



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 732 OF 2017**

**JOSEPH WACHIRA MBITI.....PLAINTIFF**

**VERSUS**

**GEORGE MUHOHO WANJIRU.....1<sup>ST</sup> DEFENDANT**

**NEWTON MBARI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated 5<sup>th</sup> September, 2017, the Plaintiff herein *Joseph Wachira Mbiti* sought for Judgement against the Defendants jointly and severally for:

- a. A declaration that the transfer of the suit property as captured in the Entries Nos. 4, 5, 6 and 7 of the Register for the parcel of Land comprised in TITLE No. NACHU/MIKUYUINI/107 was fraudulent, irregular, illegal, unlawful, null and void.***
- b. An Order of this Honourable Court to issue and direct the Thika Land Registrar to cancel Entries No. 4, 5, 6 and 7 in the Register for the Land comprised and described as TITLE No. NACHU/MIKUYUINI/107 and for a further Order of this Honourable Court to issue and direct Thika Land Registrar to restore in the Register of parcel No. NACHU/MIKUYUINI/107, the name of the Plaintiff as the Registered proprietor and issue a new title to the Plaintiff and in the Plaintiff's name.***
- c. Costs of the suit***
- d. Another or such other better reliefs as this Honourable Court deems fit to grant in the circumstances of this suit.***

In his claim, the Plaintiff alleged that he was at all material time to this suit, the registered proprietor of the property known as Title *No. Nachu/Mikuyuini/107*, from 9<sup>th</sup> October, 1991 to 16<sup>th</sup> September, 2016 measuring approximate 2.34 Hectares (5 acres). He also alleged that he was allocated the said parcel of Land in 1989, by the defunct County Council of Kiambu, (now Kiambu County Government) vide a letter dated 14<sup>th</sup> March, 1989. Further that he has since 1991, enjoyed exclusive possession, peaceful enjoyment and use of the said parcel of land compromised in the said title *No. NACHU/MIKUYUINI/107*.

It was his averments that on diverse dates between 7<sup>th</sup> August, 2010 and 13<sup>th</sup> October 2016, the Defendants fraudulently and in a very complicated conspiracy and in a purported fraudulent sale, caused the suit property to be transferred to the 1<sup>st</sup> Defendant on 6<sup>th</sup> September, 2016, and later transferred to the 2<sup>nd</sup> Defendant on 13<sup>th</sup> October, 2016. It was the Plaintiff's contention that the transfer to the 2<sup>nd</sup> defendant was effected barely 37 days from the date of the purported transfer of the said property from the Plaintiff to the 1<sup>st</sup> Defendant.

It was further contended that the documents on the part of the Plaintiff used by the Defendants to allegedly transfer the suit property from the name of the Plaintiff to the 1<sup>st</sup> Defendant were a forgery including the 1.D Card, Passport size, Photographs, PIN Certificate and Signature on the instrument of the transfer. He also contended that the Plaintiff achieved successful transfer of the suit property from the Plaintiff to the 1<sup>st</sup> Defendant on 6<sup>th</sup> September, 2016, but the said transfer was fraudulent. Further that the 1<sup>st</sup> Defendant caused the suit property to be transferred to the 2<sup>nd</sup> Defendant on 13<sup>th</sup> October, 2016 which transfer was fraudulent as the 1<sup>st</sup> Defendant did not have a good title.

He particularized the fraudulent acts of the Defendants in para 9 of the Plaint among them causing the registration of transfer of the suit property in favour of the 1<sup>st</sup> Defendant using forged documents. Further causing the suit property to be transferred from the 1<sup>st</sup> Defendant to 2<sup>nd</sup> Defendant when the Defendants knew or ought to have known that the 1<sup>st</sup> Defendant did not have a good title to the suit property. Further that despite the above ***fraud, Irregularity, illegality and conspiracy***, the Land Registrar caused entries in the Register, in favour of

1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff further contended that when he learnt of fraud, Irregularity, Illegality and Conspiracy, as pleaded above, he sought to protect his proprietary interest in the said suit property by causing a **caution** to be registered against the said **Title Nachu/Mikuyuini/107**, on **27<sup>th</sup> April, 2017**, by claiming a proprietor interest thereon.

The Plaintiff urged the Court to direct the Land Registrar to cancel the entries in the Register which reflected the above fraud and restore his name as the proprietor of the suit property. He also urged the Court to Order for re-issue of new title for the said parcel of Land and further declare the said entries entered in favour of the Defendants as irregular and unlawful and therefore null and void.

The Defendants were served with Summons to Enter Appearance and only 1<sup>st</sup> Defendant filed a Defence on **24<sup>th</sup> October, 2017**. The 2<sup>nd</sup> Defendant entered appearance through the **Law Firm of Anyango, Ogutu & Company Advocates** on **24<sup>th</sup> October, 2017**. However, he did not file any Defence.

The 1<sup>st</sup> Defendant, **George Muhoho Wanjiru** in his Statement of Defence denied all the allegations made against him by the Plaintiff. He averred that he is the registered proprietor of the suit property known as title **No. Nachu/Mikuyuini/107**. He denied ever unlawfully, wrongfully, illegally, or unprocedurally causing the transfer of the suit property to the 2<sup>nd</sup> Defendant and he did not put the Plaintiff to strict proof. He contended that the transfer of the suit property from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was lawful, without any forgery as alleged and did not put the Plaintiff to strict proof. He also denied ever committing any acts of fraud and/or involved in any fraudulent acts and/or at all in transferring of the said parcel of land **Nachu/Mikuyuini/107**, and he denied all the particulars of fraud as particularized by the Plaintiff and did not put him also to strict proof. The 1<sup>st</sup> Defendant also contended that the transfer of the suit property was overboard, proper and lawful and that he has since obtained a good title. He urged the court to dismiss the Plaintiff's suit with costs.

The matter proceeded for viva voce evidence on **23<sup>rd</sup> July, 2019**. Though the Defendants respective advocates were served with the Hearing Notices, as per the Affidavit of Service dated **2<sup>nd</sup> May, 2019** filed by **Ben Kyalo Mueke**, a process server, the Defendants did not attend Court, nor send any representation. The matter proceeded in their absence wherein the Plaintiff gave evidence for himself and called no witness.

#### **PLAINTIFF'S CASE**

**P.W.1: Joseph Wachira Mbiti**, adopted his witness statement dated **15<sup>th</sup> September, 2017**, as his evidence in court. He also produced the list of documents as exhibit in support of his case. He further testified that the land parcel **No. Nachu/Mikuyuini/107**, was allotted to him by the County Council of Kiambu in 1990. He identified the letter of allotment in Court which confirmed that he was indeed allotted the said parcel of land. That vide a letter addressed to the County Council clerk on **14<sup>th</sup> March, 1989**, the Plaintiff was informed that he had been allocated the said plot **No. 3353**, and he was also informed what he was supposed to pay some stand premium. That after payment, a title deed **No. Nachu/Mikuyuini/107** was issued to him. That the said title deed was issued on **9<sup>th</sup> October, 1991**. It was his evidence that he has never sold the said parcel of land, but he later noted that it was changed to **George Muhoho Wanjiru** the 1<sup>st</sup> Defendant herein. He denied ever selling the said land to 1<sup>st</sup> Defendant nor signing the transfer documents. That the transfer form bearing his name **Joseph Wachira Mbiti**, was never signed by himself. Though the I.D Number was his, the passport size photograph thereon is not his. He produced his genuine I.D card and **P.I.N** Certificates exhibit in Court. It was his further evidence that the passport photos on the I.D card and **transfer** form that were used to transfer the Land to **George Muhoho Wanjiru**, were not his passport photos. He also denied ever having gone to the **Land Control Board** to obtain consent from the said **Land Control Board** to sell the instant parcel of Land. Further that though the Land was later sold to 2<sup>nd</sup> Defendant, he was not involved in the said 2<sup>nd</sup> transfer and/or transaction. He also denied having ever sold the suit property to any of the Defendants herein and he urged the Court to cancel the two transfers and revert the land back to himself. He denied all the allegations made in the Defence filed by the 1<sup>st</sup> Defendant.

After the close of viva voce evidence, the Plaintiff filed Written Submissions on **19<sup>th</sup> November, 2019**, through the **Law Firm of Kanyi Ndurumo & Company Advocates**. It was submitted that the Plaintiff has proved his case on the required standard of balance of probabilities.

The Court has now considered the pleadings in general, the available evidence and the exhibits produced in Court and makes the following findings.

There is no doubt that vide a letter dated **14<sup>th</sup> March, 1989**, the Plaintiff herein **Joseph W. Mbiti** was allocated Plot **No. 3353**, by the Defunct **County Council of Kiambu**. The said letter was signed by the County Clerk Secretary. There is also no doubt that the Plaintiff was issued with a **Title deed** for the said parcel of Land being **Nachu/Mikuyuini/107**, on **9<sup>th</sup> October, 1991**. The said title was registered under the **Registered Land Act Cap 300** Laws of Kenya (now repealed). By dint of Section 27 of said **Cap 300** (now repealed) the Plaintiff became the absolute and indefeasible proprietor of the said parcel of Land. It provides as follows:

**27(a) "The registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto"**

Further as provided by **Section 28** of the said repealed **Cap 300**, the Plaintiff's proprietorship or interest could only be defeated by operation of law. See **Section 28 (Cap 300)** which provides;

**"The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances**

**belonging thereto, free from all other interests and claims whatsoever, but subject –**

*(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

*(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:*

The Plaintiff has alleged that he retained the original title deed for the suit property and that he never sold the said parcel of land to anyone, not even the 1<sup>st</sup> Defendant. However, it is evident that this suit property was transferred to the 1<sup>st</sup> Defendant, **George Muhoho Wanjiru** on **6<sup>th</sup> September, 2016**, as per the transfer document produced in Court by the Plaintiff. Further, it is also evident that the said **George Muhoho Wanjiru**, obtained a **Certificate of title** on **6<sup>th</sup> September, 2016**. Therefore, as a registered proprietor, the said **George Muhoho Wanjiru** became the **absolute** and **indefeasible** owner of the suit property as provided by **Section 26 of the Land Registration Act, 2012** which provides

*“ 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.*

Further as the absolute owner, the said **George Muhoho** was entitled to enjoy rights of such a proprietor as provided by **sections 24 and 25** of the said **Land Registration Act 2012**. **Section 24(a)** provides that;

*(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and*

**Section 25(1) of the Land registration Act** provides;

*(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

*(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

*(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

Such rights include dealing with the Land as he wished and disposing or selling the same was such a right. Rightful, as a proprietor, the said **George Muhoho**, the 1<sup>st</sup> Defendant herein sold the suit property to 2<sup>nd</sup> Defendant **Newton Mbari** on **13<sup>th</sup> October, 2016**. The documents of such transfer have been produced by the Plaintiff as exhibits in Court.

Therefore, **Newton Mbari** is the registered owner of the suit property as per Certificate of Official Search and copy **Green Card** produced in court as exhibits by the Plaintiff. As provided by **section 26** herein of the **Land Registration Act**, the said **Newton Mbari**, 2<sup>nd</sup> Defendant is the **absolute** and **indefeasible** owner of the suit property. However, the said proprietorship can be challenged and the certificate of title impeached if the said certificate of title was acquired **Fraudulently, illegally, irregularly**, unprocedurally or through misrepresentation or through corrupt schemes see **section 26(1) of the Land Registration Act**.

*“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 Plaintiff has alleged that he did not transfer the suit property to the 1<sup>st</sup> Defendant. He testified that the documents used to transfer the suit property to 1<sup>st</sup> Defendant though bearing his name were a forgery as the I.D card bears a different I.D Card number and passport photograph therein is not his. Further the **PIN** Certificate was not his PIN Certificate though it bears his name. That the passport photograph on the **transfer** form is not his. He produced his genuine I.D Card and PIN Certificate. He also told the Court that he is still retaining the original title deed. The Plaintiff's claim is hinged on fraud. **Fraud** is described by the Blacks Law Dictionary as;

*“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”*

Further **Black's Law 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 is also trite that allegations of fraud are serious allegations and must be pleaded and proved on the required standard.

See the case of ***John Mbugua Gitau...Vs... Simon Parkoyiet Mokare & 4 others (2017) eKLR***, where the court reiterated its findings in ***Emfil Ltd ...Vs... Registrar of Titles***, and held that;

***"Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities."***

The Court has looked at the statement of claim as filed by the Plaintiff and the Court notes that the Plaintiff has indeed pleaded the particulars of fraud.

Further in his evidence, the Plaintiff did adduce evidence to the effect that after obtaining the Certificate of title in **1991**, he has retained the same and has never sold the suit property to anyone. It is clear that the suit property was transferred from the Plaintiff to 1<sup>st</sup> Defendant and the documents used for the said transfer were a forgery. The court has no doubt that the Plaintiff is not the one who transferred the suit property to 1<sup>st</sup> Defendant as the documents used for such transfer are indeed a forgery. Therefore, the 1<sup>st</sup> Defendant did not obtain a good title. Having not obtained a good title, the 1<sup>st</sup> Defendant could not transfer the suit property to 2<sup>nd</sup> Defendant. The Defendants did not attend Court to challenge the Plaintiff's evidence and allegations and averments and this Court would have no reason to doubt the same.

The transfers herein to the Defendants were done in the year **2016**. Therefore, the said titles were registered under the **Land Registration Act 2012**. **Section 26(1)** of the Land Registration Act gives instances wherein a Certificate of title can be challenged and/or impeached. Fraud and misrepresentation is one of such instance. It is very clear that the registration of the suit property in favour of 1<sup>st</sup> Defendant was done fraudulently, though misrepresentation and illegally. Therefore, the 1<sup>st</sup> Defendant's title is impeachable. Having impeached the 1<sup>st</sup> Defendant, title that he held before transferring of the suit land to 2<sup>nd</sup> Defendant, then automatically, the 2<sup>nd</sup> Defendant's Certificate of title is not valid and the same is found to be null and void. See the case of ***Esther Ndegi Njiru & another ...Vs... Leornard Gatei [2014] eKLR*** where the Court held that ;

***"As regards the issue whether the registration of the plaintiffs as the owners of the suit property is absolute and indefeasible and not liable to be challenged. I would answer in the negative. Having held and found that the 2<sup>nd</sup> Defendant fraudulently processed and acquired the title to the suit property in his name my view is that he did not acquire a good title to the property and no interest in the property could pass to him. The 2<sup>nd</sup> Defendant therefore not having any good title or interest in the suit property could not pass a good title to the plaintiffs."***

As provided by **section 80(1)** of the Land Registration Act, the Court has power to Order for rectification of the Register by directing any Registration to be cancelled and/or amended. The Court is satisfied that the registration of the suit property in favour of the Defendants was done fraudulently, and/or through fraud. As provided by the above provisions of Law, then the Court directs that the Certificate of title held by the 2<sup>nd</sup> Defendant **Newton Mbari** be cancelled. The said register should be rectified and the Land Registrar, Kiambu to restore the said Register in favour of the Plaintiff herein. **Section 80(1) of Land Registration Act** provide as follows

***"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."***

Having now carefully considered the available evidence, 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 Judgement for the Plaintiff against the Defendants herein jointly and severally as prayed in the Plaint in terms of prayers No. **(a)** and **(b)** with costs of the suit to be borne by the Defendants herein.

Further, the Court notes that the suit property is situated in **Nachu/Mikuyuini** area and certainly, the Land Registry cannot be in Thika, but in Kiambu. The Court therefore directs the **Land Registrar, Kiambu**, to cancel the entries as prayed in prayer No. **(b)** of the Plaint dated **5<sup>th</sup> September, 2017** and not **Land Registrar, Thika**.

It is so ordered.

**Dated, signed and Delivered at Thika this 23<sup>rd</sup> Day of July 2020**

**L. GACHERU**

**JUDGE**

**23/7/2020**

**Lucy - 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 His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** 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 :**

**Mr. Kanyi Ndurumo for the Plaintiff**

**No Consent for the 1<sup>st</sup> Defendant**

**No Consent for the 2<sup>nd</sup> Defendant**

**L. GACHERU**

**JUDGE**

**23/7/2020**