



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 809 OF 2017

JOYCE MUKONYO MUTINDA.....PLAINTIFF

VERSUS

FREDRICK OUMA OGAL.....1ST DEFENDANT

DISTRICT LAND REGISTRAR THIKA.....2ND DEFENDANT

JUDGMENT

By a **Plaint** dated **30th October 2017**, the Plaintiff herein brought this suit against the Defendants jointly and severally seeking for orders that;

a. An order for cancellation of the registration/title made to the 1st Defendant by the 2nd Defendant in respect of land parcel No.Ruiru/Kiu/Block 10 (Mahiira) 1251 and the registration of the Plaintiff in respect of the said parcel of land upheld.

b. Costs of this suit.

In her statement of claim, the Plaintiff averred that she was the registered proprietor of the suit land having been duly registered on **3rd December 2015**. She further averred that on the **28th September 2016**, after conducting the search, she discovered that the 2nd Defendant had issued to the 1st defendant another green card with respect to the suit land. It was her contention that the 1st Defendant is a stranger to her and that upon clarification having been made at **Nyakinyua Company Limited**, the said company did not have any details of the 1st Defendant.

It was therefore her contention that the registration of the **1st Defendant** as proprietor was fraudulent and illegal. She particularized fraud by the Defendant as; acquiring title without supporting documents, performing a double registration by the 2nd Defendant in favour of the 1st Defendant thereby allowing itself to be misled. She further averred that the registration of the 1st defendant as a proprietor was despite her holding a bonafide title over the suit property.

Despite being served with summons to enter Appearance and the Plaint, the Defendants did not enter appearance nor file any suit papers. The matter therefore proceeded for formal proof wherein two witnesses testified and the Plaintiff closed her case.

PLAINTIFF'S CASE

PW1 - Joyce Mukonyo Mutinda, the Plaintiff herein adopted her witness statement as part of her evidence. She further adopted her list of documents and produced it as exhibit 1. She testified that she had the suit property's title deed and that she bought the suit land from **Samuel Mbauni Gachahi** and urged the Court to allow her claim.

PW2 Samuel Mbauni Gachahi, adopted his witness statement dated **5th October 2018**, and testified that he sold the suit property to the Plaintiff.

The Court directed the Plaintiff to file written submissions and in compliance with said directive, the Plaintiff filed the written submissions which the Court has now carefully read and considered.

The suit has not been contested and therefore the Plaintiff's evidence remains uncontroverted and unchallenged. However the Plaintiff is still required to prove her case on the required standard of balance of probability.

Even though the Plaintiff's evidence is not challenged it does not mean that the Court will not interrogate the said evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited and whether it has met the required standard as it is trite that 'whoever alleges must prove'. See **Section 107** of the **Evidence Act**, which states:-

"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".

Further, it is trite that *ex parte* evidence is not automatic proof 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 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...Carooline 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."

Having considered the available evidence, the court finds the issue for determination as follows:-

Whether the Applicant is entitled to the orders sought.

The Plaintiff has sought for cancellation of the title that was issued to the 1st Defendant. It is clear that **Section 26** of the **Land Registration Act** provides for instances when a certificate of title to land can be impeached. It provides that

"(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."

This Court must therefore determine whether the Plaintiff has proved that the Certificate of title issued to the 1st Defendant falls under any of the above category. It is the Plaintiff's contention that the Defendants perpetrated fraud when the 2nd Defendant issued the title to the 1st Defendant, despite the fact that she still held the title to the suit property.

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"

For the court to arrive at a just determination, it has to determine first whether the documents used to confer title to the 1st Defendant were proper documents. This Court has seen the title deed that bears the name of the Plaintiff and the same was issued on the **3rd December 2015**. There is also a certificate of official search that confirms the same. It was the evidence of PW2 that he owned the suit property and that he sold the same to the Plaintiff. This evidence has not been controverted.

Further the Court has also seen the **green card** indicating that the title deed over the suit property was issued to the 1st Defendant on **20th March 2013**. However PW2 has produced a title deed that proves he owned the land then and had been issued with his title deed on **11th September 1996**. As already held above, the evidence adduced by both PW1 and PW2 was not controverted and the fact that PW2 owned the suit property and only transferred the same to the Plaintiff in **2015**, is not controverted. It is this Court's considered view that the 1st Defendant could not have acquired ownership of the suit property in the year **2013**, whereas PW2 obtained ownership of the same in the year 1996 and did not sell it to the 1st Defendant.

It is trite that when a person's ownership of a property has been challenged, then that person ought to produce proof of the root of such ownership. The Defendants did not come to Court to put forth their case and therefore the Plaintiff having provided evidence before this

Court to show the root of her ownership, then the Court is satisfied that there was misrepresentation of facts and possibly fraud in the manner in which the 1st Defendant acquired proprietorship over the suit property. The procedure having been illegal, then the Court has no option but to impeach the 1st Defendant's certificate of title.

Having impeached the 1st Defendant's title, it therefore means that the certificate of title over the suit property held by the 1st Defendant must then be cancelled so that the register can be rectified. Under **Section 80** of the **Land Registration Act**, the Court has powers to cancel title. See **Section 80(1)** which provides;

“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 found that the Registration of the 1st Defendant was done by mistake, this Court has no option but to order the cancellation of the said title.

The upshot of the above therefore is that the Plaintiff has proved her case on the required standard of balance of probabilities and therefore entitled to the orders sought.

Having carefully read and considered the Pleadings, the evidence produced before this Court and the written submissions, the Court finds and holds that the Plaintiff has proved her case on the required standard of balance of probabilities and her claim is merited and it is therefore allowed entirely with costs to the Plaintiff.

It is so ordered.

Dated, Signed and Delivered at Thika this 5th day of March 2019.

L. GACHERU

JUDGE

5/3/2020

In the presence of

Mr. Munene holding brief for Muturi Njoroge for Plaintiff

No appearance for Defendant

Court Assistant - Court Assistant.

L. GACHERU

JUDGE

5/3/2020