



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC SUIT NO.734 OF 2017

JOSEPH KAMAU GACHINGA(Suing for

and on behalf of the Estate of

JECINTA WAMBUI GACHINGA(Deceased).....PLAINTIFF

VERSUS

MICHEAL MUNGAI KARANJA.....1ST DEFENDANT

ALICE NYAMBURA CHEGE.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

JUDGMENT

By a Plaint dated 3rd August 2017, the Plaintiff herein filed this suit against the Defendants seeking for orders that;

a) A declaration that title deed registered in the names of the 1st and 2nd Defendants over land parcel Ruiru East/Juja East Block 2/257 are invalid and void ab initio and the names of the 1st and 2nd Defendants be cancelled/ extinguished from the land registry in respect of land parcel Ruiru East/Juja East Block 2/257.

b) Costs

In his statement of claim, the Plaintiff averred that the deceased **Jacinta Wambui Gachinga** is the lawful registered owner of the suit property by virtue of being a shareholder of **Juja Farmers Limited** . He averred that the 1st Defendant illegally and fraudulently procured title for the suit property without the deceased's knowledge or consent. He particularised fraud by the Defendants as; issuing and/or procuring falsified/irregular document for the suit property on such premises to facilitate registration of the 1st and 2nd Defendants, unlawfully re allocating the suit premises to the Defendants, working in conspiracy to defeat the Plaintiff's title to the suit proposed, making parallel registration of title in the names of the Defendants.

The Plaintiff sought leave to serve the Defendants by way of substituted service and on **19th September 2018**, through the Daily Nation Newspaper by way of advertisement the 1st and 2nd Defendants were served. Despite service, the Defendants did not file summons to enter appearance and the matter proceeded for formal proof wherein the Plaintiff gave evidence for himself and did not call any witness.

PLAINTIFF'S CASE

PW1 Joseph Kamau Gachinga adopted his witness statement and testified that he went to the Lands office and found that there were three green cards and one was for his mother, another for **Alice Nyambura Chege** and **Micheal Mungai Karanja**. It was his testimony that his mother's green card was issued on **19th May 1989**. That the title for **Raphael** was issued on **14th January 1991** and the one for **Alice** was issued on **21st April 1994**. He urged the Court to order for the cancellation of the subsequent green cards and maintain his mother's green card, He produced his list of documents as exhibits 1 to 7C.

The Plaintiff filed written submissions through the Law Firm of **J.K Ngaruiya & Company Advocates** and submitted that **Jacinta Wambui Gachinga's**(deceased) registration to the suit land was the first in time and unchallenged the Defendants title should be cancelled. Further that when there are two competing titles, the first in time should always prevail. The Plaintiff relied on provisions of law and case law and urged the Court to allow his case.

The Defendant failed to enter appearance and thereby defend the suit. Though the suit is not been defended, that does not mean that the Court will wholly believe the Plaintiff's evidence without interrogation. Further the Court will not just enter Judgment without interrogating the veracity of the evidence placed before it as the Plaintiff is still required to prove his case on the required standard of balance of probabilities. See the case of Shaneebal Limited ...Vs... County Government of Machakos (2018)eKLR, where the Court cited the case of Karuru MunyoroVsJoseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988, where the Court held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

Even if the Plaintiff's evidence remains unchallenged and uncontroverted, the Court still has an obligation to interrogate it and determine whether the same is merited to enable the Court come up with logical conclusion as *ex parte* 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, 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...Caroline Nduku (2018) eKLR, where 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 issues for determination is whether the Plaintiff is entitled to the orders sought.

The Defendant did not file their defence and therefore, there is no evidence to weigh as against the Plaintiff's evidence. However, the Plaintiff is the one who has alleged and he had a duty to call sufficient evidence to prove his case on the required standard of balance of probabilities. Section 107 of the Evidence Act places such a duty on he who alleges must prove. It states as follows:-

(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 Plaintiff has alleged that the deceased herein **Jacinta Wambui** was the owner of the suit property having acquired ownership by virtue of being a shareholder of **Juja Farms**. This Court has seen balloting card, receipt for payment of monies and a share certificate confirming that indeed the deceased was a member of the said Company. Further the Court has further seen green cards that were produced as exhibits before this Court indicating that the deceased **Jacinta Wambui** acquired ownership of the suit property on the **19th may 1989**, **Micheal Mungai** acquired ownership on the **14th January 1991** and that **Alice Nyambura Chege** acquired ownership **21st April 1994**, the Court further notes that the **green cards** indicate that the said ownership was acquired directly from the government of Kenya by all the three. It is the Court's considered view that once the suit property had been allocated to **Jacinta Wambui Gachinga**, the deceased herein it was no longer available for allocation and therefore there is no way that the same could still be allocated to two other people.

It is very clear that **Section 26 of the Land Registration Act**, gives a proprietor of land **absolute** and **indefeasible** rights over the said property. Having been registered as the proprietor, it meant that the deceased (**Jacinta Wambui Gachinga**) held all the rights and privileges that appertain to the suit property in accordance with **Sections 24 and 25** of the **Land registration Act**.

The Defendants did not come to Court to give an account of how they acquired ownership over the suit property. In the absence of any rebuttal of the Plaintiff's evidence and being that of all the three the Plaintiff's (deceased's) title was the first in time and the Plaintiff having produced evidence to show how the deceased acquired the same, the Court finds and holds that the Plaintiff was the owner of the suit property and therefore the titles held by the Defendants must be cancelled.

Section 143 of Registered Land Act Cap 300(repealed) and now copied in **Section 80 of the Land registration Act** gives the Court the powers to cancel any title that had been acquired illegally and having held that the Plaintiff had absolute title over the property, it means that the Defendants title over the suit property must then be cancelled.

Having now carefully considered the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities.

For the above reasons the Court enters Judgment for the Plaintiff against the Defendants entirely as prayed in the Paint with costs to the Plaintiff.

It is so ordered.

Dated, signed and Delivered at Thika this 15th Day of June 2020.

L. GACHERU

JUDGE

15/6/2020

Jackline - Court Assistant

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 the Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consent. 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 :

No consent for the Plaintiff

No consent for the 1st Defendant

No consent for the 2nd Defendant

No consent for the 3rd Defendant

L. GACHERU

JUDGE

15/6/2020