



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO.1833 OF 2007**

**ATHANAS BONAVENTURES WANYAMA.....1<sup>ST</sup> PLAINTIFF**

**PRISCILLA OMBITO WANYAMA.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**THE LAND REGISTRAR – KIAMBU DISTRICT .....1<sup>ST</sup> DEFENDANT**

**REUBEN MUNA KANGETHE.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiff filed suit through a plaint filed on the 31<sup>st</sup> March, 2006. They shall hereinafter be referred to as the plaintiffs. They have sued 2 defendants, the first (1<sup>st</sup>) defendant is the Land Registrar Kiambu District and the second (2<sup>nd</sup>) defendant is Reuben Muna Kangethe.
2. This case was first heard by Lady Justice Okwengu on the 27<sup>th</sup> June 2011. Lady Justice Okwengu heard the evidence of the 1<sup>st</sup> Plaintiff on the said date.

**PLEADINGS**

3. The plaintiffs averments and claims as per the plaint are as follows; that on or about 29<sup>th</sup> February 1996 the plaintiffs purchased for value Land Reference Number Kiambu/Municipality/Block-111/101 measuring 0.2263 Hectares (hereinafter referred to as the suit land) from M/s. Mumwe Investment Limited the Original lessor (from the Government of Kenya since 1<sup>st</sup> April 1982) and thereafter got registered as the joint proprietors and were issued with a Certificate of lease of the land parcel dated 29/2/1996 which has been in their joint custody to date; that on 26<sup>th</sup> March 2006 they were alerted by a neighbor bordering their plot that the 2<sup>nd</sup> defendant had started construction on the suit land without their consent or authority. On confronting the 2<sup>nd</sup> defendant he claimed to have purchased the parcel of land from one Stanley Kimani Irungu who had represented himself as the sole registered owner and that the 1<sup>st</sup> Defendant had purported to issue him with a certificate of lease pursuant to the said transfer in 1998. Their search at Lands Registry revealed the same that the defendant was irregularly and fraudulently registered as the sole owner of the suit land; they aver further that since purchasing the said parcel of land they have never sold or transfer the same to any person or Stanley Kimani Irungu and that the registration and transfer of the land by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was totally illegal and fraudulent and hence a nullity in law.

**Particulars of fraud against the defendants as per the plaint**

- i. Altering registration records at the Kiambu Land Registry relating to the suit land to register one Stanley Kimani Irungu as the owner thereof in 1998 without the plaintiff's knowledge at all.
- ii. Transferring ownership of the suit land from the plaintiff's to one Stanley Kimani Irungu without insisting on the surrender of the of the original title or certificate of lease and or complying with registration requirements as provided under Cap 300, Laws of Kenya
- iii. After a and b above proceeding to register a transfer of the suit land from one Stanley Kimani Irungu to the 2<sup>nd</sup> defendant while knowing that the registration of the transfer in favor of Stanley Kimani Irungu was infact fraudulently done and in total breach of the law and registration requirements.
- iv. The 2<sup>nd</sup> defendant proceeding to purportedly purchase the suit land from one Stanley Kimani Irungu without first establishing and doing a personal search of the suit parcel to ascertain the genuineness of Stanley Kimani Irungu's alleged title.

The plaintiffs' seek judgment against the defendants jointly and severally as follows;

- a. A permanent injunction against the 2<sup>nd</sup> defendant restraining the 2<sup>nd</sup> defendant from occupying dealing with or developing suit land herein Kiambu/Municipality /Block -111-101;
  - b. Cancellation of the transfer and title registered in favour of one Stanley Kimani Irungu and subsequently in favour of the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant.
  - c. A declaration that the plaintiffs' are the joint genuine proprietaries of the suits land herein, Kiambu Municipality/ Block-111-101.
  - d. General damages for trespass and restoration of the suit land to its original status prior to the trespass.
  - e. Costs of the suit
  - f. Any other relief the Court deems fit in the circumstances.
4. The 1st defendant filed a defence on the 30th of July 2012. It denies the plaintiffs' claim and put the plaintiffs to strict proof, it denies the allegation of fraud and avers that there was an entry in the green card entry no. 7 indicating that the property was leased to Stanley Kimani Irungu and that at the time of the purported transfer from Stanley Kimani Irungu to Reuben Muna Kangethe the 1st defendant was not aware of any fraudulent intent on the part of the said Stanley Kimani Irungu and that if there any fraud it was perpetrated by the Stanley Kimani Irungu with the knowledge of and/or collusion of the plaintiffs and the 2nd defendant and that the 1st defendant is innocent of any fraud.
  5. The 1<sup>st</sup> defendant particularizes the fraud and/or negligence on the part of the plaintiffs and 2<sup>nd</sup> defendant and Stanley Kimani Irungu as follows:
    - a. There is no trace of transfer document from the plaintiff to one Stanley Kimani Irungu at the Land Registry.
    - b. It was procedurally expected that the 2nd defendant should have conducted a due diligence check and obtained from the vendor a copy of the transfer from the plaintiffs to Stanley Kimani Irungu if any existed yet he did not.
    - c. The 2nd defendant ought to have verified the true human identity of the Stanley Kimani Irungu before placing any funds with him as any consideration for the transaction.
    - d. The name Stanley Kimani Irungu appears on the records at the Land Registry and the other parties in the case have opted to place the blame squarely on the 1st defendant by failing to enjoin him to these proceedings to take the blame and to refund of consideration, if any was paid.
  6. The 1st defendant pleads in the alternative that Stanley Kimani Irungu was the one who purported to pass good title while he knew that he was legally incapable of doing so the same which was well within the knowledge of the plaintiffs and the 2nd defendant; that the proceedings are incompetent as they have not been commenced against the Attorney General as required by section 12 of the Government Proceedings Act Cap. 40 and no notice was issued to the Attorney General as required by section 13A (1) of Cap. 40.

The 1st defendant avers that at the opportune time it will seek to enjoin Mr. Stanley Kimani Irungu and seeks indemnity from him and that failure to enjoy the Attorney General as a party in this case and to effect service has prejudiced the cause of action it sought to dismiss the plaintiffs' suit.

7. The 2<sup>nd</sup> defendant filed his defence on 30<sup>th</sup> May 2006. He avers that after making enquiries for the purchase of a property he met Stanley Kimani Irungu who had advertised the sale of the property at Runda Mumwe in the daily nation of 26<sup>th</sup> and 27<sup>th</sup> January 2006; on meeting Stanley he was taken to view the said plot and was shown an original title over Land reference Number Kiambu/Municipality/Block 111/101 which title was properly signed and sealed by the Land Registrar; that on 27<sup>th</sup> January he conducted an official search over the suit property at Land registry Kiambu and established that the same was registered in the names of Stanley Kimani Irungu; that he instructed his advocate to draw up a sale agreement between him and the proprietor for the sale of the suit land for a consideration of Kshs. 1,600,000 and sought to rely on the terms and conditions of the said lease for the hearing of this suit; that he paid 10% deposit of Kshs.160,000/- to Stanley Kimani Irungu on 27<sup>th</sup> January 2007 upon the execution of the sale agreement with the balance to be paid upon Stanley Kimani Irungu availing all the completion documents to wit rates clearance certificate, consent to transfer from Commissioner of Lands and a duly executed transfer of lease which he availed on 2<sup>nd</sup> February, 2006; that he paid stamp duty and lodged the documents for registration and released the balance of the purchase price of Kshs. 1,440,000 to Stanley Kimani; that he was duly issued with a Certificate of lease on 14<sup>th</sup> February 2006 over property no. L.R. No. Kiambu/ Municipality/ Block 111/101 as registered proprietor by the 1<sup>st</sup> defendant and hence he is a bonafide purchaser for value without notice of any defect in title if at all and that he complied with all the step for lawful acquisition of the suit property and argues that the plaintiffs suit is fatally defective and urged the Court to strike it out.

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

8. The 1<sup>st</sup> plaintiff Athanas Bonaventure Wanyama testified that he purchased land parcel Kiambu Municipality Block 111/1/100 and 101 at Kshs. 750,000/- in 1996 from Mumwe Investments Limited who had title to the land and obtained a certificate of lease from the Republic of Kenya; later the transfer dated 29/2/96 was prepared and registered and they were issued with a certificate of lease. He never assigned the land to anyone. He relied on a letter of offer by Mumwe Investment to him and the wife and added that he has never assigned the certificate of lease to anyone else; that sometime in March 2006 he obtained information that there was someone developing the suit land this prompted him to go to the said parcel of land and that is when he met the 2<sup>nd</sup> defendant Reuben Muma Kangethe who claimed to be the owner and showed him a copy of his Certificate of lease. From there they proceeded to the Kiambu Land registry where the District Land Registrar informed him that he had sold his land to one Stanley Kimani Irungu, a person he did not know and upon requesting the Land Registrar to produce the certificate of lease surrendered to him none was shown to him. He proceeded to the CID headquarters where he reported the matter but they were unable to get Stanley Kimani Irungu. He urged the Court to nullify the purported sale and cancel any transfer and revert the property back to him, he also claims for general damages for trespass and that the property be reinstated to its original state. He seeks costs and interest.
9. On cross examination the 1<sup>st</sup> plaintiff stated that when he informed the 2<sup>nd</sup> defendant he appeared shocked; that he never saw any certificate of lease bearing the 2<sup>nd</sup> defendant's names but the Registrar told him that the 2<sup>nd</sup> defendant was the registered owner of the suit property and that Mr. Irungu was registered as the owner of the suit property in 1998 and transferred the same to Mr. Kangethe in 2006. He never saw the green card. He admitted not paying rent or land rates for the suit property between 1998 to 2006 .He stated he was away working in Somalia but his wife was around. He denied being aware that the suit land had been sold and that is why he was not paying the rates; that when he went to the Land Registry Mr. Kangethe went and reported the issue to the police and later on put a restriction on the suit land. He further stated that the 2<sup>nd</sup> defendant did not conduct a search to verify that Stanley was the owner when he purchased the said parcel of land

- and as such acted fraudulent for not ascertaining ownership of the property. He testified that he had not fenced the plot but had agreed with Mumwe Investment that they would remove the coffee trees when he was ready to develop the suit land. That when he discovered the 2<sup>nd</sup> defendant developing the suit land it had a development at foundation stage but it is now at roof stage and he blamed the delay on time taken to obtain an injunction. He further submitted that they could not enjoin Stanley Kimani Irungu as a party as they could not trace him and denied being in cahoots with him.
10. On re-examination the 1<sup>st</sup> plaintiff stated that from that the time the land was in possession of the 2<sup>nd</sup> defendant; that he has never received any demands for rates or land rent and denied having executed any transfer in favour of Maina or Kangethe.
  11. Pw2 was Gacheru wa Nganga an advocate attached to Kamau Kuria and associates, he testified that their firm is the one that dealt with the conveyance transaction between Mumwe Investments to Mr. Wanyama and indicated that the advocate who dealt with the same Kathurima had since left the firm; that according to the documents on record the transfer was from Mumwe Investments to Mr. Athanas Wanyama and his wife and there was no other party; the property was Kiambu Municipality 111/100 and 101.
  12. On cross examination he stated that he referred to his records of transfer in 1994 and denied knowing what happened in 1994 and that their firm acted for both the buyer and seller.
  13. The 1<sup>st</sup> defendant did not call any witnesses.

## **2<sup>ND</sup> DEFENDANT'S CASE**

14. Reuben Muna Kangethe the 2<sup>nd</sup> defendant testified that in 2005 he came to Kenya with an intention of constructing a residence for his family. He saw an advertisement on the daily nation of 26/11/2006 and called the seller and arranged to see the original documents when he met the seller Stanley Kimani Irungu who had a copy of certificate of lease, he went viewed the property and they agreed to draw an agreement. On the 27<sup>th</sup> of January 2006 they met at his advocate's office Eric Masese but he declined to draft the sale agreement without 1<sup>st</sup> seeing an original copy of the certificate of lease and they proceeded to do an official search which indicated that Stanley Kimani Irungu was the owner since 10<sup>th</sup> September 1998. They later agreed on purchase price at Kshs 1.6 million and he paid a down payment of 10% which was Kshs. 160,000/-. Mr. Kimani obtained the rate clearance certificate and the letter of consent to transfer dated 1/2/2006 and Mr. Stanley executed the transfer of lease, he paid stamp duty of Kshs. 64,000/- which was 4% of the purchase amount and the transfer was registered and subsequently his advocate authorized the release of Kshs. 1,440,000/- all amounts totaled to Kshs. 1.6 million and was later issued with a certificate of lease on 14<sup>th</sup> February 2006; Kimani's lease was cancelled by the District Land Registrar; that upon being shown the beacons he fenced the plot, did a valuation of the property and his architectural plans were approved at Kiambu District planning office and he proceeded to start construction; at that time he said there were no structures erected on the plot but had grass and coffee trees; that on 26<sup>th</sup> March 2006 while when he visited the construction site he found the plaintiff Mr. Wanyama who claimed to be the owner of the plot; Mr. Wanyama on reading to him the title numbers coincided with the ones he had on his lease; he visited the Land Registry and the Registrar indicated he could not find the documents that transferred the land to Mr. Stanley Kimani. He recalled seeing documents at the registry that the plaintiff had bought the suit land from Mumwe Investment and was issued with a certificate in February 2006 and the same document indicated that Kimani bought. The 2<sup>nd</sup> entry in the register indicated that Kimani Irungu owned the property from the 9<sup>th</sup> of October 1998. He denied using a short cut to get the suit land. Later they decided to involve the CID. Police rang Kimani's phone and it went unanswered. He looked for Kimani upto his home in Muranga and was even taken to Kimani's in-laws and spoke to Kimani's wife. The CID managed to speak to Kimani on phone and requested him to go to the CID headquarters at 2.00 p.m. the following day but he never did. No arrests were made. He denied taking part in any fraud in buying the said property.
15. On cross examination by Mr. Wambua; he reiterated his testimony and further stated that he purchased the property when he was 30 years and mature enough to know what he was getting

- into; that he met with one Mwangi in Westlands and he claimed to be the owner of the said property and even went to view it at the same day; that the seller had a copy of the title but no deed plan; that although he was taken there he had nothing to verify it was the one and did not verify if he had other documents; that he did not ask for copies but he only wanted original title; that on 27<sup>th</sup>/1/2010 Mwangi brought someone who accompanied them to his lawyers office; that the owner had his Identification Card; his advocate refused to draw the sale agreement unless a legal search was done; his lawyer decided that he personally does the search; he obtained a copy of ID card and title and proceeded to Kiambu Land Registry and did the search and was given the certificate of official search; that the name on the title was of Stanley Irungu Block 3/101 Kingari; that the lawyer prepared the sale agreement that the title number was Kiambu/Municipality/Block/111/101 and he executed the sale agreement and paid the deposit of Kshs. 160,000/-; that the vendor was to complete transfer and the Land Registrar was to register the transfer; that the vendor gave him a clearance certificate which he used to pay the stamp duty; that he lodged the documents on 2/2/2005 and the transfer was done after he paid the stamp duty; that the sale took 4 days to complete;
16. On cross examination by Mr. Kilonzo he reiterated his testimony and stated that he could not get any of the two Mwangi and Stanley Irungu who sold him the land; that he made a report to the CID headquarters and that he had not complained against the 2 to any investigative body; that he made efforts to trace the sellers and even took CID officers to Stanley Kimani Irungu's Murang'a home in efforts to get Kimani to clear the sale from Mr. Wanyama in 1998; he denied having any transfer document from Kimani to Mr. Wanyama and admitted that he did not know if there was a transfer. According to him the speed at which the sale took place did not raise any eyebrows. He denied being an accessory to being conned;
17. On re-examination by his counsel he reiterated his testimony and added that he had no reason to doubt the genuineness of the transaction; that the address had a typographical error and he did not think the same was a big deal; that he trusted his lawyer he lodged his documents and paid the stamp duty and that it took 12 days to have the certificate of lease; the bank draft was issued on 30<sup>th</sup> January; that he did not file the form of search personally; that he did not get the transfer from the vendor but his advocate prepared and he and the vendor signed; he was also given the completion documents and the bundle was presented at Kiambu Land registry the same were received and entered into the register he filled a form to pay stamp duty and all went to the registrar; He took the receipts to the registry and they signed the transfer which he left with the staff; that he never saw the transfer and has not seen it since; He collected the certificate of lease at the front office where he had submitted the completion documents; he denied knowing of a day book and did not have reason to suspect the entire transaction nor of titles and names of registers that had to be signed in the lands office; that Mr. Wanyama to push the issue but gave up as he appeared uninterested in the criminal aspect of this matter and that he was willing to assist the police in investigations; he thought that Mr. Wanyama was protecting Mr. Kimani; that in purchasing the said land he followed the laid down procedure; he did the search, got the documents to the transfer; he denied having met Mwangi or Irungu since the sale; that Irungu fulfilled the terms of the agreement and he was issued with a signed certificate of lease;
18. Jonathan Dirangu Kingori the District land Registrar Kiambu testified that the transfer instrument for Municipality Block 111/101 presented for registration by Reuben Muna transferring the said parcel from Stanley Kimani Irungu. That the said instrument was accompanied by a rate clearance certificate from Municipal of Kiambu, consent from Commissioner of Lands, receipts evidencing rates has been cleared copies of ID of Stanley and Muna; that the transfer was for Kshs. 1.6 million and attracted a stamp duty of Kshs. 64,000/- that it was on the basis of these documents the transfer was effected and a certificate of lease in the names of Stanley Kamau was registered on 9th/10/1998; that on 27/3/2006 Athanas appeared at their offices claiming to have the original certificate of lease which indicated that it was issued on 26/2/1990. He however indicated that he did not adduce in Court the day book which shows transactions registered at any particular day and that there was nothing showing any fraud and or any records showing transfer from Athanas to Stanley that this prompted him to restrict the land and urged the plaintiff to report to the CID.
19. On cross examination he affirmed that the 2nd defendant was the current registered owner of the said parcel of land and he conceded that there was an entry on the day book of Mumwe Investment transfer to Athanas on 29/9/1990 but there was nothing to show the transfer from

Athanas and Pricilla to Stanley Kimani Irungu and indicated that the way the same was registered could not be explained and confirmed that a person who is not a registered owner cannot transfer property to another person and that as per the consent the registration was not done on the same day. He testified that Mr. Kangethe's transfer presented on 2/2/2006 and the certificate was issued on 2/2/2006 and denied having any transfer from Mumwe to Athanas; that the abstract indicate there was a transfer from Athanas to Stanley but did not have the transfer document. However there were no documents evidencing the transfer between Athanas to Stanley and added that the transfer between from Athanas to Stanley was proper and he had no reason to suspect fraudulent activity that he had a look of the day book and the same did not have any record on the entry of the entry on 9/10/98. He acknowledged there was a transfer done by a person in his office and added that in his view the said certificate of Stanley originated from the registry and that the records show that between 9/9/1998 and 29/2/2006 Stanley was registered lease. He recognized that the signature appearing on both certificates of lease was the same. That once certificates are surrendered they are destroyed but he doesn't refute there is a possibility that a staff member could have used it for fraudulent purposes.

20. On re-examination he affirmed that there was no record of transaction between Athanas and Stanley.

21. Parties filed written submissions which came for highlighting on 12<sup>th</sup> November, 2013.

## **SUBMISSIONS**

### **Plaintiffs' Submissions**

22. Miss Thengi for the plaintiff submitted that various issues emerge; whether there is a valid transfer to Stanley Irungu, whether 2<sup>nd</sup> defendant acquired good title and who is the lawfully registered proprietor to the suit property? She submitted that the plaintiff acquire the property in 1996 and they have a valid certificate of lease and that the plaintiff has not transferred to Stanley Irungu as claimed and that the registrar of Lands could not explain how Stanley's name came to be registered in the suit property. The plaintiff produced the original title in Court and added that in light of the Registrar's submission that there was fraud in registration to Stanley and therefore his registration is invalid and sought to rely on the case of **ADRIAN GILBERT V. RUTO** where a subdivision was declared invalid. She also referred to the case of **ALBERT MAE GACIE VS. AG & 4 others (2006) eKLR**. It was submitted that Stanley Irungu couldn't transfer a valid title to the 2<sup>nd</sup> defendant as they have no rights to the property he didn't acquire it. There is no transfer from the plaintiff to Stanley and he couldn't transfer any title to the 2<sup>nd</sup> defendant is a total nullity. That in the case of Albert Gache it was held that Peter Gache who had purported to transfer the property had no good or valid title to offer or transfer to the 2<sup>nd</sup> defendant hasn't acquired good title. On the 3<sup>rd</sup> issue the plaintiff have shown a claim of ownership of the grant of lease to Mumwe Investment Limited. And there was a transfer to the Mumwe Investment and that the 1<sup>st</sup> and 2<sup>nd</sup> defendant can't show claim of ownership to the 2<sup>nd</sup> defendant. She relied on section 25 of the Lands Registration's Act subject to section 28 of the repealed RLA which protects the rights of a proprietor and urged the Court to protect the plaintiff's rights as the registered owner of the suit property.

### **Section 25 Rights of a proprietor**

*(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.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

#### Section 28 Overriding interests

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law.

That the plaintiffs have an absolute indefeasible title to the property which can't be defeated as they haven't transferred the property of their own free will. She relied on the case of the case of **Gitwany Investment Limited vs Taj Mall Limited (2006) eKLR** where the Court from the Court of appeal decision. They urged the Court to uphold the title obtained in 1996 and that the defendant has failed to establish absolute and indefeasible title. On the case of **Adrian Gilbert Muteshi –vs- William Samoei Ruto & 4 Others**, where it was held that;

*“the district land registrar is the custodian of all titles. The 4th Defendant denied being the proprietor of the said land. The 1st defendant too is not the owner. With the evidence of the 2nd and 3rd defendant's witness which support the plaintiff's evidence I can conclusively find that the plaintiff is the proprietor of Uasin Gishu/Tapsagoi/33.”*

Counsel also relied in the case of **Gitway investment Limited –vs- Tajmal Limited & 2 Others** where it was held that;

*“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title...”*

The Court further held;

*“like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by mistake that is admitted, the Commissioner of lands issued two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title it retains its sanctity.”*

She submitted further that the plaintiffs have demonstrated a clear uninterrupted chain of ownership of the suit property from M/s Mumwe Investment Limited whilst on the other hand the 2nd defendant

has failed to do so.

23. The 1<sup>st</sup> defendant submitted that the District Land Registrar in his opinion that the 2<sup>nd</sup> defendant acquired good and indefeasible title under section 21(3) of Cap 281 and the same can only be challenged on the ground of fraud or misrepresentation to which the owner is proved to be a party; that the registrar also testified that the transfer presented for registration from Stanley Kimani Irungu to Reuben Muna was accompanied by consent to transfer issued by Commissioner of Lands, rates clearance receipt, consent from Kiambu municipality, copies of National Identity Cards for both Stanley Kimani Irungu and Reuben Muna and he further affirmed that the 2<sup>nd</sup> defendant acquired good title; that the plaintiff has alleged that the 1<sup>st</sup> and 2<sup>nd</sup> defendant together altered the records at Kiambu District Land registrar to have Stanley Irungu fraudulently registered as the owner of the suit property. It is accepted in law that he who alleges must prove the allegations and the plaintiff has not proved fraud and as such their claim must fail; that the plaintiffs have not proved that they are the registered proprietors of the suit property and as such their suit should be dismissed with costs. The 1<sup>st</sup> defendant submitted further that each party to bear their own costs.
24. Mr. Ochieng for the 2<sup>nd</sup> defendant sought to rely on their written submissions. He submitted that the subject matter is governed by the Cap 300 RLA where the statute is clear judicial authority is not necessary and is only necessary where the facts and statute are similar. He urged the Court to be guided by the provisions of Cap 300; that the plaintiff hadn't proved his case against the defendant in terms of the required standards and urged the Court to dismiss the suit with costs as the same is based on unfounded in particular fraud as against the Stanley Irungu who is not a party in this suit and that failure to enjoin Stanley Irungu in the orders sought by the plaintiff is fatal and urged the Court to refer to the plaintiff's prayer b, the restrictions are in respect of the two entries in favour of Kimani Irungu and the restrictions were on basis of suspected fraud; that Stanley Irungu was not enjoined and it is trite law and the Court cannot make orders as against a party not enjoined in the suit; that pleadings were made against the Registrar in his capacity of being a government body. There is a misjoinder as only the Attorney General can be sued on behalf of the government department and no notice had been served upon the Attorney General and therefore the orders sought against the 1<sup>st</sup> defendant can't be made; that the proceedings are against the government not enjoined as a party. The particulars of fraud are pleaded but there is no evidence to prove the same that fraud was committed by either the 1<sup>st</sup> or 2<sup>nd</sup> defendant; that in fraud the balance of proof is higher than on a balance of probability but lower than beyond reasonable doubt; that the plaintiff's conduct is not one of a person defrauded of his property. He submitted further that on title the fundamental consideration is on the registrar and not the certificate of lease and referred the court to section 32 and 39 of Cap 300 in that it places no obligation on the one dealing with the proprietor and that his duty was to conduct a search; that Cap 22 protects his title is indefeasible and that the registered lease is the 2<sup>nd</sup> defendant and he acquired a good title under section 27 and 28 of Cap 300 and cannot be taken away as he is protected under section 43(2) of Cap 300 as he was not part of the fraud and argued that the Court should ignore the 3 cases cited by the plaintiff as the same are distinguishable. He wondered why the plaintiff was protecting Kimani from police prosecution and drew the Court's attention to a letter from the CID and the plaintiff's failure to enjoin Kimani in the matter and/or insist on proceedings against Kimani. That holding a certificate of title was not enough and that the defendant hadn't led any evidence that when any evidence that when a transfer is being registered a certificate of lease there and referred the Court to section 33 of Cap 33 there is no mandatory provision. That the plaintiff states that there is no evidence of transfer to Stanley yet DW2 testified that there was no transfer from Mumwe to the plaintiff and transfer from plaintiff to Stanley but there is transfer from Stanley to the 2<sup>nd</sup> defendant. That the only recourse to the 2<sup>nd</sup> defendant is only under section 144 of Cap 300 and wish to be indemnified by the Government. He urged the Court to dismiss the suit with costs to the 2<sup>nd</sup> defendant.

It was further submitted that a party not only plead fraud in particulars of fraud but must also adduce evidence to support each and every particulars of fraud pleaded. In *Koinange and 13 others -vs- Koinange (1986)* it was held that;

*“It is a well-established rule of evidence that whosoever asserts a fact is under the obligation to prove it in order to succeed, the party alleging fraud, in this case the plaintiff’s had burden of proving it and they had to discharge that burden.”*

In the case of **Ratilal Gordharibhai Patel -vs- Lalji Makaiji (1957)** where it was held that *“the burden of proof in fraud case is very high approaching but below the burden of proof beyond reasonable doubt.*

This was restated in the case of **Urmila Mahindra Shah –vs- Barclays Bank international & Another**, where it was held that;

*“in civil cases, what is usually required is proof beyond the usual standard of proof beyond the usual standard of balance of probability.”*

Further in the case of **Chesulut vs Timothy Sangok Appeal no. 265 of 1999** it was held that;

*“it is trite law that allegations of fraud are not to be proved on a balance of probability, the burden of such proof lies somewhere between balance of probability and beyond reasonable doubt.”*

Failure to pursue criminal investigations and proceedings against Stanley Kimani and that no evidence has been adduced that it is a must to surrender the certificate of title as enumerated by section 33(1) Cap 300. And that no record of transfer was produced by plaintiff to show the transfer of the said land from Mumwe Investment to the plaintiffs and argued that the lack of documents for the transfer of the said land from the plaintiffs to Kimani is not in any way different from the lack of documents in respect of the said land from Mumwe to the plaintiff. The only thing that is certain is that the documents in respect of the 2<sup>nd</sup> defendant are in the file.

That the conduct of the 1<sup>st</sup> plaintiff dispels any notion of fraud having been committed against him and his conduct re-inforces the 2<sup>nd</sup> defendant’s strong belief that the 1<sup>st</sup> defendant colluded with the Stanley Kimani Irungu. He never took possession of the said land and only possessed the land for only 2 years for the 10 years.

Order 1 rule 3 of the Civil Procedure Rules all persons may be joined as defendants against whom any rights to relief in respect of or arising out of the same act or transaction or a series of acts or transactions is alleged to exist whether jointly, severally or in the alternative where if separate suits were brought against such persons any common question of law or fact might arise. That the corpus of the plaintiffs’ allegation of fraud revolves around the said Stanley Kimani Irungu. That it is trite law that the Court cannot grant orders against a party who has not been made a party to this suit. The 2<sup>nd</sup> defendant’s title flows from the transfer registered in favour of the said Stanley Kimani Irungu and any orders cancelling the title cannot be granted if he was not made a party and the Court cannot breach a fundamental and basic principle by cancelling Stanley Kimani’s registration and title without giving him an opportunity of being heard; that the 2<sup>nd</sup> defendant is the registered owner of the said piece land and acquired a good and indefeasible title under section 21(3) of Cap 281 and no fraud has been proved against him; that the plaintiff sued the district land registrar as an officer in the government of the Republic of Kenya and not in his personal capacity. It was submitted that the proceedings are against the government and section 12(1) of the Government Proceedings Act Cap 40 laws of Kenya states that

*“subject to the provisions of any other written law civil proceedings by or against the government shall be instituted by or against the government shall be instituted by or against the Attorney General, as the case may be.”*

That the attorney general was never served with the statutory Mandatory Notice nor was he sued and/or served with summons to enter appearance. His participation was only called to solve the technical challenge of soliciting evidence from DW2 who had been summoned by to appear as a witness. It was submitted that being a necessary party failure to serve the Attorney General as a defendant was fatal and

no effective decree can be passed by this court against the 1<sup>st</sup> defendant. He relied on the case of **Deputy Commissioner of Harloe –vs- Rama Kristna** where it was held that;

*“For a party to be deemed a necessary party, there had to be a right or relief against such a party in respect of the matters involved in respect of matters involved in the suit and also Court cannot be in a position to pass an effective decree in absence of such a party.”*

That the 2<sup>nd</sup> defendant acquired a good title as under section 23(1) which gives him absolute and indefensible title. He relied on the case of **Abiero –vs- Thabiti Finance Company limited & Another Civil suit no. 1025 of 2000.**

*“I accordingly find that find that the registration of the title having been issued to the purchaser, one David Mburu as the registered proprietor of the suit property such title is indefensible, there having been no proof of fraud on the part of the said David Mburu Gichere, this title can only be challenged on the grounds of fraud and misrepresentation to which he is a party. The consequences is that I hold that the two reliefs for the invalidation and nullification and for the rectification of the register in respect of the suit property must fail and are accordingly dismissed.”*

Issue of possession was dealt with in **Nafuu Housing Limited vs Nicholas Mwai Mwangi ELC 652 of 2012.**

He sought to differentiate the cases relied on by the plaintiff as follows;

- i. **Chaunhan –vs-Omagwa civil appeal no 12 of 1980**
- ii. **Albert Gilbert Muteshi –vs- William Samoei Ruto & 4 others** he argued that the facts and circumstances of the transfer and registration of the first defendant were different from the ones herein. That the 4<sup>th</sup> defendant who was presumed the transferor of the suit premises denied subdividing, selling and transferring the suit parcel to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant filed concession conceding to the owner ship of the suit land. No evidence was led as to the existence of a sale agreement or even the payment of the purchase consideration in the event the Court found that the 4<sup>th</sup> defendant could not have been a party to any purported sale and therefore the rectification of the register had to be made.
- iii. **Albert Mae Gachie –vs- The Hon attorney General & other**

*Findings of the Court was that all the defendants had participated in the fraud, the Court held that the transfer from the 4<sup>th</sup> defendant to the 3<sup>rd</sup> defendant was null and void for all intent and purposes and ordered cancellation of the transfer. This he argues was different from the case herein in that there is no evidence of fraud especially on the part of the 2<sup>nd</sup> defendant.*

#### **Gitway investment Limited –vs- Tajmal Limited & 2 Others**

Here the issues in dispute revolved around two different titles. There was no transfer in respect to one title from one party or the original allottee to subsequent title holders.

25. Miss Thengi in reply submitted that the plaintiff reported the matter to the CID and denied that the plaintiff did nothing to get Stanley Irungu; that the 2nd defendant is the one who knows Stanley Irungu; she added that the Registrar could not explain how the property was transferred to Stanley Irungu.

#### **Telcom (K) Limited –vs- KAM Consult (2001) 2EA 575**

*“having considered the submissions of the parties before me, I agree completely something is something that with the submissions of thee respondent’s counsel that fraud which can only be found on evidence after hearing.....the party alleging fraud had to prove fraud by calling evidence.....”*

## **ANALYSIS**

26. I have considered the pleadings herein as well as the rival submissions by all counsels and the authorities cited. The main issues in dispute are who between the Plaintiffs and the 2<sup>nd</sup> Defendant is the legal and rightful proprietor of property Title Number L.R. No. Kiambu/ Municipality/ Block 111/10, whether the plaintiff has proved fraud against the defendants and if the plaintiffs failure to enjoin the Attorney General is fatal to the plaintiff's case?

### **Has the plaintiff proved fraud against the defendants**

27. I do agree with the submissions that fraud must be specifically pleaded and proved. In the case of *Koinange & 13 others v Koinange [1968] KLR 23* it was held that;

***“allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities.”***

In this case there is no dispute that the plaintiff bought the suit land from Mumwe investment in 1996. The current records at the Land Registry at Kiambu show that the suit land was transferred from Stanley Kimani Irungu to the second defendant in March 2006. From the evidence adduced the title the plaintiffs hold is an original title and the second defendant holds is a title issued by the land registrar at Land's Registry. There is evidence that the 2<sup>nd</sup> defendant dealt with one Stanley Kimani Irungu whom neither the 1<sup>st</sup> defendant nor the 2<sup>nd</sup> defendant joined in this suit. In the plaintiff's particulars of fraud he alleges the alteration of records at Kiambu Land Registry. Mr. Kingori who testified from Kiambu Registry acknowledged that the plaintiffs appeared as the original owners however he had nothing to show how the transfer had been done from the 1<sup>st</sup> plaintiff to Stanley Kimani Irungu. He acknowledged that the 2<sup>nd</sup> defendant's title originated from their office. How can a Land Registry lack records of a transfer from one owner to another? It was the plaintiffs' evidence that they never transferred this property to Stanley Kimani Irungu the 2<sup>nd</sup> defendant. In my view the alteration of records at Kiambu Land Registry that caused the transfer from the Plaintiffs' names to Stanley Kimani Irungu could only have been done by the officers at the Land Registry as they had possession of all the records on the suit property. I therefore find and hold that the fraudulent acts are attributed to the officers of the 1<sup>st</sup> defendants. I am not persuaded that the 2<sup>nd</sup> defendant was a part of the fraud as it appears that he did all that was necessary at the time he purchased the property from Stanley Kimani Irungu who has since disappeared. He is a bona fide purchaser. The officers of the 1<sup>st</sup> defendant did not act in good faith as they could have sought the surrender of the original title from the plaintiffs before causing any registration of the transfer to Stanley Kimani Irungu.

Under Section 26 of the Land Registered Act No. 3 of 2012 it is provided that;

#### ***A Certificate of title to be held as conclusive evidence of proprietorship***

***“(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.***

***(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original. “***

There is evidence that the Plaintiff purchased the said parcel of land from Mumwe Investment Limited and even called Pw2, Gacheru wa Nganga an advocate attached to Kamau Kuria and associates, who testified that their firm is the one that dealt with the conveyance transaction between Mumwe Investments to Mr. Wanyama. However there is no substantive evidence on how the Plaintiffs' transferred the said land to Stanley Kimani Irungu. Section 25 of Land Registration Act no. 3 of 2012 replaced section 28 of Registered Land Act Cap 300 ( now repealed). Section 25 provides that;

***(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.***

***(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.***

It is also obvious that the Plaintiff's title came earlier in time, being that it was issued in 1996. It is trite law in equity that the first in time shall prevail. In view of the foregoing and in line with the evidence on record coupled with the law, I do find and hold that on a balance of probability the Plaintiffs are the legal owner of property Title No. L. R. No. Kiambu/ Municipality/ Block 111/101.

#### **Non-joinder of the Attorney General**

The 2<sup>nd</sup> defendant argued that there is a misjoinder as only the Attorney General can be sued on behalf of a government department and no notice had been served upon the Attorney General and therefore the orders sought against the 1st defendant can't be made; that the proceedings are against the government not enjoined as a party. I note that the 1<sup>st</sup> defendant despite the lack of the said notice was represented by the office of the Attorney General all through the proceedings. The 1<sup>st</sup> defendant did not oppose or raise issue on this. Am further guided by the provisions of Order I Rule (9) of the Civil Procedure Rules provides thus:

***“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”***

I therefore find the issue of non joinder cannot stand. It is a pity that the 2<sup>nd</sup> defendant bought the suit land from a person with no authority he was conned and stands to lose the amount he paid for it. I therefore find that the plaintiffs have proved their case on a balance of probability and grant them the orders as follows;

- a. **A permanent injunction against the 2nd defendant restraining the 2nd defendant from occupying dealing with or developing suit land herein Kiambu/Municipality /Block -111-101;**
- b. **Cancellation of the transfer and title registered in favour of one Stanley Kimani Irungu and subsequently in favour of the 2nd defendant by the 1st defendant.**
- c. **A declaration that the plaintiffs' are the joint genuine proprietaries of the suits land herein, Kiambu Municipality/ Block-111-101.**
- e. **Costs of the suit**

Orders accordingly.

Dated, signed and delivered this **1<sup>st</sup>** day of **July** 2014.

**R. E. OUGO**

**JUDGE**

**In the presence of:-**

.....**For the Plaintiffs**

.....**For the 1<sup>st</sup> Defendant**

.....**For the 2<sup>nd</sup> Defendant**

.....**Court Clerk**