



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 635 OF 2017

FRANCIS MWAURA MUNGARA

JOHN KINUTHIA MUNGARA

MARYANNE WANJIRU MUNGARA (Suing as the legal Administrators of the estate of

ISSAC MUNGARA MWAURA (Deceased).....PLAINTIFF

VERSUS

EMMANUEL NJOROGE MWANGLI.....1ST DEFENDANT

THE LAND REGISTRAR THIKA LANDS REGISTRY.....2ND DEFENDANT

JUDGMENT

By a Plaint dated 30th June 2017, the Plaintiffs herein filed this suit against the Defendants and sought for the following orders;

- a) An order of permanent Injunction to restrain the Defendants, their servants, workmen, licensees, agents or any other persons acting on their own behalf or on behalf of the Defendants from howsoever trespassing, entering, encroaching, remaining in, selling, subdividing, taking over, dispossessing, alienating, reclaiming, fencing, cultivating, charging, or further charging and or harassing the Plaintiffs or interfering with their peaceful entitlement and possession of Title No. Ruiru Kiu Block 2 (Githunguri) 1003.*
- b) An order of Inhibition restraining any dealings of any nature whatsoever on Title No. Ruiru Kiu Block 2 (Githunguri) 1003 without the express approval and consent of the Plaintiffs.*
- c) An order directed to the 2nd Defendant to immediately cancel any title and illegal entries made in respect of or in favour of the 1st Defendant and to immediately rectify the register and issue a Title in respect of Title No. Ruiru Kiu Block 2(Githunguri) 1003 to Paul Kiarie Mungara the beneficial owner.*
- d) OCS Ruiru Police Station to ensure compliance with any orders issued herein.*
- e) Costs of this suit plus interest.*
- f) Any other or further relief as this Court may deem fit and just to grant.*

In their statement of Claim, the Plaintiffs averred that the late **Isaac Mungara Mwaura**, bought a share form one **Kuria Chege** on 31st **January 1975**, under Share Certificate No. 421 in **Githunguri Constituency Ranching Company limited** and that the deceased paid all fees and levies dues to Githunguri Constituency Ranching Company Limited and was eventually given a share certificate number 4574 in **April 1983**. They further averred that the deceased balloted under number 3085 and was allocated the suit property which he took possession of and started cultivating . That in **2011** , the deceased wanted to process his title and the Githunguri Constituency Ranching Company Limited duly filed for him all the necessary clearances as well as a transfer documents which he was to lodge at the 2nd Defendant's Registry.

That in **2013**, the deceased discovered that a title had already been issued to the 1st Defendant. It was their contention that the Githunguri

Ranching Company Limited officials denied executing any clearances or transfer in respect of the suit property in favour of the 1st Defendant or any other person. That the deceased unfortunately died in **2014**, while pursuing the matter. The Plaintiffs further averred that upon tracing the 1st Defendant, he denied owning the suit property and their appeal to have him transfer the suit property back to **Paul Kiarie Mungara** have not been fruitful. It was their contention that the 1st Defendant's acquisition of the suit property was fraudulent and tainted with illegalities and collusion with the 2nd Defendants.

The suit is contested and the 1st Defendant filed a Defence on **22nd November 2017**, and denied all the allegations made in the Plaintiff. He averred that on **7th January 2003**, he entered into a sale agreement with one **Francis Kamau Mwangi**, of **L.R Ruiru Kiu Block 2/1003** vide ballot **No. 3085** for a consideration of **Kshs. 150,000/=**. He further averred that he paid **Kshs. 100,000/=** and later paid **Kshs. 50,000/=** on **15th April 2003**, and an acknowledgement was duly executed. It was his contention that he is the registered owner of the suit property with all the rights, privileges and appurtenances free from all other interests and claim. He denied having any dealing with **Isaac Mungara Mwaura**.

The 2nd Defendant filed a Defence dated **7th December 2018** and denied all the allegations made in the Plaintiff. It was its contention that if title was issued to the 1st Defendant for the suit property, the same was based on documents presented before the Land Registrar's office who exercised due diligence and the said documents being believed to be genuine were duly registered and that thus, the 2nd Defendant performed his/her duties as prescribed by law. The Court was urged to dismiss the suit with costs.

The matter proceeded by way of *viva voce* evidence wherein the Plaintiff called two witnesses and the 1st Defendant called one witness and closed their case. The 2nd Defendant did not call any witness though it participated through its advocate in the proceedings.

PLAINTIFF'S CASE

PW1 John Kinuthia Mungara adopted his witness statement dated **30th June 2017**. He further produced the bundle of documents as Exhibit No. 1 to 10. He acknowledged that the share certificate produced as exhibit 4 was a Duplicate of Certificate **No. 421**. Further that the same was being transferred from one person to another. He further testified that then father bought the suit property in **1975** and he was issued with a share certificate **No. 4574** on **24th April 1983**. That he had reported the matter to Ruiru Police station and statements were recorded by the parties. He further acknowledged that the green card produced by the 1st Defendants indicates that he is No. 2 on the green card and entry No.1 is the government of Kenya.

Further testified that the documents that his father was issued with by the Githunguri Ranching Company Limited were all signed, but that his copy was not signed by the Commissioner of Lands. He also acknowledged that they did not attempt to file the transfer documents nor did they pay for the registration. He also testified that the 1st Defendant recorded a statement and averred that he did not have any interest over the suit property. Further that Githunguri Ranching Company limited executed the clearance. Further that Entry No. 1 was done on **8th April 2003** and Entry No. 2 was also done on **8th April 2003**. He also testified that they have been in occupation of the land since 1975.

PW2 John Maina Mburu the Chairman of **Githunguri Ranching Company Limited**, adopted his witness statement dated **26th March 2018**. It was his testimony that the suit property was allocated to member **No. 3085** and that according to their Company records, the suit land was allocated to **Isaac Mungara Mwaura**. He produced the copy of the record as Exhibit 11 and a copy of the ballot as exhibit 12. He further testified that from their records, the suit property has never been transferred to any other person. He further produced letter dated **23rd March 2018** as Exhibit 13.

It was his testimony that the suit property initially belonged to Githunguri Ranching Company Ltd. That the procedure requires that for one to have a clearance certificate issued by the Directors of the Githunguri Ranching Company Limited, a transfer form is also issued and the clearance certificate is forwarded by a letter to the Commissioner of Lands by the Land Registrar. That after signing, payment is then done at Ardhi House and the documents are forwarded back to the Land Registrar, where a green card is opened. He also confirmed that he signed a clearance for **Isaac Mungara Mwaura** who is the owner of the suit property.

It was his testimony that as Chairman of the Company, he was appointed by the Board of Directors to be handling the matters. That the suit property no longer belonged to Githunguri Ranching Company, and that the leases are different from the issuance of the title deeds. Further that from the ballot register, the suit property had some remarks. He also testified that the original ballot register was with the Registrar of Company. That the title issued to the deceased was a freehold and the Company had the area lists of leasehold and freeholds. Further that the land document is the clearance certificate issued by Directors of the Company and backed by their register.

DEFENCE CASE

DW1 Emmanuel Njoroge Mwangi testified that he is the owner of the suit property. That he filed a witness statement and documents in favour of his case to which there was a sale agreement, abstract of title and copy of the Certificate of official search which he urged the Court to adopt. He told the Court that he has never utilized the land nor has he developed it. Further that he does not stay on the suit property. It was his testimony that he bought the suit property from one **Kamamu Mwangi**, who had a ballot card and that he obtained the title deed from him as he had the title deed by that time. He acknowledged that the title deed did not show that **Francis Kamau Mwangi** owned the parcel of land. Further that the agreement talks of a ballot card and not the title deed. It was his evidence that they went to Land Control Board for the Consent and that he bought the suit property for **Kshs. 100,000/=** which monies he had saved in his house.

Further that the land belonged to Githunguri Ranching Company Limited. That he recorded his statement with the police and averred that he had not been to the suit property. Further that he was on the land **5 years** ago and he had not paid any monies to Githunguri Company Limited and that Francis did not give him any document from the Company.

He also told the Court that the title was processed by the vendor but he did not sign any document. That he conducted a search on **26th July 2017**, and paid the monies to his Advocate. That he was given the ballot but he did not see the title in the name of Francis. Further that he did not take possession of the suit land immediately as he only had **Kshs. 100,000/=** and his grandmother added him the **Kshs. 50,000/=**. That there was a misunderstanding between him and his grandmother, and when his grandmother died, her children took away the title deed.

After the close of the *viva voce* evidence, parties filed written submissions which this Court has carefully read and considered. The Court's finds the issues for determination are;

- 1. Who is the bonafide owner of the suit property**
- 2. Whether the Plaintiff is entitled to the orders sought**
- 3. Who should bear the costs of the suit.**

1. Who is the bonafide owner of the suit property

It is not in doubt that the 1st Defendant is the registered owner of the suit property and being the registered owner of the suit property he holds all rights and privileges that appertain to it. Further as a registered owner, he holds it as an absolute and indefeasible proprietor. However, it is not in doubt that though he is the absolute and indefeasible owner, his title can be impugned if it is found that the same was acquired through fraud or unprocedurally. **Section 26(1)** of the Land Registration Act provides that;

“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.”

The 1st Defendant being the registered owner of the suit property has averred that he bought the suit property for **Kshs.150,000/=** from **Kamamu Mwangi** vide a sale agreement dated **7th January 2003**. From the sale agreement the sale was being conducted on the basis Ballot No. 3085. Further in the sale agreement the Vendor was described as the registered owner of the said property. In his evidence DW1 testified that he bought the suit property from the Vendor one **Kamamu Mwangi** who had the title deed. However, his evidence seems to contradict his documents produced in Court. The green card shows that the Title was first granted to the Government of Kenya on **8th April 2003**, wherein the same was transferred to the 1st Defendant on the same date.

It is trite that when a registered proprietor's root of title is called into question, then that person has an obligation to explain the root of the said title. See the case of **Munyu Maina ...Vs... Hiram Gathiha Maina [2013] eKLR** where the Court Of Appeal held that;

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellants' testimony.”

The Plaintiffs have averred that the suit property belonged to the late **Isaack Mwaura**. To this effect, evidence was produced showing receipts that the said **Isaack Mwaura(deceased)** had used for payment to **Githunguri Constituency Ranching Company Limited**. It was the evidence of both the Plaintiffs and the 1st Defendant that the suit property was procured through Githunguri Constituency Ranching Company Limited vide **ballot No. 3085**. Though the 1st Defendant had alleged that he had bought the suit property from **Kamamu Mwangi**, who had the ballot no. there was no evidence that was produced to show that the said **Kamamu Mwangi** ever held the ballot to the suit property. However, PW2 who is the Chairman of the **Githunguri Ranching Constituency Company Limited**, produced in evidence the register that confirmed that the deceased **Isaack Mwaura** was the owner of ballot **No. 3085** and the owner of the suit property. PW2 further gave the procedure through which one was to acquire property from the Company. It was his testimony that one needed to have a share certificate and a clearance certificate. In their testimony, the Plaintiffs produced a share certificate dated **24th April 1983**, in the name of **Isaack Mwaura**, clearance Certificate **dated 18th June 2011** in the name of the deceased and further a letter dated **31st January 1975**, by **Kuria Chege** confirming that he had sold his share Certificate **No. 421 to Isaack Mwaura**.

Therefore, it is not in doubt that while the Plaintiffs have been able to satisfactorily explain the root of title held by the said **Isaack Mwaura(deceased)** which evidence was corroborated by the evidence of PW2 who confirmed that the deceased is the owner of the suit property the same has never been transferred to anyone. The Defendant on the other hand has not been able to explain how the suit property was transferred to him. The deceased having been allocated the suit property in the year **1975**, it then follows that no one else could be allocated the said suit property and the 1st Defendant acquired the rights in **2003**, when the same had already been allocated to the Plaintiff. See the case of **M'Ikiara M'Mukanya & another ...Vs... Gilbert Kabere M'Mbijiwe [1983] eKLR** where the Court held that;

“The plot they were granted was not available for allocation since 1967 when it was granted to the respondent. The council had no plot No 58 at Nkubu Market to allocate and it could not allocate what it did not have. This may explain the fact that although

the appellants exhibited the letter of indication requesting them to report at the Council's office and be shown the plot allocated to them, they neither spoke of nor exhibited in their evidence any Letter of Allocation granting to them the plot, which the respondent exhibited. The alleged allocation to the appellants is of no effect in law. On the other hand the respondent's interest whether as a licensee, which he is not, or a lessee, which I say he is, was never determined by the Council, and he remains the legal owner of plot No 58, Nkubu Market”

From the analysis of the available evidence, the Court finds and holds that **Issack Mwaura** (deceased) is the bonafide owner of the suit property. Further the Court finds that the 1st Defendant has failed to satisfactorily explain the root of his title. Having failed to explain the root of this title, the court finds and holds that the same was acquired unprocedurally and it must be impeached.

2. Whether the Plaintiff is entitled to the orders sought

The Plaintiffs are the Administrators of the Estate of **Issaac Mwaura**, who the Court has already held and found is the bonafide owner of the suit property. The Court has already impeached the title held by the 1st Defendant and therefore it automatically means all the rights and privileges that he held no longer exist.

The Plaintiffs have sought for a permanent Injunction and an Inhibition restraining the Defendants from dealing with the suit property. The Plaintiffs being the Administrators of the bonafide owner, also have the capacity to protect his interests and thus the Court holds and finds that the prayers for Permanent Injunction and Inhibition are merited.

The Plaintiffs have also urged the Court to cancel the title issued to the 1st Defendant and have the 2nd Defendant rectify it and the same issued in the name of **Paul Kiarie Mungara**. The title deed herein was issued under **Cap 300 (now repealed)** and **section 143(1)** of the said repealed Act comes into play herein. The above provision has also been captured under **Section 80(1)** of **Land Registration Act** which provides:

“Subject to subsection (2), 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.”

From the above provision of Law, the Court has the powers to cancel and order for rectification of any certificate of title unprocedurally acquired. In this instant, the Court has already held that the 1st Defendants title was acquired unprocedurally. Consequently, it follows that the same must be cancelled. Further the Court has seen the certificate of confirmation of grant wherein the suit was listed to be registered and vest in **Paul Kiarie Mungara**. Therefore, this Court holds and finds that the said prayer is merited.

The Plaintiffs had sought for Police assistance. However, at this stage, no evidence has been produced to show that the said police assistance would be required. Therefore, the said prayers is found **not** merited.

3. Who should bear the costs of the suit.

Section 27 of the Civil Procedure Act gives the Court discretion to grant Costs. However, it is also trite that costs usually follow event and a successful party is always entitled to costs of the suit unless there are exceptional circumstance. In this instant suit, the Court is satisfied that the Plaintiffs being the successful party are entitled to Costs of suit.

Having now carefully considered the available evidence herein, the cited authorities and relevant provisions of the law and the written submissions, the Court finds that the Plaintiffs have proved their case on the required standard of balance of probabilities and therefore their claim is merited.

Consequently, the Court enters Judgment for the Plaintiffs against the Defendants jointly and severally as prayed in the Plaint dated **30th June, 2017** in terms of prayers **No. (a), (b) (c) and (e)**.

It is so ordered

Dated, signed and Delivered at Thika this 18th day of June 2020.

L. GACHERU

JUDGE

18/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open

Court.

By Consent of :

M/s Kinyanjui, Kirimi & Company Advocates for the Plaintiffs

M/s Muturi Njoroge & Co Advocates for the 1st Defendant

No Consent for the 2nd Defendant

L. GACHERU

JUDGE

18/6/2020