



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 154 OF 2015**

**PETER MWAI MARUI.....PLAINTIFF**

**VERSUS**

**LAWRENCE MAHIGA MURIITHI.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**SOPHIA MUKWANJERI BUNDI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiff filed this suit vide a plaint dated 3<sup>rd</sup> December 2015 seeking *the following orders*:

- (1) Cancellation of entry No. 4 to the register of L.R. No. KABARE/GACHIGE/2730 and revert to the names of the plaintiff.***
- (2) Costs of the suit.***

This suit was filed contemporaneously with a Notice of Motion under certificate of urgency in which the Plaintiff/Applicant was seeking a prohibitory order to be placed over the suit property pending the hearing and determination of the said application and the suit. On 25<sup>th</sup> April 2016, the 2<sup>nd</sup> Defendant filed a statement of defence and on 11<sup>th</sup> July 2016, the 1<sup>st</sup> Defendant filed his defence and counter-claim to the plaintiff's claim. The 3<sup>rd</sup> defendant later made an application to be enjoined as a party in this suit and on 14<sup>th</sup> February 2019, she filed her statement of defence.

**PLAINTIFF'S CASE**

The plaintiff in his testimony stated that Lawrence Mahiga Muriithi who is the 1<sup>st</sup> defendant sold him land parcel No. KABARE/GACHIGE/2730 (herein referred to as the suit property). He said that the original number was KABARE/GACHIGE/183. However, he could not remember the registered owner of the original parcel of land No. 183. He said that the 3<sup>rd</sup> defendant who is the 1<sup>st</sup> defendant's wife was aware of the sale transaction. He stated that they went to the Land Control Board and were issued with consent to transfer. He was subsequently issued with a title deed on 25<sup>th</sup> April 2013. He produced the same as Plaintiff's Exhibit No. 1. He said that the Land Registrar has never issued him with a notice to cancel his title. He stated that he was told by a friend that the land was transferred to the 3<sup>rd</sup> defendant with her children. He said that the purported transfer to the 3<sup>rd</sup> defendant was done without his consent. He stated that he bought the land at a price of Ksh. 450,000/=. He produced the green card indicating the entries No. 1 and 2 as cancellations and replacing with that of Lawrence Mahiga Muriithi as Plaintiff's Exhibit 2 (a) & (b) respectively. The plaintiff further stated that he filed a case against the 3<sup>rd</sup> defendant being CMCC No. 270 of 2013 (Kerugoya) in which judgment was entered in his favour and on 26<sup>th</sup> June 2015, he was issued with a decree. The suit was for eviction of the 3<sup>rd</sup> defendant. He managed to enforce the eviction order against the 3<sup>rd</sup> defendant and took possession of the suit property. The 3<sup>rd</sup> defendant did not appeal against the said eviction order. The plaintiff also stated that after the 1<sup>st</sup> defendant sold him the suit property, he moved to South Ngariama Settlement Scheme where he bought another land.

**1<sup>ST</sup> DEFENDANT'S CASE**

The 1<sup>st</sup> Defendant called the Land Registrar Kirinyaga one Margaret Anila Omullo who stated that the suit land No. KABARE/GACHIGE/183 was sub-divided into parcel No. KABARE/GACHIGE/2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731 and 2732. She stated that the dispute before Court is in relation to the cancellation of land parcel No. KABARE/GACHIGE/2730 which was first registered in the name of the plaintiff on 3<sup>rd</sup> April 2013 and a title deed issued on 25<sup>th</sup> April 2013. He stated that the records kept in their

offices indicate that there are no documents supporting the registration of the plaintiff as proprietor of the land. She stated that it was not clear how the plaintiff was sneaked into the register whereas he was not listed among the beneficiaries of the Estate of the deceased, first proprietor. The witness stated that upon discovery of the fact that the plaintiff's name was un-procedurally and/or fraudulently entered in the register of the suit land, the Land Registrar corrected the mistake by cancelling the name of the plaintiff and replacing it with the name of the 1<sup>st</sup> defendant who was the correct beneficiary of the suit land parcel No. KABARE/GACHIGE/2730. She stated that if indeed the plaintiff did purchase the suit land from the 1<sup>st</sup> defendant as alleged, he should have followed the right procedure. She stated that the right procedure was for the plaintiff to seek and obtain consent to transfer, payment of stamp duty, signing of transfer documents by both parties and payment of registration fees at the Land Registry. She further stated that **Section 79 (2) of the Land Registration Act No. 3 of 2012** gives the Land Registrar power to rectify a register of documents where the document in question has been obtained by fraud. The witness further stated that the original title deed was registered in the name of one Gichimu Njeru (deceased) on 5/9/1958. After his demise, a succession was done and registered on 16/12/1998. The beneficiaries were Muriithi Gichimu, Ephantus Gichimu Muriithi, Lawrence Mahiga Muriithi, Josphat Mbithe Muruthi all holding in trust for Ismail Wachira Muriithi, Kinyua Muriithi, Jacob Warui Muriithi and Simon Mburu Muriithi. On 29/5/2012, there was a restriction letter by the DCC Kirinyaga East dated 22/5/2012. She said that the same restriction was removed on 3/4/2013. The same day the 3/4/2013, the parcel was closed on partition which resulted into new numbers being KABARE/GACHIGE/2724 – 2732. The parcel of land No. KABARE/GICHIGI/2730 according to their records was supposed to be registered in the name of Lawrence Mahiga Muriithi but the same was registered in the name of Peter Mwai Warui (plaintiff). She stated that the said Peter Mwai Warui was not among the beneficiaries. She said that the name of Peter Mwai Marui was entered erroneously. After the Land Registrar realized his mistake, he cancelled the same and entered the correct beneficiary Lawrence Mahiga Muriithi (1<sup>st</sup> defendant).

### 3<sup>RD</sup> DEFENDANT'S SUBMISSIONS

The 3<sup>rd</sup> Defendant who is the wife to the 1<sup>st</sup> Defendant stated that they used to live with her family in the suit land until the plaintiff pulled down her house claiming that he bought the land. She stated that she does not know how the plaintiff acquired the suit land. She said that she had lodged a caution on the suit land but the same was removed in circumstances she does not understand.

### ISSUES FOR DETERMINATION

The following in my view are issues for determination:

***(1) Whether the cancellation of the plaintiff as the proprietor of land title No. KABARE/GACHIGE/2730 through entry No. 4 and replacing with Lawrence Mahiga Muriithi was regular and/or procedural?***

***(2) Whether the plaintiff obtained title to land parcel No. KABARE/GACHIGE/2730 lawfully and procedurally?***

***(3) What appropriate orders should be made?***

***(4) Who shall bear the costs of this suit?***

(1) Whether cancellation of the plaintiff as proprietor of land parcel No. KABARE/GACHIGE/2730 vide Entry No. 1 & 2 of the green card and replacing it with Lawrence Mahiga Muriithi was lawful?

The plaintiff in his evidence stated that he bought the suit property L.R. No. KABARE/GACHIGE/2730 from the first defendant Lawrence Mahiga Muriithi at a consideration of Ksh. 450,000/=. The plaintiff produced a copy of a sale agreement dated 30/4/2011. From the alleged sale agreement, the property being sold is described as ½ acre out of land parcel No. KABARE/GACHIGE/183. The property is described as registered in the names of the vendor and others in common shares. From the green card for the suit property which was produced in his evidence, the plaintiff only came to be registered as proprietor of the suit property on 3/4/2013 after the original land title No. KABARE/GACHIGE/183 was partitioned through a succession cause done and registered in the Land offices on 16/12/1998. When the 1<sup>st</sup> defendant and the plaintiff purported to enter into an agreement for the sale of land on 30/4/2011, the suit property was not in existence. The said sale agreement in my view is not binding and enforceable in law as the property being sold and bought was non-existent. I also agree with the testimony of the Land Registrar, Kirinyaga County that the registration of the plaintiff as proprietor is illegal and un-procedural as he was not one of the beneficiaries of the Estate of Gichimu Njeru (deceased). The names of the beneficiaries of the Estate of the said Gichimu Njeru (deceased) as reflected from Entry No. 2 dated 16/12/1998 were as follows:

(1) Muriithi Gichimu - 0.48 acre

(2) Ephantus Gichimu Muriithi - 0.48 acre

(3) Lawrence Mahiga Muriithi - 0.48 acre

(4) Joseph Kairu Muriithi - 0.48 acre

(5) Josphat Mbute Muriithi - 0.48 acre

In trust of Ismael Wachira Muriithi - 0.44 acre

Kinyua Muriithi - 0.44 acre

Jackson Marui Muriithi - 0.44 acre

The beneficiaries of the Estate of the said Gichimu Njeru (deceased) including the 1<sup>st</sup> defendant Lawrence Mahiga Muriithi were to hold the portions they were to receive in trust for other third parties. If the 1<sup>st</sup> defendant wanted to dispose a portion of his share from the Estate of his late father, he should have waited until the land is partitioned and the title deed transmitted into his name before doing any lawful transaction. The share of the Estate of Gichimu Njeru (deceased) was transmitted directly to the plaintiff and not Lawrence Mahiga Muriithi who is the legal beneficiary of that estate. That was an illegal and un-procedural manner in which the plaintiff acquired title to the suit property. Such a title which is obtained illegally and un-procedurally cannot be allowed to stand for one more second.

**Section 26 (1) of the Land Registration Act No. 3 of 2012** states as follows:

***“26 (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, 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;***

***(b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme....”***

I can say without any fear of contradiction that when Parliament enacted this law, they had in mind such cases as obtained in this case. The same statute under **Section 79 (2)** provides as follows:

***‘No alteration affecting the title of the proprietor may be made pursuant to Sub-section (1) without the proprietor’s consent unless:***

***(a) The proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or***

***(b) It would for any other reason be unjust for the alteration not to be made.***

***Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration”.***

The law gives powers to the Land Registrar(s) to make alterations on the register where they discover after registration that the person registered as proprietor of such land has by fraud or lack of due diligence caused or substantially contributed to the error, mistake or omission. Though the law requires the Land Registrar to issue a ninety days notice of his intention to make the alterations on the register, the law also requires any person aggrieved by the actions by the Land Registrar to move the Court for appropriate orders. Failure by the Registrar to issue the ninety days notice of his intention to effect any alteration to the register is not fatal as the affected proprietor can ventilate his rights in a Court of law.

The plaintiff in this case has not demonstrated that he obtained the title to the disputed land in a legal procedure and a clean manner. Such evidence can only satisfy this Court to grant the orders sought. In the upshot, I find that the plaintiff has not proved his claim to the required standard. As such, this suit is hereby dismissed. As regards the 1<sup>st</sup> defendant’s counter-claim, I am of the view that the same has been proved to the satisfaction of this Court. I therefore enter judgment for the 1<sup>st</sup> defendant against the plaintiff as follows:

***(1) The plaintiff’s suit be and is hereby dismissed and judgment be entered in favour of the 1<sup>st</sup> defendant’s counter-claim.***

***(2) A declaration that the cancellation of the plaintiff’s name and reverting back the name of the 1<sup>st</sup> defendant as the proprietor of land parcel No. KABARE/GACHIGE/2730 was proper.***

***(3) A declaration that the agreement dated 30/4/2011 is null and void and of no legal effect.***

***(4) Damages for breach of contract in terms of clause 9 of the sale agreement dated 30/4/2011 against the 1<sup>st</sup> defendant by the plaintiff.***

***(5) Each party to bear her own costs.***

**READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 7TH DAY OF FEBRUARY, 2020.**

.....

**E.C. CHERONO**

**ELC JUDGE, KERUGOYA**

In the presence of:

1. 1<sup>st</sup> Defendant - present
2. 3<sup>rd</sup> Defendant – present
3. Mbogo, Court clerk – present