



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1003 OF 2005 (O.S)

MARION GATHONI MAINA.....PLAINTIFF

VERSUS

FRANCIS MURIITHI MUNDIA.....1ST DEFENDANT

GRACE WAITHERA GACHU (being sued

as the administrator of the Estate of her

late husband GACHU MUCHEMA).....2ND DEFENDANT

JUDGMENT

Introduction

The Plaintiff filed an originating summons dated 10th August 2005 as amended on 14th August 2009, seeking the following orders:-

1. Rectification of the register be done by directing that the title known as Nyandarua/Olaragwai/1591 in the name of the 1st Defendant be cancelled and the said land be registered in the name the Plaintiff.
2. A declaration that the Plaintiff has become entitled to the parcel of land known as Nyandarua/Olaragwai/1591 in place of the 1st Defendant.
3. The Plaintiff be registered as the proprietor of the land known as Nyandarua/Olaragwai/1591 (hereinafter referred to as “the suit property”) in place of the 1st Defendant.
4. The costs of the suit be provided for.

The originating summons was supported by the Plaintiff’s affidavit sworn on 14th August 2009. Each of the Defendants filed a replying affidavit both sworn on 10th December 2009. Hearing of the Originating Summons commenced on 6th March 2014 when the Plaintiff and the 1st Defendant testified.

The Plaintiff's case

The Plaintiff (PW1) testified that she filed the suit as an administrator of the estate of the late Gibson Maina who was her husband. She informed the court that the suit property was bought in 1989 from John Kamau Wainaina and referred the court to a title in her bundle of documents dated 2nd June 1989 issued

in the name of Gibson G. Maina with respect to the property known as Nyandarua/Ol'aragwai/491. She averred that according to the title, the land measured about 8.10 hectares which is approximately 20 acres. It was her evidence that the Plaintiff took possession immediately after buying the land which he fenced, built a farm house, and was also farming thereon.

While stating that she was aware of the proceedings in the Resident Magistrate's Court between Gachu Muchema and John Wainaina Kamau, in **Naivasha SRMCC No. 107 of 1987**. PW1 testified that the dispute was about money owed by John Wainaina to Gachu Muchema, and that her husband was not party to the dispute. PW1 informed the court that the ruling in that case was that the Plaintiff was to lose 4.5 acres of his land which was to be given to Mr. Gachu Muchema to settle Mr. Wainaina's debt. It was the evidence of PW1 that by that time, they had finished the transaction with Mr. Gachu Muchema, had title and had settled on the land.

In further evidence, PW1 averred that her husband was aggrieved with the ruling and he preferred an appeal in the High Court in **Nairobi H.C Misc. Application No. 265 of 1994** whose proceedings were attached to her bundle of documents. It was the Plaintiff's contention that Mr. Gachu Muchema fully participated in the said proceedings where the High Court nullified the orders of the subordinate court and ordered that the 4.5 acres be returned to them. PW1 exhibited the orders dated 19th March 2002 and averred that her husband had passed on at the time but that Mr. Gachu Muchema was still alive.

PW1 informed the court that she took the orders to the Nyahururu Land Registrar who declined to effect the order on the register stating that Mr. Gachu Muchema was no longer the registered owner of the land necessitating this suit. While referring to a consent order dated 1st September 2006 in her bundle of documents, PW1 informed the court that she had built a farmhouse on the disputed portion which she wanted to preserve. It was the evidence of the Plaintiff that she moved to court since the Defendant wanted to evict her. According to this witness, the Defendant was issued with a title to the suit property on 31st January 1996, when the instant suit which was instituted in 1994 was still pending before the court.

PW1 averred that Mr. Gachu Muchema never disputed having sold the land. Further, PW1 stated that she did not know the Defendant who had never occupied the suit property. It is the evidence of PW1 that owing to the court order, she tills 15.5 acres and not the land in dispute. PW1 exhibited a caution dated 23rd June 2004 which she placed on the suit property in order to preserve it. She urged the court to rectify the title since no appeal had been preferred against the order of the High Court where the decision of the Senior Resident Magistrate's Court at Naivasha was challenged.

During cross examination by Counsel for the Defendants, PW1 stated that they were not party to the proceedings at Naivasha Senior Resident Magistrate's Court, and that her husband filed the judicial review application at the High Court. PW1 averred that in **Naivasha SRMCC No. 107 of 1987**, they were dealing Nyandarua/Olaragwai/491 which her husband had title to. According to PW1, her husband read in the Kenya Gazette that he was required to surrender the title for Nyandarua/Olaragwai/491 since 4.5 acres had been hived off pursuant to the decision of the said Senior Resident Magistrate's Court.

PW1 averred that they discovered that the said land had been subdivided and that the Defendant had been registered as owner of the suit property after the order of the High Court in **Nairobi H.C Misc. Application No. 265 of 1994** in 2002. She averred that they lodged a caution after discovering the transfer. According to the witness, the order of the High Court in 2002 quashed the decision of the Senior Resident Magistrate court in **Naivasha SRMCC No. 107 of 1987** and nullified the hiving off of the suit property including the new title. Further, PW1 reiterated that she filed the application that allowed her to harvest her crops on the disputed land. It is her evidence that the suit property was hived off from Nyandarua/Olaragwai/491, and that the changes in the title took place secretly while the suit was still pending in court.

Defendants' case

The 1st Defendant (DW1) testified that he was a business man who resided in Kahawa West, Nairobi. He stated that he carries out farming in his ancestral land in Kiambu County. DW1 averred that he bought the suit property in the year 1993 and was issued with a title in 1996. He informed the court that he took possession and fenced off the land where his employee resides. It was the evidence of DW1 that he was not known to the Plaintiff who does not reside on the land. DW1 averred that he was not aware that the land was a portion of another land since Gachu Muchema had a title to the land which had no encumbrance. He maintained that he bought the disputed land and contended that his title cannot be cancelled.

In cross examination by the Plaintiff's advocate, DW1 averred that he bought 4.5 acres from Mr. Gachu Muchema. He stated that he was not aware that the land was hived off from another land or that it was as a result of the decision of the Senior Resident Magistrate's Court at Naivasha. While stating that Mr. Gachu Muchema never informed him of the matter before the High Court, DW1 denied knowledge of Mr. Gachu Muchema's participation in the matter at the High Court stating that he was not a party to the said suit.

DW1 testified that his title was clean, and that he proceeded with the sale since there were no encumbrances. According to this witness, the case may have involved a different parcel from his. DW1 was referred to a replying affidavit sworn by Mr. Gachu Muchema on 14th November 1994 in **Nairobi H.C Misc. Application no. 265 of 1994**, and he averred that he had started buying the land in 1993. He reiterated that he was not aware that the High Court had quashed the proceedings of the Senior Resident Magistrate's Court at Naivasha and nullified his transaction with Mr. Gachu Muchema.

DW1 informed the court that he had fenced off the disputed parcel and that the son of Mr. Gachu Muchema who lived in the neighborhood was developing the land. He stated that the disputed parcel of 4.5 acres had a structure when he was buying the land and that he thought the structure belonged to Mr. Gachu Muchema. DW1 averred that the occupant of the structure was unknown to him, and was not his employee but that of the Plaintiff. He maintained that he took possession of the land in 1996 when he got title and fenced it. Lastly, DW1 contended that he had another land and that there was no need for him to occupy the disputed land.

Parties filed written submissions and the Plaintiff in submissions dated 26th March 2014 reiterated the facts of the case and argued that the 2nd Defendant who was sued in her capacity as the administrator of her late husband Gachu Muchema did not file any pleadings opposing the Originating Summons, despite her husband having been adversely mentioned in the Originating Summons where he was accused of forgery. It is the Plaintiff's submission that the 2nd Defendant's failure to file a defence in response to the Originating Summons can be construed to mean that she was not opposed to the same and that the facts stated there in were true.

It was submitted that the late Gachu Muchema was served with pleadings in **Nairobi HC Misc. 265 of 1994** and even filed grounds of opposition and a replying affidavit in 1994. Counsel for the Plaintiff argued that by signing the transfer to the 1st Defendant in 1996, Gachu Muchema was intent to frustrate the outcome of **Nairobi High Court Misc. Case No. 265 of 1994**. It was contended that since the late Gachu Muchema did not wait for the outcome of the suit in **Nairobi High Court Misc. Case No. 265 of 1994** before transferring the suit to the 1st Defendant, the doctrine of *lis pendens* was applicable in this suit.

It is the Plaintiff's submission that since the court order given in **Nairobi High Court Misc. Case No. 265 of 1994** on 19th March 2002 was issued on merit, it was binding and valid since no appeal had been preferred against it. Counsel submitted that the court has jurisdiction to adjudicate and determine all land matters and further, that the court had a duty to enforce the court orders issued in **Nairobi High Court Misc. Case No. 265 of 1994** by ordering a rectification of the registered.

The Defendants in submissions dated 12th May 2014 argued that the Plaintiff had not proved her case against them. Counsel argued that under section 38(1) of the Limitation of Actions Act, the estate of

Gachu Muchema is not capable of being sued, and that no order can be issued against the estate which has no title capable of being rectified. It was submitted that the late Gachu Muchema who was registered as the owner of land parcel no. Nyandarua/Olaragwai/491 transferred the same to John Kamau Wainaina on 2nd June 1989.

Counsel argued that John Kamau Wainaina transferred the parcel to Gibson G. Maina on 14th March 1994 and that land parcel no. Nyandarua/Olaragwai/491 was closed on subdivision and resultant title numbers Nyandarua/Olaragwai/1590 and Nyandarua/Olaragwai/1591 came into existence. Counsel averred that land parcel no. Nyandarua/Olaragwai/1591 was sold to the 1st Defendant on 14th March 1991, and title issued to him on the same day.

It is submitted for the Defendants that the present suit was filed in court on 10th August 2005, 9 years after the 1st Defendant had obtained title and took possession. Counsel for the 1st Defendant argued that the suit was filed prematurely before expiration of 12 years since the Plaintiff's husband had only occupied the land for about 18 months after the 1st Defendant had obtained title. Counsel averred that the annulment of the Naivasha Senior Resident Magistrate Court's decision did not revoke the 1st Defendant's title, which title was not capable of being revoked since the Plaintiff's late husband was not in occupation of the suit land.

Counsel for the Defendants' made reference to section 143 of the Registered Land Act (now repealed), and submitted that no fraud or mistake had been proved against the 1st Defendant who was a purchaser for value when title of the suit property, whose title was free from encumbrances. Lastly, it was submitted that there was no indication that the 1st Defendant knew or ought to have known that the judicial review proceedings were pending in the High Court and further, that the title to land parcel no. Nyandarua/Olaragwai/1591 was not revoked.

The Issues and Determination

Arising from the foregoing facts, evidence and submissions, the main issue before the court is whether the Plaintiff is entitled to the relief sought of rectification of the register in respect to title known as Nyandarua/Olaragwai/1591 in the name of the 1st Defendant, a declaration that she has become declaration that the Plaintiff has become entitled to the parcel of land known as Nyandarua/Olaragwai/1591 in place of the 1st Defendant, and registration of the same in her name in place of the 1st Defendant.

The genesis of the dispute before court revolves around Nyandarua/Ol'aragwai/491 measuring 8.10 hectares, which the Plaintiff's late husband, Gibson G. Maina, bought from John Kamau Wainaina and was issued with a title deed dated 2nd June 1989. John Kamau Wainaina had bought the said parcel, then known as Nyandarua/Ol'aragwai/422 from Gachu Muchema whereof he failed to pay the full purchase price. Gachu Muchema filed **Naivasha RMCC No. 107 of 1987** against John Kamau Wainaina. On 14 July 1993, the court adopted an elder's award which directed John Kamau Wainaina to surrender 4.5 acres back to Gachu Muchema.

Aggrieved by this finding, the Plaintiff's late husband filed **Nairobi High Court Misc. Case No. 265 of 1994** against Gachu Muchemi where a ruling issued on 19th March 2002 quashed the findings of the Senior Magistrate's Court in **Naivasha RMCC No. 107 of 1987** which purported inter alia to nullify the transfer of land parcel no. Nyandarua/Ol'aragwai/497 in favour of the Plaintiff's husband.

In the meantime, Gachu Muchema sold the 4.5 acres which were reverted back to him to the 1st Defendant. The 1st Defendant was issued with a title number Nyandarua/Olaragwai/1591 on 31st January 1996 with respect to the said 4.5 acres, which is the subject matter of this suit. The Plaintiff is seeking an order for rectification of the register in respect to the 1st Defendant's title number Nyandarua/Olaragwai/1591, cancellation of the 1st Defendant's title in the suit land and registration of the

suit parcel in her name.

The Plaintiff has argued that despite the findings in **Nairobi High Court Misc. Case No. 265 of 1994** that quashed the Magistrate Court's decision to hive off 4.5 acres from her property, the land registrar could not effect the changes in the register since the property was no longer registered in the name of Gachu Muchemi having been transferred to the 1st Defendant. The Plaintiff has also contended that since no appeal has been preferred against the finding made in **Nairobi High Court Misc. Case No. 265 of 1994**, she is entitled to rectification of the register. According to the Plaintiff, Gachu Muchemi transferred the suit property to the 1st Defendant during the pendency of judicial review proceedings.

The 1st Defendant on the other has contended that he is an innocent purchaser for value without notice. He argued that no fraud or mistake had been proved against him in acquisition of the land. He also argued that no evidence had been tendered to prove that he knew or ought to have known that the judicial review proceedings were pending before the High Court.

Section 143 of the repealed Registered Land Act which was the applicable law at the time of filing of the Plaintiff's Originating Summons provided as follows with respect to rectification of a title by the Court:

“(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.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

The same provisions are now found in section 80 of the Land Registration Act of 2012.

In my view, the Plaintiff is entitled to the order of rectification sought since no appeal was lodged to challenge the decision in **Nairobi High Court Misc. Case No. 265 of 1994** that quashed the Senior Resident Magistrate Court's decision to hive off 4.5 acres from the Plaintiff's property, and which was the basis of the 1st Defendant's title to the suit property.

In addition, since the 1st Defendant was issued with a title on 31st January 1996 while the judicial review proceedings were pending, the doctrine of *lis pendens* is also applicable. The purpose of the principle of *lis pendens* under common law is to preserve the suit property until the suit is finally determined or until the court issues orders and gives terms on how the suit property should be dealt with. The effect of the doctrine of *lis pendens* is to render any conveyance of property that is the subject of litigation subservient to the rights of the parties arising from the said litigation.

The 1st Defendant's submission that he was not aware of the judicial review proceedings cannot also stand in light of the finding of the Court of Appeal in the case of **Bernadette Wangare Muriu -vs- National Social Security Fund Board of Trustee & 2 others (2012) eKLR** that the doctrine of *lis pendens* binds not only parties to the litigation, but 3rd parties who may acquire an interest in the subject matter of the proceedings during the pendency of the proceedings, irrespective of whether they had notice of the litigation or not.

In the present case, the transfer of the suit property to the 1st Defendant during the pendency of the judicial review proceedings means that the 1st Defendant's right is subservient to the rights of the Plaintiff, in whose favour judgment was made in **Nairobi High Court Misc. Case No. 265 of 1994**.

The 1st Defendant cannot therefore claim that his title is indefeasible pursuant to section 143 of the

Registered Land Act (repealed), and the present case is one where the registration of the suit property in the name of the 1st Defendant was clearly mistaken and fraudulent in light of the pending proceedings over the said property. In addition the said registration can no longer stand in light of the court decision nullifying the Magistrate Court's order in **Naivasha RMCC No. 107 of 1987** which was the basis for the vesting of the title to the suit property in Gachu Muchemi who later sold it to the 1st Defendant.

Lastly, from the evidence adduced by the 1st Defendant he is not in actual possession of the suit property, having given contradictory evidence that his employee is on the land, at the same time stating that the Plaintiff's employee stays on the farmhouse built on the suit property, and yet again testifying that the land is being cultivated by a son of Gachu Muchemi. He also testified that he did not know who built the structure that was on the suit property. The Plaintiff on the other hand testified that she and her deceased husband had fenced and built a farmhouse on the suit property, and had been cultivating on the same. She also stated that she had brought an application before the court to be allowed to harvest her produce on the suit property.

Having found that the Plaintiff is entitled to the relief of rectification of the title of the suit property, the outstanding questions are whether she should then be declared owner of the same, and whether the suit property should consequently be registered in her name. This Court notes in this regard that the Plaintiff is bringing this suit as administrator of the estate of Gibson G. Maina, and the suit property was hived from a parcel of land that registered in the name of the said Gibson G. Maina. The suit property must therefore be subjected to the normal processes of succession, in order to determine who is entitled to it, and in whose name it should be registered.

In addition, the effect of the decision in **Nairobi High Court Misc. Case No. 265 of 1994** was to revert the *status quo* with regards to the suit property to the position before the decision in **Naivasha RMCC no. 107 of 1987**, which was that the suit property was registered in the name of the Plaintiff's deceased husband, Gibson G. Maina. It is therefore the finding of this Court that for these reasons the Plaintiff cannot be declared owner of the suit property, neither can the suit property be registered in her name, but only in the name of her deceased husband.

The Orders

The Plaintiff's Originating Summons therefore only succeeds to the extent that this Court has found that she has proved her case for rectification of the title to the suit property in favour of her deceased husband. On the outstanding issue of costs, this Court is guided by the provisions of section 27 (1) of the Civil Procedure Act (Cap. 21) which states as follows:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

In the circumstances of this case, this Court notes that the Plaintiff has only partly succeeded in her claim, and also that the registration of the suit property in the 1st Defendant's name arose from acts involving third parties including the 2nd Defendant, and it would therefore not be fair to condemn the 1st Defendant to meet the costs of this suit.

This Court accordingly orders as follows:

1. That the Chief Land Registrar shall forthwith rectify the register for the title known a

- Nyandarua/Olaragwai/1591 by cancelling the registration in the name of Francis Muriithi Mundia and registering the said title in the name of Gibson G. Maina.
2. That the Nairobi Environment and Land Court Deputy Registrar to execute any necessary forms and/or vesting order in respect of the parcel of land known as Nyandarua/Olaragwai/1591 in favour of Gibson G. Maina.
 3. That the Chief Land Registrar shall deliver the new title to Nyandarua/Olaragwai/1591 issued in the name of Gibson G. Maina to the Plaintiff herein, Marion Gathoni Maina.
 4. That the 2nd Defendant shall meet half of the costs of the Plaintiff's suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____7th____ day of ____October____, 2014.

P. NYAMWEYA

JUDGE