



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 95 OF 2018

WAGATHARI GITHINJI - **PLAINTIFF**

VS

MARY NDUNGE MBELENZI - **1ST DEFENDANT**

DISTRICT LAND REGISTRAR, THIKA - **2ND DEFENDANT**

MUTHITHI FARMERS COOP SOCIETY LTD - **3RD DEFENDANT**

JUDGMENT

1. The Plaintiff filed suit against the Defendants claiming that he is the registered owner of the suit land known as KAKUZI/KIMIRIRI/BLOCK8/613 (suit land) having bought the same from the 2nd Defendant. That in 2012 he discovered that the 1st Defendant had become registered as owner of the suit land through fraud and collusion with the 3rd Defendant.

2. He sought the following prayers;

a. A declaration that the title in respect of the suit land held by the 1st Defendant is null and void.

b. That the 2nd Defendant be ordered to cause the cancellation of title in respect of the suit land held by the 1st Defendant and all the entries upon the green card in respect of the said title.

c. That the 1st Defendant be ordered to pay the costs of this suit.

3. On the 16/8/13 the 1st Defendant filed a defence which was later amended on the 12/3/15 to include a counterclaim as well as enjoin the 3rd Defendant.

4. The 1st Defendant denied the Plaintiffs claim in its entirety and in particular that the 3rd Defendant sold any land to its members but instead allocated the land to its members as per the shares that the members acquired in the Society. The 1st Defendant contended that she was a member of the Society and acquired two shares which entitled her to two parcels of land; the suit land and parcel No 156. She averred that the Plaintiff acquired the suit land through the connivance of the 3rd Defendant and the officials of the 2nd Defendant. In para 11 of the defence and counterclaim the 1st Defendant has pleaded the particulars of fraud and collusion against the 2nd and 3rd Defendants.

5. In her counterclaim she sought the following orders;

a. A declaration that the Plaintiff in the counterclaim is the legal and registered owner and entitled to possession, use and ownership of Land Parcel No. KAKUZI/KIMIRIRI BLOCK 8/613, Thika County.

b. A declaration that the sale, transfer and/or registration of the 1st Defendant in the counterclaim as the owner of Land Parcel No. KAKUZI/KIMIRIRI BLOCK 8/613, Thika County was fraudulent, unlawful and *void ab initio*.

c. A declaration that the registration of the 1st Defendant in the counterclaim with the management of the presidential commission on large scheme farms was fraudulent and *void ab initio*.

d. An order directing the 3rd in the counterclaim to cancel the title deed issued to the 1st Defendant in the counterclaim in respect of Land Parcel No. KAKUZI/KIMIRIRI BLOCK 8/613, Thika County.

e. Alternatively, an order directing the 2nd Defendant in the counterclaim to give the Plaintiff a new parcel of land.

f. Costs and interest of the counterclaim.

6. The 2nd Defendant in the Counterclaim/3rd Defendant averred in its defence that the Plaintiff is not their member. That the 1st Defendant being their member was allocated the suit land. That it did not allot any land to the Plaintiff according to its records. It associated itself with the case of the 1st Defendant.

7. The Land Registrar did not file any response to the Plaintiff's suit.

8. At the hearing the Plaintiff led evidence and stated that he purchased 1 share from the Society and later through the ballot he acquired plot No KAKUZI/KIMIRIRI/BLOCK8/613 which he was put in possession. Subsequently he was issued with a title. However, in 2012 upon carrying out a search at the Lands office he discovered that the title of the suit land had been issued to the 1st Defendant. That he obtained a confirmation from the Society that the land belonged to him. See letter dated the 24/4/12 addressed to the Land Registrar, Thika.

9. In support of his case, the Plaintiff produced the following documents; original title deed in his name, ballot No KAKUZI/KIMIRIRI/BLOCK8/613, letter dated the 24/4/12 addressed to the Land Registrar from the Society confirming that he was the legitimate holder of the suit land. He stated that the suit land is being occupied by the 1st Defendant although he had occupied it from 1989 – 2008. The witness did not explain the circumstances under which he relinquished occupation (if at all he had occupation).

10. Asked whether he had any evidence to proof his membership in the Society, he alleged that his share certificate was taken away by the Chairman of the 3rd Defendant in 1989 upon being issued with the ballot.

11. The 1st Defendant testified and relied on her witness statement dated the 12/8/13. She led evidence that the area residence incorporated the Society and acquired land from a white settler for settlement of its members. That she became registered as a member of the Society on the 28/12/88 and paid Kshs 100/-, a copy of the receipt was produced in support. That she subsequently acquired 2 shares at the costs of the Kshs 10,000/- and issued with share certificate No 1190 dated the 9/12/89. She also adduced other receipts in respect to payment of survey and works fees. That when wrangles erupted in the management of the Society, the Government of the day formed the Presidential Commission to oversee the subdivision of the land and issuance of titles to members of the Society. That the commission did not have the mandate to allocate land to anyone. They were using the membership register of the land buying Society to issue titles. She became registered as owner on the 5/5/89 but was issued with title on the 14/5/93. That they took possession and peacefully occupied the suit land until 2012 when the Plaintiff started claiming title to the suit land.

12. She explained that those in the Society that had already taken possession and constructed houses were not required to ballot and that is why she did not ballot.

13. DW2 – Charles Mbate Githua stated that he is the Chairman of the 3rd Defendant and while producing a copy of the share certificate No 1190 in the name of the 1st Defendant, averred that the suit land belongs to the 1st Defendant and not the Plaintiff. That according to the Society's records, the Plaintiff is not a member of the 3rd Defendant. That the 1st Defendant was allocated two acres of land one of which later was registered as KAKUZI/KIRIMIRI/BLOCK8/613(suit land).

14. DW3- Joseph Wangombe Kamuyu, the Land Registrar, Thika testified that the suit land was registered in the name of the Plaintiff on the 5/5/89 but later entries Nos 2 and 3 on the register were cancelled. He informed the Court that he does not know the reasons for the cancellation of the entry. And a restriction was entered on even date with the effect that no dealings without the consent of the Chief Land Registrar. Thereafter a new entry No 2 was entered on the register denoting the 1st Defendant as the registered owner of the suit land. On the 23/5/12 a prohibition was registered prohibiting all dealings on the suit land until the ownership of the suit land was established. That according to his opinion and the record the current owner of the suit land is the 1st Defendant.

15. In addition, he stated that there are certain glaring anomalies in the register which he singled out before the Court. Firstly, that according to the register no title was issued to the 1st Defendant. That the prohibition dated the 23/5/12 was registered pursuant to the letter of the Plaintiff of even date. That it would appear that the title issued to the 1st Defendant dated the 14/5/93 was not entered on the Register. He opined that this may have been an omission on the part of the registry.

16. The Plaintiff submitted that the single issue before the Court is who among the two contesting parties is the rightful owner of the suit land. That the cancellation of the entries Nos 2 and 3 on the register are not explained and it can only be assumed that it was done through fraud. The Plaintiff stated that the production of a receipt of the Presidential Commission as well as the ballot was proof inter alia that he was the genuine owner of the suit land. He contended that his ownership was also supported by the 3rd Defendant in its letter dated the 24/4/12.

17. The 1st Defendant submitted that the Presidential Commission on large scale farms did not have the mandate to allocate land but this was the preserve of the land buying company or Society which allocated land to its members according to their investment in the shares of the Society. That the mandate of the commission was to facilitate subdivision and issuance of titles in accordance with the records wielded by the Society. It contended that in any event the title held by the Plaintiff was cancelled and even though no reasons were given for the cancellation, it remains that the title is not valid.

18. The 2nd Defendant did not file any written submissions.

19. The 3rd Defendant submitted and associated itself with the case of the 1st Defendant.

20. Having reviewed the pleadings, the evidence adduced at the trial, the written submissions the key issue is who between the Plaintiff and the 1st Defendant is the owner of the suit land.

21. The case of the Plaintiff is that he is the registered owner of the suit land having purchased it from the 3rd Defendant pursuant to his membership. He produced a receipt from the Presidential Commission on large scale Farms dated the 8/6/89 and a ballot of even date for parcel KAKUZI/KIMIRIRI/BLOCK8/613 as well as a title issued on even date in his name. That notwithstanding holding a title, he discovered in 2012 that the 1st Defendant was also registered as owner of the suit land. He avers that the 3rd Defendant has confirmed that the 1st Defendant was its member and that if any title was issued to her it was done through fraud, collusion and knowledge of the 2nd Defendant.

22. Section 26 of the Land Registration Act mandates the Court to take the certificate of title issued by the Registrar upon registration as prima facie evidence that the person named therein is the absolute and indefeasible owner subject to the permitted restrictions, encumbrances and conditions endorsed in the certificate of title. It further goes ahead to state that a title may be challenged on ground of fraud or misrepresentation which the person is proved to be a party or where the certificate of title has been acquired illegally uprocedurally or through a corrupt scheme.

23. I shall now examine the case of the Plaintiff through the prism of documentary evidence adduced in Court. According to the green card, entry no 1 is registered in the Government of Kenya. Entry No 2 in the name of the Plaintiff and dated the 5/5/89 is cancelled and a restriction is added that no dealings without the consent of the Chief Land Registrar. The Chief Land Registrar was not called to explain the reasons for the cancellations and restriction on record. The Land Registrar informed the Court that there were no documents on record that would offer any explanations for the cancellation of the title. However, he opined that there must have been a good reason for the cancellation and restriction.

24. It is to be noted that the title held by the Plaintiff stands cancelled as per the register. There is no evidence that the Plaintiff has challenged the said cancellation of the title. The Plaintiff filed suit 24 years later seeking to recover the suit land from the 1st Defendant. Although he stated that he discovered that the 1st Defendant had a title to the same land in 2012, he did not elaborate. The parties have not addressed me on the issue of statute bar either.

25. It is commonly accepted by the Parties that the suit land belonged to the 3rd Defendant having acquired it from a white settler. That the Society issued shares to its members through which they acquired the land by virtue of their membership. The Plaintiff failed to produce a share certificate to support his claim of membership. Instead he produced a receipt dated the 8/6/89 in the sum of Kshs 300/ issued by the Presidential Commission on large scale farms being registration fees. He also produced a ballot No KAKUZI/KIMIRIRI/BLOCK8/613. The ballot does not contain his name and therefore it is doubtful if the ballot belongs to the Plaintiff as its roots or origin was not disclosed.

26. The Plaintiff led evidence that he balloted for the land before the Presidential Land Commission and was issued with a title on the 5/5/89. It is commonly accepted that the Presidential commission's mandate was to oversee the subdivision and issuance of titles in the large-scale farms to the members of the land buying companies/societies to facilitate their settlement and stamp out the rampant corruption arising from mismanagement of the said entitles then. Its role was not to allocate land to the members of the land buying Companies/Societies. Land owners appeared before the commission to prove their claims and were issued with titles. The commission worked in conjunction with the officials of the land buying societies and the officials from the Lands office to oversee the exercise. The question that begs an answer is how the Plaintiff balloted for land after he was issued with a title. That perhaps explains why the title was cancelled by the Land Registrar.

27. Section 107 of the Evidence Act states as follows;

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

28. This evidential rule was highlighted by the Court of Appeal in the case of **Jennifer Nyambura Kamau –Vs- Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013]eKLR** when it expressed itself as thus;

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the Appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the Appellant to call the expert witness. The Appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

29. The burden of proof that he is the owner of the registered land rests with the Plaintiff. A party cannot unleash a title on the Court without proving or supporting its acquisition. Such evidence in this case would be in form of a share certificate to show that he was a member of the 3rd Defendant and the number of shares held, the payment of the shares, the balloting or allocation of the suit land, the payment of outgoings such as survey fees etc.

30. In the case of **Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No.239** of 2009, the Appeal Court held that when a registered proprietor's 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 being 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.

31. It is the finding of the Court that the Plaintiff did not possess any of the documents named in para 29 and it is the considered view of the Court that the Plaintiff has a hollow title incapable of conferring any interest in the suit land. In any event the said title stands cancelled.

32. Although the Plaintiff avers that the title of the 1st Defendant may have been obtained through fraud, collusion and or illegality on the part of the 1st and 2nd Defendants, he neither pleaded such grounds nor proved the same. The grounds remain as mere unproved allegations.

33. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427**:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (**Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308**).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (**see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

34. It is the conclusion of the Court that the Plaintiff failed to prove any fraud on the part of the 1st Defendant.

35. Now to the 1st Defendant's counterclaim. The 1st Defendant's case is that she is the registered owner of the suit land having acquired it through her Membership in the 3rd Defendant Society. She led evidence how she became registered as a member on the 28/12/1988 and paid a membership fee of Kshs 100/-. On the 14/10/89 she paid Kshs 1100/- being works fees to the Society. On the 9/12/89 she again registered for the second share which was allocated to her. On the 9/11/89 she paid survey fees for the survey of the land. On the 30/12/89 she paid the sum of Kshs 10,000/- to the Society in respect to the two shares held on the Society. The cost of one share was Kshs 5000/-. Finally, she was issued with share certificate No 1190 for two shares. The share certificate was signed by the chairman Githua Mbate and two other officials.

36. The 3rd Defendant led evidence that the 1st Defendant was its member vide share certificate No 1190 under which she was allocated the suit land. He was categorical that the Plaintiff was neither its member nor was issued with any ballot according to their records. The 1st Defendant explained that she took possession of the suit land before the balloting of the lands and accordingly as per the policy of the Society then those who had occupied the land were allowed to so occupy their portions and did not ballot. The Plaintiff did not challenge this evidence and is taken to be credible.

37. As to whether the 1st Plaintiff was a member of the 3rd Defendant, the Court answers that in the affirmative.

38. According to the green card adduced on record, the 1st Defendant was registered as owner of the suit land on the 5/5/89 and a title was issued to her on the 14/5/1993. It is to be noted that the entry in respect to the issuance of this title is missing on the green card. No explanation was given for this anomaly except the Land Registrar opined that it may have been omitted by mistake. Though the Plaintiff wished the Court to read fraud into this anomaly, he did not lead evidence to support a case of fraud. There was no evidence led to suggest that the 1st Defendant caused the omission and or that the omission was as a result of an illegality or fraud on the part of the 1st Defendant.

39. In the case of **Dickson Ndegwa Mbugua vs. City Council of Nairobi & 3 Others, NBI CA No. 254 of 2010**, the Court held as follows;

“For the Court to order rectification of the register, it had to be satisfied that the 3rd and 4th respondents had knowledge of the fraud alleged by the Appellant or that they caused or substantially contributed to it by their neglect or default. Having found that they had no such knowledge and did not cause the fraud or substantially contribute to it by their neglect or default, I cannot see how their title can be impeached or nullified under the previous legal regime. To nullify their title, we would have to ignore completely the express terms of section 143(2) of the repealed Act, which I believe we are not entitled to do. This Court did not shy away from nullifying title to land where it was satisfied that the proprietor was a party to the fraud pursuant to which he was registered as proprietor or where he had contributed to the fraud or mistake by his acts of neglect or default, perhaps best encapsulated in the Court's quip in **Athi Highway Developers Ltd Vs. West End Butchery Ltd & 6 Others (2015) eKLR** that ‘only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market.’

40. Given that the title held by the 1st Defendant has not been challenged, I agree with the 3rd Defendant's submissions that subject to the Court finding on the legitimate owner of the land this is an anomaly that can be rectified under section 79 of the Land Registration Act by the Registrar or section 80 by the Court. I am satisfied that the omission of the entry in respect to the 1st Defendant's title is an omission that can be rectified under Section 80 of the Land Registration Act.

41. Going by the pleadings and the evidence of the Plaintiff, he failed to prove any sale or such other acquisition of the suit land from the 3rd Defendant. As alluded above the 3rd Defendant did not sell land to the Plaintiff. It is not plausible therefore that the Plaintiff would have balloted for land when he was not a member of the 3rd Defendant. Even if any balloting took place (which has not been proved), there was no interest capable of being transferred to the Plaintiff as the land had been allocated to the 1st Defendant by the Society. It is not in dispute that the land is in possession of the 1st Defendant.

42. The 3rd Defendant was explicit in its evidence that it neither sold nor allocated land to the Plaintiff.

43. Although the 1st Defendant has pleaded fraud and collusion on the part of the 2nd Defendant, the same has not been proved to the standard required above. Indeed it is the vigilance of the 2nd Defendant that led to the registration of the restriction and the prohibition pending the establishment of who between the parties is the validly registered owner of the suit land.

44. The Plaintiff failed to prove his case on a balance of probabilities and it is therefore dismissed

45. In the end I find that the claims of fraud have been proved on the part of the Plaintiff. It is the finding of the Court that the 1st Defendant has proved her case in the counterclaim and hereby grant judgement in her favour.

46. Final orders;

a. Plaintiff's suit is dismissed.

b. The 1st Defendant's Counterclaim succeeds.

c. A declaration be and is hereby made that the 1st Defendant is the legal and registered owner and entitled to possession, use and ownership of Land Parcel No. KAKUZI/KIMIRIRI BLOCK 8/613, Thika County.

d. A declaration that the sale, transfer and/or registration of the Plaintiff as the owner of Land Parcel No. KAKUZI/KIMIRIRI BLOCK 8/613, Thika County was fraudulent, unlawful and void ab initio.

e. The Land Registrar is mandated to recall for cancellation the title deed issued to the Plaintiff Land Parcel No. KAKUZI/KIMIRIRI BLOCK 8/613, Thika County and in default the said title stands cancelled and of no legal effect.

f. The Land Registrar is mandated to rectify the register to include the date when the title of the 1st Defendant was issued.

g. The 1st Defendant shall have the costs of the suit and the counterclaim.

47. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF MARCH 2020.

J .G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Manyara HB for Waweru for the Plaintiff

Ndwiga HB for Kawenda for the 1st Defendant

2nd & 3rd Defendants Absent

Irene and Njeri, Court Assistants