such title to avail these documents as proof that the process of obtaining such title was above board. In this case, the plaintiff did not avail the transfer form attached with his passport size photograph and that of the vendor. He did not also produce the application for consent to the Land Control Board and the consent itself. It is not sufficient for the plaintiff to dangle a certificate of title as prove of ownership where the very certificate of title is being challenged. He must go beyond the mere title and proof by availing the documents which gave rise to the said title. Without proving the completion documents, the certificate of title alone cannot be a valid proof of acquisition. The process is paramount. The defence called five (5) witnesses. Wangai Muhiu Maina who is also one of the administrators of the Estate of Francis Gichamba Maina Alias F.G. Maina Alias Francis Maina Mugoioyo who gave the background of the suit property. According to the witness, land parcel No. KIINE/RUKANGA/1178 does not exist. The said parcel of land would be a resultant of land parcel No. KIINE/RUKANGA/47 which is registered in the name of his late father Francis Gichamba Maina Alias F.G. Maina Alias Francis Maina Mugoioyo measuring approximately

19.5 Ha. The witness also stated that a portion of the said parcel of land measuring approximately 0.045 Ha. was acquired by the Government of Kenya by way of compulsory acquisition through Kenya Gazette Notice 313 dated 31/1/75. He stated that at the time of the said acquisition, his father (deceased) who is the registered owner had given the title deed to Barclays Bank International Ltd as a security for a bank loan. A copy of the grant issued on 26/10/2011 and confirmed on 21/2/2013 were produced in evidence. From the confirmed grant, the suit property land parcel No. KIINE/RUKANGA/471 is a subject of distribution of the Estate of the said Francis Gichamba Maina Alias F.G. Maina Alias Francis Maina Mugoioya (deceased) where one acre was to be excised therefrom for the Presbyterian Foundation to hold in trust for the Presbyterian Church of East Africa for the establishment of a congregation or retreat centre. The witness further produced land certificate in respect of the said property issued on 9<sup>th</sup> September 1971 together with a charge dated 7<sup>th</sup> October 1971. The witness also produced a certificate of official search showing that the property was charged to Barclays Bank International Limited to secure a loan of Ksh. 80,000/=. The search also shows that a caution was placed by the Government of Kenya pursuant to Gazette Notices No. 310, 311, 312, 313 & 314 on 31/1/75. Another certificate of search was also produced dated 25/2/16 showing that the same property registration No. KIINE/RUKANGA/471 was still charged to Barclays Bank International Ltd to secure a current account and that all rights under **Sections 70, 83 & 84 R.L.A** were reserved. The witness stated that according to conveyancing practice, the title must be discharged by Barclays Bank International Ltd through a discharge of charge which is then presented to the Land Registrar together with the title deed for purposes of creating an entry in their records appropriately. While they were in the process of distributing the Estate of the deceased in 2015, he received information from one Joseph Kirundi Muraya that some people were having documents purporting that his late father sold the land in question. He reported the matter to the D.C.I who commenced investigations. He stated that the land title in dispute being L.R. No. KIINE/RUKANGA/471 has not been surrendered and that the charge to Barclays Bank International Limited still exists and all rights are reserved.

In conclusion, the witness stated that when the Government acquires any parcel of land for public use, the portion that is acquired is surveyed through the Provincial Surveyor who would then prepare a catastral map and thereafter gives new numbers for the acquired portion and the remaining portion. He stated that the road that was created does not have a number. His evidence was corroborated by the evidence of Muthee Julius Kilimo (PW5) who worked at Kerugoya Land Registry as Land Registrar from 1995. The witness came with the file in respect of land parcel No. KIINE/RUKANGA/471. He confirmed that the registered owner was one F. Maina Mugoioya who was registered on 25/5/1971. He stated that sometimes on 16/12/1980, a portion of that land was acquired by the Government of Kenya through a Gazette Notice 313 of 31/1/75. The information is contained in a green card produced as Defence Exhibit No. 7. The green card indicates that the portion that was acquired was 0.045 Ha. Upon acquisition of that portion, the Government placed a restriction to protect their interest. The witness stated that after Gazettement, the Government through the Survey Department drew a catastral map indicating the extent of the portion that was acquired and thereafter caused it to be removed from the mother title and a number was created for it in the name of the Government of Kenya reserved for a road. The witness confirmed that they created a number for the road as KIINE/RUKANGA/1179 with an area measuring 0.045 Ha. The remaining portion was to remain in the name of the original owner where a number was only reserved as L.R. No. KIINE/RUKANGA/1178. He said that that number was not created. He explained that they did not create the number because the original number KIINE/RUKANGA/471 was still charged to Barclays Bank International Ltd and that they could only create the number after the title was discharged. He stated that once the chargor clears with the bank, the bank will then prepare a discharge of charge and surrenders the title to the chargor who will then present to the Land Registrar and thereafter discharge the charge from their register.

The elaborate explanation given by the defence witnesses demonstrate clearly that the plaintiff's title No. KIINE/RUKANGA/1178 is non-existent. Charles Muchuku who is the Investigating officer in a complaint lodged by Wangai Muhiu Maina (DW2) explained how his colleague Police Constable Abdi who was the initial Investigating officer took specimen signature and known signatures of the Land Registrar one Kironji Silas Muthike who is purported to have signed the title deed and green card issued to the plaintiff herein. The same Investigating officer also took the known stamp impression of the said Kironji Silas Muthike which was also subjected to examination and his findings were that the signatures were not made by the same author and the stamp impression were not made by the same instrument. The Investigations therefore shows that the title deed which the plaintiff was issued in respect of the suit land is not a valid title capable of being protected by law.

**Section 26 of the Land Registration Act** provides as follows:

**“26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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, un-procedurally or through a corrupt scheme”.**

PW5 was very categorical and candid in his evidence that the entry of the transfer of land parcel No. KIINE/RUKANGA/1178 to the plaintiff was outright un-procedural in that there was no transfer documents such as a transfer, consent from the Land Control Board and a presentation book records. Our Courts have rendered itself in cases where a title of a proprietor is impeached even where there are no acts of fraud committed. In the case of *Samuel Odhiambo Oluche & 2 others Vs Jubilee Jumbo Hardware Limited & another (2018) e K.L.R*, the Court held as follows:

**“Where a person intends to indict a title on the ground that the title has been acquired illegally, un-procedurally or through a corrupt scheme, it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part”.**

Again in the case of *Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Another (2013) e K.L.R*, the Court also held thus:

**“..... for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted**

therein which are that the title was obtained illegally, un-procedurally, or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”.

The principle was also put into perspective on a light touch in the case of *Alberta Mae Gacci Vs Attorney General & 4 others (2006) e K.L.R* where it was held:

**“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were not for valuable consideration. For my part, I would want to think that such a time when this Court would be called upon to defend such crooks has not come and shall never come .....**”

I entirely agree with the decisions by the learned Judges and have nothing useful to add suffice to say that the circumstance obtained in those cases are similar to the instant case. In the final analysis, I find and hold that the title in respect of the suit land parcel No. KIINE/RUKANGA/1178 was not acquired procedurally and therefore not valid. As such, the same cannot afford the protection of the law. The upshot of my analysis and evaluation is that this suit fails and the following orders are hereby issued:

- 1. The plaintiff’s suit be and is hereby dismissed.**
- 2. The 2<sup>nd</sup> defendant be and is hereby directed to amend the Register by cancelling the register that had been created with respect to KIINE/RUKANGA/1178.**
- 3. The costs of this suit to be borne by the plaintiff.**

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 24<sup>th</sup> day of January, 2020.**

.....

**E.C. CHERONO**

**ELC JUDGE**

**24<sup>TH</sup> JANUARY, 2020**

In the presence of:

1. Mr. Wanjohi for Plaintiff – present
2. M/S Koranje for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants
3. Mbogo – Court clerk