



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 406 OF 2017

(FORMERLY NRB ELC NO.533 OF 2012)

FLORENCE WAIRIMU NDURU.....PLAINTIFF

VERSUS

RUTH WANJIRU MUKUNGA.....1ST DEFENDANT

STEPHEN GAKURE KIMAITI.....2ND DEFENDANT

ISAAC MUTURI GACHOGU.....3RD DEFENDANT

JUDGMENT

By a Re-amended Plaintiff dated 4th July 2018, the Plaintiff herein sought for judgment against the Defendants herein jointly and severally and sought for the following orders:-

i) A Declaration that the Plaintiff is the legitimate and rightful beneficiary of the suit property, L.R No. Ruiru/ Kiu Block 2/3723, now subdivided and renamed Ruiru Block 2/10070-10081, to the exclusion of all others.

An order directing the District Land Registrar, Thika to forthwith revoke and cancel title documents in respect of Ruiru Block 2/10070-10081, and revert it to its original status in the name of Miriam Ngugi (the Deceased).

Permanent injunction against the Defendants, their agents, servants officers employees and any other person acting at their behest or under directions or instructions by the Defendants restraining them from alienating or in any way interfering with the Plaintiff quiet possession of L.R Ruiru/Kiu Block 2/3723, now subdivided and renamed Ruiru Block 2/10070-10081.

ii) Mesne Profit.

iii) Cost of the suit

iv) Any other relief this Honourable Court may deem fit to grant.

In her statement of Claim, the Plaintiff averred that she is the Administrator of the estate of **Miriam Wangari Ngugi**. That prior to the demise of the deceased, she was the registered owner of **L.R 3723, Block Number Ruiru Block 2(Githunguri) 3723 Ballot Number 1558, Share Certificate Number B-3851 measuring 0.5000 ha**, falling under map sheet No. 5, subdivided and renamed **Ruiru Block 2/10070-10081**. That the same had been allocated to her deceased mother by **Githunguri Constituency Ranching Company Limited**.

It was her contention that the Deceased did not transfer her interest to anyone before she died and that the suit property ought to devolve around her heirs. The Plaintiff further averred that in 2012, she noticed some developments on the suit property by strangers, and upon investigating, she learnt that the suit property had been fraudulently sold to the 1st Defendant by the 2nd Defendant. That the 1st Defendant claimed to have bought the suit property from the 3rd Defendant who has since been charged in Court with **Obtaining Money by False Pretences**. The Plaintiff further averred that when she sought clarification from **Githunguri Constituency Ranching Company Limited**, it was confirmed that the suit property belonged to her late mother and she had subsequently been issued with a share Certificate duly signed by the Chairman. Further, that she has on several occasions approached the 1st Defendant to vacate the suit property, but he has refused to grant vacant possession.

She particularised fraud by the 1st and 2nd Defendants as; purporting to transfer the suit land to 1st Defendant with full knowledge that the

Plaintiff has never entered into any agreement, that the original and valid allotment documents has been with the Plaintiff deceased mother since 1985. Issuing title documents to the 1st Defendant without any notice to the Plaintiff, failing to inform the 1st Defendant that the suit property had been allocated to the Plaintiff. It was the Plaintiff's further contention that the 1st Defendant having acquired title documents illegally cannot have a good title over the suit property and as a result she is seeking the 1st Defendant's eviction.

The suit is contested and the 1st Defendant filed an Amended Defence dated **30th November 2017**, and denied all the allegations made in the Plaint. She denied that the deceased was ever the registered owner of **L.R 2/3723**; She contended that she purchased the said property in **December 2005**, from **Isaak Muturi Gachogu**, the then registered owner vide a sale agreement dated **17th December 2005**, and was issued with a title deed on **8th November 2007**. The 1st Defendant further averred that she took possession of the suit property in **2005** and has been working on the suit property since then and that neither the Plaintiff nor the deceased has ever laid a claim to the suit property. Further that her acquisition of the suit property was lawful and valid and that she holds a good title over the suit property and therefore she is in lawful possession of the same as the legal owner. She further contended that the suit raises no reasonable cause of action and that the title to **L.R 2/3723**, has been closed after the same was subdivided into **12 plots** and therefore no claim against it can exist.

After close of pleadings, the matter proceeded by way of viva voce evidence wherein the Plaintiff called two witnesses and the Defendants also called two witnesses.

PLAINTIFF'S CASE

PW 1 Florence Wairimu Mburu adopted her witness statement as evidence in Court and produced her list of documents as Exhibit 1. It was her testimony that the suit property belonged to her mother and that it was wrongly registered to another person. Further that her mother had purchased the suit property from **Githunguri Ranching Company Limited** and that the current owner is **Ruth Wanjiru Mukunga** who has erected mabati house and subdivided the suit property into **12 plots**, which are all under her name. That her mother died on **29th November 2008**, and that the Plaintiff finished paying for the suit property in **2009**. Further that **Stephen Gakure**, was the first registered owner, but that he was not a member of **Githunguri Ranching Company Limited**. She told the Court that she reported the matter to the Police and the 1st Defendant was charged in Court. She further testified that the receipts she had were for payments of the suit property and that the ballot is **No. 1558C**, but does not indicate title **No. 3723**. That the register has the title Number and that her mother was a shareholder and was issued with the Certificate but that the share certificate did not have the ballot number. She stated that the Certificate was transmitted to her and her siblings. That in **1987**, the family planted a life fence around the suit property and that they used to go to the land during the weekends and they never found the 1st Defendant. Further that when they found the land invaded, they reported matter to the police, but that they had never visited the land with Police. She denied that the 1st Defendant lived on the land in **2005**. It was her contention that **Githunguri Ranching Company** gave them the clearance documents and the transaction were sanctioned by the Land Control Board.

Further that she had the share certificate and the ballot and that she was given an allotment letter by **Githunguri Ranching Company Limited**. That she testified in the Criminal Case, but the accused was set free. She also testified that she was not told that the land had been issued with a new title deed. Further that the references of the ballots were given by **Githunguri Company Limited**, but not with title numbers. That **Githunguri Ranching Company** told her that the 2nd Defendant was not a member of their company.

PW2 John Maina Mburu, the Chairman of **Githunguri Ranching Company Limited** adopted his witness statement dated **15th March 2016**. It was his testimony that the land was initially registered in the name of the Government of Kenya and that the mother title of **Ruiru/Kiu Block 12**, was in the name of **Githunguri Ranching Company Limited**. That upon subdivision, members were required to acquire clearance from **Githunguri Ranching Company Limited**. Further that the Clearance certificates were then forwarded by the Lands Office to Commissioner of Lands and the green card was opened in the name of the Government of Kenya. That the green card was opened and in the same day, registered in the name of **Stephen Gakure** and further on the same day, title deed was issued. Further that there was no transfer signed by the Commissioner of Lands issued on behalf of the Government of Kenya. He contended that the whole process cannot be done in one day and that due process was not followed.

Further that according to him, at the time he assumed office, the suit property was owned by **Miriam Wangare Ngugi**. He confirmed that he did not have anything to show that the land belonged to **Githunguri Ranching Company**. He further testified that the land was subdivided in **1983**, and after the subdivision, **Githunguri Ranching Company** continued being the owner of the suit property and they allocated the subdivided portions to the owners. That the suit property is one of the subdivision of **Githunguri Ranching Company Limited** and the Plaintiff's ballot is **No. 1558** for **Miriam Wangare**. However, the ballot does not indicate the title number as the title number is indicated in the register. He told the Court that the receipts produced by PW1 were for the purchase of shares and that in the receipt dated **10th March 1983**, the land had been subdivided and the members had to pay at the **District Commissioner's Office**, in Kiambu as the District Commissioner was overseeing the process of subdivision. That the owner had completed paying for her shares and the Company issued a share Certificate on **3rd July 2004**, to **Miriam Wangare Ngugi**. He acknowledged that the green card showed that the land was transferred to **Stephen Gakure in 2003**, and that the Company learnt that the land was registered in the name of another person in **2011**. That the land is given to citizens through allotment but that in this case, there was no allotment given by the Government. He told the Court that he did put restrictions on the suit property and the Company issued a clearance certificate on **17th May 2011**. He confirmed that the signature on the clearance certificate was his. Further that the company issued a letter dated **16th June 2011**, to confirm that the land was owned by **Miriam Wangare Ngugi**.

It was his further testimony that the 2nd Defendant was not a member of **Githunguri Constituency Ranching Company Limited** and that he has never gone to their office. Further that the registration of the Government of Kenya as the first owner occurred in all the titles. It was his contention that the 2nd Defendant acquired title fraudulently.

1st DEFENDANT'S CASE

DW1 Ruth Wanjiru Mukunga, the 1st Defendant herein adopted her witness statement dated **18th March 2013**, and produced her list of documents. It was her testimony that she has the title to the suit property and therefore the suit property is her land having bought the same in **2005**. She told the Court that she did a search and obtained a green card and that the green card showed that the first person was the 2nd Defendant, then **Isaac Muturi Gachogu** thereafter herself. That they were all issued with title deeds and that she obtained consent from the **Land Control Board** and she has been on the suit property to date. She denied the Plaintiff has ever demanded the land from her. It was her further evidence that the documents produced by the Plaintiff do not refer to any particular land. Further that the criminal case against the 2nd Defendant was dismissed.

She told the Court that she bought the suit property for **Kshs. 350,000/=** to which she gave a deposit of **Kshs. 150,000/=** and the balance after going to the Land Board in **2006**. She confirmed that she declared the value of the land as **Kshs. 200,000/=** and that the agreement is dated **17th December 2005** and consent was obtained in **2006** and the registration of the title was in **2007**.

That when she did a search, she noted that the land was never registered in the name of **Githunguri Constituency Ranching Company Limited**. She told the Court that she realized that there was a claim to the suit property in **2011** when she noted a Caveat but that she was still using the land before 2011. It was her testimony that she did the subdivision before the suit was filed and that the documents that she presented were accepted by the Land Registrar.

2nd DEFENDANT'S CASE

DW2 Stephen Gakure Kimathi the 2nd Defendant herein adopted his witness statement as his evidence. It was his testimony that he buys and sells land and that he bought the suit property from **Githunguri Ranching Company** in **1990**, and paid **Ksh. 15,000/=** and that he also paid **Kshs. 3000/=** for clearance. He further told the Court that he bought the property from a Director called **Kimwaki** and he was given a certificate and receipt and that he was given a title deed after he paid **Kshs. 3,000/=** and returned the Certificate.

That he took the clearance certificate to the Lands office and he was issued with a title deed and he later sold the suit property to **Muturi** for **Ksh. 150,000/=**. He stated that he was later informed that **Muturi** passed on. That he was charged in Court and acquitted because the Land Registrar testified that he was the owner of the suit property. It was his further testimony that the file was opened on **12th March 2003**, and that the 1st entry is Government of Kenya and the 2nd entry is to him and that the same was done on the same day. That he gave all the documents to the purchaser and though he bought the land in **1990**, he obtained the title in **2003**. Further that he was acquitted in the criminal case for lack of evidence, but he did not have any documents to show that he owned the land and that he was a genuine title holder. Further that the suit property was public land and Githunguri was only distributing the land on behalf of the public.

After close of viva voce evidence, parties filed written submissions which the Court has now carefully read and considered. The Court has also read and considered the pleadings by the parties and the evidence adduced and finds that the issues for determination are;

- 1. Who is the Lawful owner of the suit property**
- 2. Whether the 1st Defendant holds a valid title to the suit property**
- 3. Whether the Plaintiff is entitled to the orders sought.**

1. Who is the Lawful owner of the suit property?

It is not in doubt that the Plaintiff is laying claim to the suit property and the 1st Defendant is also laying claim to the same on the basis that she bought the suit property from one **Isaack Muturi Gachogu**, 3rd Defendant, who had allegedly bought the same from the 2nd Defendant. For this Court to be able to determine who between the two that is the Plaintiff and 1st Defendant has a valid claim over the suit property, the Court is required to examine who between the two has been able to establish the root of their title. See the case of **Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others [2016] eKLR**, where the Court held that;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

Further In the case of **Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Appeal Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

While the 1st Defendant has submitted that the Plaintiff has not been able to prove that the suit property initially belonged to **Githunguri Constituency Ranching Company**, the 2nd Defendant whose was the first person to be issued with the title and who the 1st Defendant

claims to have got her title through being the root of her title, has testified that he bought the suit property from a Director of Githunguri Constituency Company. That after the purchaser being the 3rd Defendant bought the suit property from him, he gave him all the documents and that upon being granted the title deed he surrendered his share certificate. The Court is therefore satisfied that the suit property initially belonged to **Githunguri Ranching Constituency Company Limited**.

Though the 2nd Defendant has alleged that that he bought the suit property from a Director of Githunguri Constituency Ranching Company, he has not produced any evidence to indicate, confirm or show that he was ever a shareholder or a member of the said Githunguri Constituency Ranching Company Limited. Further PW2 who is the Chairman of the said Company, testified that there is nothing in their records that shows that the 2nd Defendant was ever a member of the said Company or that he was issued with clearance certificate. In the absence of any evidence to support the said allegations, the Court finds and holds that the 2nd Defendant has failed to show the root of his title and therefore he was not the lawful owner of the suit property, before he sold it to 3rd Defendant.

The Plaintiff on the other hand has averred that her mother **Miriam Wangari Ngugi** was the owner of the suit property and that the suit property was passed on to them after the death of their mother. The Court has seen receipts evidencing that the said **Miriam** paid for the shares at **Githunguri Constituency Ranching Company Limited**. The court has also seen the ballot, the share certificate and the clearance certificate indicating that the said **Miriam** was the owner of the suit property having balloted for the same vide ballot No. **1558**.

In his testimony PW2 testified that the property number is never indicated in the share certificate nor on the receipts and that the same is always indicated in their register. He further testified that as per their record the suit property was originally allocated to the one **Miriam Wangari Ngugi** (now deceased). To this effect, the Court has seen the letter dated **16th June 2011**, confirming that the said **Miriam** was allocated the suit property vide **ballot No. 1558**. The Court is therefore satisfied that the Plaintiff has been able to trace and show the root of her title. The Court has seen the Chief's letter confirming the beneficiaries of the deceased who are the people who had been issued with the share certificate.

It is also not in doubt that the 2nd defendant claims to have acquired title over the suit property in **1990**. However, the said Miriam was allocated the land in **1985**, as per the letter from **Githunguri Constituency Ranching Company**. If the two parties were allocated the suit property by the said Company, and the fact that the Plaintiff's mother had already been allocated the suit property, it would only mean that the land was not available for allocation and therefore there is no way the 2nd Defendant could still be allocated the said property. See the case of **M'Ikiara M'Mukanya & another vs Gilbert Kabere M'Mbijjwe [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 above analysis of the available evidence, the court finds and holds that **Miriam Wangari Ngugi** was the lawful owner of the suit property.

2. Whether the 1st Defendant holds a valid title to the suit property.

The 1st Defendant's title deed was issued on **8th November 2007** under Registered Land Act Cap 300 (*now repealed*). Under the said Cap 300 (*now repealed*) **section 28** provides that such a registered owner is the absolute owner and that his or her ownership to such parcel of land can only be defeated by the operation of law. See Section 28 of Cap 300.

“28. 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:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The court has found that the root of the 2nd Defendant's title is doubtful. The 2nd Defendant therefore did not have a good title to pass to 3rd Defendant and consequently, the said 3rd Defendant could not pass a good title to 1st Defendant. Therefore, the court finds and hold that the 1st Defendant certificate of title is impeachable as the root of her title is questionable and it is possible it was acquired **unlawfully, illegally** and **unprocedurally**. See the case of **Elijah Makeri Nyangw'ra ...Vs...Stephen Mungai Njuguna & Another (2013) eKLR** where the court held that:-

“The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

For the first limb, it appears to me that the title of the 1st defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1st defendant was a party to the fraud or misrepresentation. Indeed, to me the 1st defendant was an innocent purchaser for value. He was probably conned of his money by the 2nd Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2nd Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2nd defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).

Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.

In the instant case, the 1st Defendant allegedly bought the suit property from Isaak Muturi who also allegedly bought the same from the 2nd Defendant. The Court has already held above that the title held by the 2nd Defendant was not lawful issued or held as he failed to explain the root of his title. Therefore, it follows that whatever title he passed could not be a good title as he did not have any title to pass. See the case of Esther Ndegi Njiru & another ...Vs... Leonard Gatei [2014] eKLR where the Court held that;

“It would thus in my view follow that if the 2nd Defendant did not have a good title in the property he could not pass a good title to anybody else.

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 2nd 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 2nd Defendant therefore not having any good title or interest in the suit property could not pass a good title to the plaintiff.”

From the above, the Court holds and finds that the 1st Defendant does not have a good title over the suit property as whatever was passed to her was not a good title and therefore the title is not valid and must then be impeached.

3. Whether the Plaintiff is entitled to the orders sought.

In her re-amended Plaintiff, the Plaintiff has sought for a declaration that she is the legitimate owner of the suit property, an order directing that Land Registrar do revoke and cancel title documents in respect of the suit property that has since been subdivided and for a permanent injunction. The suit property was registered under **Cap 300** (now repealed) and **section 143(1)** of the said Registered Land Act Cap 300 (now repealed) which is reiterated in **section 80** of **Land Registration Act** gives the Court power to revoke and cancel any title:-

“143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

From the above analysis the Court has already held that the Plaintiff is the lawful owner of the suit property. Therefore, it follows that she holds all the rights and interests over the suit property. Having held above that the 1st defendant's title is impeachable as she does not hold a good and valid title, the Court is satisfied that the Plaintiff is entitled to the orders sought of revocation of the title certificate held by the 1st Defendant for an order of Permanent Injunction.

The Plaintiff has also sought for mesne profits. It is trite that mesne profits must be specifically pleaded and proved. The Plaintiff has failed to do the same and therefore is not entitled to the said prayer.

Further the Plaintiff has sought for the costs of the suit. Section 27 of the Civil Procedure Act gives the Court discretion to grant cost. However, it is trite that costs usually follow the event and in this case the Plaintiff being the successful party is therefore entitled to the cost of the suit.

Having carefully considered the available evidence herein, the court finds that the Plaintiff has proved her claim on the required standard of balance of probabilities. Consequently, the court finds the Plaintiff's claim merited and Judgment is entered in favour of the Plaintiff against the Defendants jointly and severally as per the re-amended Plaintiff dated 4th July 2018 in terms of prayers no (i) and (ii) (c).

It is so ordered.

Dated, signed and Delivered at Thika this 16th day of July 2020

L. GACHERU

JUDGE

16/7/2020

Court Assistant – Lucy

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 **Judgement** 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.

With Consent of and virtual appearance via zoom

Mr. Gakaria for the Plaintiff

1st Defendant in person and in absence of her advocate

No consent for the 2nd Defendant

No consent for the 3rd Defendant

L. GACHERU

JUDGE

16/7/2020