



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 626 OF 2017

SIMON GATHURU KIMANI (Suing as a legal Representative & Administrator
of the Estate of **RUTH MWIHAKI GATHURU (deceased)** **PLAINTIFF**

VERSUS

PETER GACHAGU MUIRURI.....**1ST DEFENDANT**

JOHN MUTHAMI MWAURA.....**2ND DEFENDANT**

JUDGMENT

By a Plaint dated **29th June 2017**, the Plaintiff hereon filed this suit against the Defendants seeking for the following orders:

- a. A declaration that the parcel of land known as **Kijabe/ Kijabe/ Block 1/2810**, belongs to the late **Ruth Mwhaki Gathuru (Deceased)**, and any other claim relating to the said land by any person including the defendants be deemed to be null and void for all purposes.
- b. An order that the Registration of the **2nd Defendant** as the registered proprietor of land parcel number **Kijabe/Kijabe Block 1/2180**, be cancelled forthwith and in lieu thereof a new registration be done in favour of **Ruth Mwhaki Gathuru**, as the bonafide registered owner of the above referenced parcel of land and that the Naivasha Land registrar to effect the order .
- c. A permanent injunction do issue against both the Defendants restraining them or their servants , agents , nominees and or employees from entering , constructing, trespassing or dealing with in any manner within land parcel **Kijabe/Kijabe Block 1/2810**, belonging to the late **Ruth Mwhaki Gathuru (Deceased)**.
- d. Costs of this suit with interest.
- e. Any or such further relief that this Honourable Court may decide to grant.

In his statement of claim, the Plaintiff averred that the suit property legally and lawfully belongs to the late **Ruth Mwhaki Gathuru**, having been issued to her as a member of **Mai –Mahiu Kijabe Longonot Company limited** ,vide share certificate No. **3978**, and ballot card No. **2810**. That the Plaintiff took possession of the suit land upon the demise of the said **Ruth Mwhaki Gathuru**, on **10th June 1984**, and has been in continuous occupation. He however discovered that the **1st Defendant** colluded with corrupt officials of **Mai-Mahiu Kijabe Longonot Kijabe Company Limited**, and altered the register and removed the name of the deceased in favour of the **1st Defendant** who in turn transferred the said portion to the **2nd Defendant**.

It was therefore his contention that the title issued to the **2nd Defendant** is illegal, unlawful, fraudulent and in contravention of the provisions of the **Land Registration Act**. He particularized **fraud** by the **1st & 2nd Defendants** under paragraph 7 of the plaint and urged the Court to allow his claim.

Despite being served with the suit papers, the Defendants did not enter appearance and the matter proceeded for formal proof wherein the Plaintiff testified and closed his case.

PLAINTIFF'S CASE

PW1 Simon Gathuru Kimani, the Plaintiff herein adopted his witness statement and testified that the land belonged to his late wife, **Ruth Mwihaki Gathuru**, and that he has letters of Administration and produced his list of documents as exhibits in Court being exhibits **1 to 4**. It was his evidence that he did not know the Defendants and that when he visited the land registry, that is when he noted that the defendants were registered as the owners of the suit land. He produced the **green card** as **exhibit 5**, extract of the register as **exhibit 6** and urged the Court to allow his claim.

Since the Defendants did not enter appearance nor file their defence, the suit herein remains uncontroverted and unchallenged. However, the Plaintiff is still required to prove his case on the required standard of balance of probabilities. It is trite that he who alleges must prove. See **Section 107 of the Evidence Act** which provides:

“(1) 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.”

The fact that the evidence is not challenged does not mean that the Court will not interrogate the Plaintiff’s evidence. 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 a logical conclusion as exparte evidence is not automatic prove of a case. 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**, where 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 as 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 opponent has not made a presence in the contest.”

From the available evidence, the court finds the issue for determination as follows: **whether the plaintiff is entitled to the orders sought.**

The Plaintiff has averred that he is the personal representative of the Estate of **Ruth Mwihaki Gathuru**, and to this effect the Court has seen the letters of Administration of the said Estate and it is satisfied that the plaintiff has the requisite **locus standi**. It is the Plaintiff’s contention that the said **Ruth Mwihaki Gathuru**(deceased), was the owner of the suit property when the Defendants fraudulently colluded with other official of **Maai Mahiu Kijabe Longonot Company Limited** to change the ownership of the suit property.

It is trite that when Certificate of title of a person over any property is challenged, then it becomes incumbent upon that person to prove the root of their ownership. The Plaintiff in his evidence has produced a Share certificate, ballot card, receipts of payment that show or prove that the said **Ruth Mwihaki Gathuru**, was the owner of the suit property. Further this Court notes that the name of the said **Ruth Mwihaki Gathuru**, was crossed out and replaced with that of the 1st Defendant. As already stated above once a person’s ownership over a property is challenged, then the root of that ownership ought to be explained. Failure to do so therefore would only mean that the ownership was acquired through fraudulent means, through misrepresentation or illegally.

In this instant case, the Plaintiff has averred that he has been in occupation of the suit property and denied ever granting ownership to any other person. If plaintiff did not grant ownership of the suit property to any other person, then if the said ownership changed, then the same must have been done through fraudulent means or corrupt scheme.

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 Laws 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”

It would therefore mean that misrepresentation of facts amounts to fraud. Failure by the Defendants to explain how the ownership changed hands from the plaintiff to themselves means that the said ownership was acquired through misrepresentation of facts as the parties that did so altered the register without any proper documentation. Without available evidence on how the change of ownership was done, the Court finds that the said **Ruth Mwihaki Gathuru (deceased)**, was the owner of the suit property and without any evidence to controvert the same, then her name must be restored as such.

Section 26 of the Land Registration Act, provides for instances when the registration of a title to property may be impeached:-

“(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; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

It is clear that if the proprietorship was acquired unprocedurally or without following the due process, then the said registration must be impeached. In this instance, the court is satisfied that due process was not followed as the root of the said registration of the Defendants has not been explained. Further the fact that the evidence by the Plaintiff has not been controverted means that this Court has no reason to doubt the same. Consequently this court is satisfied that the Plaintiff is entitled to the orders sought. Further, the Court has powers to cancel any registration of title as provided by **Section 80(1) of the Land Registration Act** which states as follows;

“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.”

Having considered the available evidence, the court is satisfied that the Plaintiff is entitled to the orders sought and that he has proved his case on the required standard of balance of probability. For the above reasons, the Court finds that the plaintiff’s prayers as sought are merited.

Having now carefully considered the pleadings, the available evidence, the exhibits produced in Court and the written submissions by the Plaintiff, the Court enters Judgment for the plaintiff against the Defendants jointly and severally in terms of prayers No. **(a), (b), (c)** and **(d)** of the plaint.

It is so ordered.

Dated, Signed and Delivered at Thika this 6th day of March 2020.

L. GACHERU

JUDGE

6/3/2020

In the presence of

M/S Mbugua holding brief for Muturi Njoroge for the Plaintiff

No Appearance for the Defendants

Lucy - Court Assistant.

L. GACHERU

JUDGE

6/3/2020