



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 285 OF 2012

**JULIA WANJIKU GABURIA (Suing as the legal administrator of the
Estate of the late JOSEPH GABURIA MITARU).....PLAINTIFF**

VERSUS

SAMMY NDUNGU MUNGAI.....1ST DEFENDANT

DISTRICT LAND REGISTRAR NAKURU.....2ND DEFENDANT

JUDGMENT

1. By plaint filed on 18th December 2012, the plaintiff averred that she is the administrator of the estate of her late husband Joseph Gaburia Mitaru (deceased) who was the owner of the parcel of land known as Kiambogo/Kiambogo Block 1/498 measuring approximately 4.62 hectares having purchased it from Mwariki Farm Company in 1969 in partnership with his brother Michael Maina Mitaru. That despite the deceased paying for the plot fully in 1989, he passed away in the year 2010 before any title was issued to him. That she conducted a search on 3rd December 2012 and to her shock found that title in respect of the property was issued to the first defendant by the second defendant on 6th October 1989. She contended that the title was fraudulently issued by the second defendant and fraudulently obtained by the first defendant.

2. She therefore prayed for judgment against the defendants jointly and severally for:

(a) A declaration that the transactions that saw the 1st defendant being issued with a title deed for land parcel number Kiambogo/Kiambogo Block 1/498 was obtained by fraud hence null and void and therefore there be a cancellation order of the same and an order that the said title be issued to the plaintiff.

(b) A permanent injunction restraining the defendants by themselves, their agents, representatives, servants and any body (sic) acting under them from dealing and interfering in any manner whatsoever with the suit premises.

(c) Costs of this suit and interest.

(d) Any other further relief that this Honourable Court may deem fit and just to grant.

3. The first defendant filed a statement of defence in which he averred that the deceased sold his interest in the property to the first defendant's father who then opted to have the title issued in the first defendant's name. He denied the allegations of fraud, averred that the suit is time barred and gave notice of an objection to that effect. He urged the court to dismiss the suit with costs. The second defendant equally filed a defence in which he denied the plaintiff's allegations and urged the court to dismiss the suit with costs.

4. The matter then proceeded to hearing. The plaintiff testified as PW1 and stated that Joseph Gaburia Mitaru was her husband to whom she got married in the year 1968. He passed away on 30th April 2010. She produced a copy of Death Certificate C No. [particulars withheld] (PExb 1). She added that she obtained Grant of Letters of Administration (PExb 2A) in respect of his estate on 17th January 2012 in Nakuru High Court Succession Cause No. 503 of 2011 and Certificate of Confirmation of Grant (PExb 2B) on 21st September 2012. That her late husband owned plot number Kiambogo/Kiambogo 2/498 located at Kiambogo and which was distributed to her in the confirmation of grant. That when she went to the land registry to process transfer in her favour after getting the confirmed grant, she found that the 1st defendant was the registered owner. She produced an application to be registered as proprietor by transmission (PExb 3A) and transfer by personal representative (PExb 3B). She further produced application for registration dated 23rd October 2012, receipt number 2875154 being payment for registration charges and for certificate of title, National Bank bank slip No. 246017 dated 15th October 2012, Stamp Duty Declaration Assessment and Pay In Slip Serial No.], copy of Gazette Notice No. 14190 published in Kenya Gazette of 11th November 2011, copy of her ID No. [particulars withheld] and a copy of her KRA PIN Certificate No. [particulars withheld] (PExb 3C to 3I respectively).

5. She further stated that the land registry refused to issue her with a title deed and instead informed her that the plot was owned by the 1st defendant. She therefore reported the matter to the police and also lodged a caution. She paid KShs 500 to register the caution and was issued with a receipt dated 23rd October 2012. She produced the receipt, an application for registration of caution dated 23rd October 2012 and Certificate of Search as at 3rd December 2012 (PExb 4A to 4C respectively). She added that her husband and his brother Michael Maina Mitaru were shareholders of Mwariki Farm and that the plot was transferred to her husband in 1986 by Michael Mitaru. She produced a copy of a letter from Mwariki Farm Ltd to her husband dated 29th September 1986 asking him to go and be shown the beacons, a copy of a letter from Mwariki Farm Ltd dated 23rd September 1989 asking members of the company to go sign the transfer and pay KShs 220, a note from Mwariki Farm Ltd dated 2nd October 1989 and a receipt for KShs 220 dated 2nd October 1989 (PExb 5A to 5D respectively). She further stated that despite her husband going to the land registry at Nakuru severally, they kept telling him to go back. Ultimately, he passed away without getting the title. She added that she has been occupying and cultivating the plot from 1986 up to the date of her testimony and that the 1st defendant has never been in possession. That prior to filing this case, she issued a demand letter dated 5th December 2012 (PExb 6) to the 1st defendant through her advocate. She also stated that the 1st defendant is claiming that he bought the plot from her late husband through a sale agreement dated 24th October 1989 which shows the buyer as Mungai Njuguna Kariuki. She denied that her husband sold the plot to the said Mungai Njuguna Kariuki. She pointed out that the 1st defendant's title deed was issued on 6th October 1989 which suggests that he got the title before buying the land and that the 1st defendant had not shown her any consent of the land control board. Further, that although the sale agreement is indicated to have been drawn by G. Ngure & Co. Advocates, her advocates sought to know from Law Society of Kenya through letter dated 30th January 2013 (PExb 7A) if such a law firm existed. LSK replied through letter dated 15th February 2013 (PExb 7B) stating that such a firm did not exist. LSK advised her advocates to also check with the registrar of companies. Her advocates sought the information from the registrar of companies through letter dated 27th July 2016 (PExb 8A). The registrar replied through letter dated 16th September 2016 (PExb 8B) stating that the said business name did not exist in his records. In conclusion of her evidence in chief, she urged the court to grant her judgment as prayed.

6. Under cross examination, she stated that she has never lived on the plot but is instead using it. Further, that her husband passed away in the year 2010 and that he had not collected the title for a period 21 years. She added that she went to the plot and found beacons on it after discovering that it was registered in the 1st defendant's name. That she constructed a small shed on it made of iron sheets in the year 2011, after her husband passed away.

7. The next witness was Michael Maina Mitaru (PW2) who partly adopted his witness statement and also gave oral testimony. He stated that he is a resident of Kitale and a brother to the deceased. That deceased and him were members of Mwariki Farm Ltd and that they purchased the suit plot from the company by each contributing half of the amount required by the company. That the company issued share certificate No. 59 (PExb 9A) in his name since it could not be issued jointly to him and the deceased. He also produced a copy of a letter from Mwariki Farm dated 4th June 1975 (PExb 9B) informing him that he had been allocated plot No. 42 measuring 10 acres, a copy of a letter from Mwariki Farm dated 5th June 1979 (PExb 9C) informing him that he had been allocated agricultural plot No. 158 whose number later changed to No. 498 and a copy of letter dated 22nd August 1986 (PExb 9D) which he wrote to the chairman Mwariki Farm Ltd requesting him to transfer plot No. 498 to his brother Joseph Gaburia Mitaru. Under cross examination, he stated that he has lived at Kitale since 12th April 1975 while the deceased lived at Mangu in Nakuru and that he would not therefore know if the deceased had sold the plot without informing him.

8. The plaintiff's case was closed at that point.

9. Sammy Ndungu Mungai, the first defendant testified as the sole witness for his case. He described himself as a businessman residing in Nakuru. He stated that this case concerns land parcel Kiambogo/Kiambogo Block 2/498 which he owns and in respect of which he has a title deed issued to him on 6th October 1989. He produced a photocopy of the title (DExb 1). He added that his father Mungai Njuguna Kariuki purchased the plot from the deceased through a sale agreement dated 24th October 1989 (DExb 2) and that he has been using the plot since 1994. He therefore urged the court to dismiss the case. Under cross examination he stated that the title deed was issued in his name and that he does not know how it was issued before the sale agreement. He added that he was not present during the issuance and that he does not know if there was any fraud. Further, that he came across the sale agreement and the title after his father passed away and that he conducted a search at the lands registry which confirmed that the plot belonged to him. He could not tell the date when his father passed away, his own date of birth, whether he gave his father any of his documents for purposes of the issuance of the title, whether his father obtained a consent of land control board or even whether there exists any bank slip confirming payment of stamp duty. He further stated that he was not sure if he signed any transfer form and that he did not know the advocate who drafted the sale agreement.

10. The first defendant's case was closed at that point. The second defendant opted not to call any witness and his case was also closed. Parties were then ordered to file and exchange written submissions. Both the plaintiff and the first defendant filed their submissions. Learned state counsel appearing for the second defendant opted not to file any submissions.

11. In the submissions filed for the plaintiff, three issues for determination are identified: whether the title was issued fraudulently, whether fraud has been proven and whether the suit is time barred. It is argued in regard to the first two issues that the first defendant acknowledged in his testimony that he did not sign any transfer and did not pay stamp duty. Further that the sale agreement was attested by unknown persons and that the basic procedure for transferring land was not followed. It is also argued that the first defendant cannot blame his deceased father but being the registered owner, ought to have proven that his title was legally obtained. Relying on the cases of **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR** and **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**, it is argued that fraud has been established. Regarding the issue of limitation, it is argued that time did not begin to run until the plaintiff discovered the fraud in the year 2012. The case of **Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another [2018] eKLR** is cited. The plaintiff therefore urged the court to allow the claim as prayed.

12. For the first defendant it is argued that the sale transaction was between the deceased and the first defendant's father and that no allegation of fraud has been made against the first defendant's father. It is argued that the plaintiff's case cannot therefore succeed. It is further argued that since the plaintiff's grant was confirmed on 21st September 2012, there was no land known as Kiambogo/Kiambogo

Block 2/498 in existence at that date and consequently the plaintiff lacks the capacity to bring this suit in so far as it concerns the suit property. Additionally, it is argued that the first defendant has been in possession since 1989 with the plaintiff's knowledge thereby rendering this claim time barred since it is brought over 12 years after the possession started. Finally, it is argued that the first defendant's rights as a registered proprietor cannot be defeated since it is not proven that there was any fraud to which he was a party and since there is no allegation of illegality, corruption or unprocedural acquisition. The court is therefore urged to dismiss the case.

13. As previously noted, the second defendant did not file any submissions.

14. I have carefully considered the parties' pleadings, evidence and submissions. Although both the body of the plaint and the prayers refer to plot number Kiambogo/Kiambogo Block 1/498, the plaintiff and the first defendant have all formulated their respective cases, testimonies and documentary evidence around plot number Kiambogo/Kiambogo Block 2/498. A reading of paragraph 6 of the first defendant's defence leaves no doubt that he was aware that the correct plot number is Kiambogo/Kiambogo Block 2/498. He even stated in his testimony that "this case concerns land parcel number Kiambogo/Kiambogo Block 2/498". It is thus apparent that reference by the plaintiff to "Block 1" instead of "Block 2" was an oversight. I will therefore treat the entire case and pleadings as referring to plot number Kiambogo/Kiambogo Block 2/498 and not Kiambogo/Kiambogo Block 1/498. Such an approach is in line with the court's duty under **Section 3 of the Environment and Land Court Act, Sections 1A and 1B of the Civil Procedure Act and Article 159 (2) (d) of the Constitution** to see to it that the just, expeditious, proportionate and accessible resolution of disputes is attained and that substantive justice prevails.

15. Three issues arise for determination: firstly, whether the suit is barred by Limitation of Actions Act; secondly, whether the first defendant's title was issued fraudulently; and finally, whether the plaintiff is entitled to the reliefs sought.

16. I will deal with the issue of limitation first since it goes to the jurisdiction of the court. The plaintiff's claim is essentially an action to recover land. In that regard, **Section 7 of the Limitation of Actions Act** sets the period of limitation at 12 years as follows:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

17. The plaintiff has made allegations of fraud against the defendants and it is on that basis that she seeks cancellation of the first defendant's title to the suit property. Whenever an action is based on the fraud of the defendant **Section 26 of the Limitation of Actions Act** provides for extension of the limitation in the following terms:

Where, in the case of an action for which a period of limitation is prescribed, either –

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or ...

the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it: ...

18. The question that then emerges is when the plaintiff discovered the alleged fraud. There is no dispute that the first defendant was registered as proprietor of the suit property on 6th October 1989 and that prior to that date the property was owned by the plaintiff's deceased husband. It is however not clear if any title was ever issued to the deceased. The first defendant has not helped the situation by demonstrating how and what documents were used to process and issue his title. According to the plaintiff, the deceased unsuccessfully pursued a title from Mwariki Farm until his death on 30th April 2010 and that every time he went to the company to enquire he was told to go back later. I am therefore persuaded that the deceased was not aware of any possible fraud. The plaintiff formally came into the picture when she obtained letters of administration in respect of the deceased's estate on 17th January 2012 and subsequently certificate of confirmation of grant on 21st September 2012. According to her, she only came to learn that a title had been issued to the first defendant when her application to be registered as proprietor by transmission was rejected by the land registrar. A perusal of the said documents shows that they were lodged at the land registry on 25th October 2012. It is that discovery which seems to have triggered subsequent actions by the plaintiff such as issuing a demand letter to the first defendant on 5th December 2012, conducting a search on 9th December 2012 and filing this case on 18th December 2012. I am therefore satisfied that the plaintiff discovered the alleged fraud in the year 2012 and filed this suit the same year, well within the limitation period. Although it has been argued that the first defendant has been in possession since 1989 with the plaintiff's knowledge thereby rendering this claim time barred, I note that those arguments are built around affidavits which were filed during interlocutory proceedings. The hearing of this suit was by way of oral evidence. The first defendant did not produce or include the said affidavits in his evidence. He cannot therefore seek to introduce them by way of submissions. In the circumstances I find that this suit is not barred by **Limitation of Actions Act**.

19. The second issue for determination is whether the first defendant's title was issued fraudulently. The first defendant is the registered proprietor of the suit property. Ordinarily, the court would be duty bound under **Section 26 of the Land Registration Act** to accept his certificate of title as proof of ownership. That said, his title can be nullified if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme. The section provides:

26. 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.

20. The first defendant's title was issued on 6th October 1989, prior to the enactment of **Land Registration Act**. In that regard, the provisions of **Section 27 (a)** and **28** of the repealed **Registered Land Act** are instructive. They provided as follows:

27. Subject to this Act –

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

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...

21. The circumstances in which a court could interfere with the register so as to affect the rights of a registered proprietor were circumscribed by **Section 143** of the repealed **Registered Land Act** as follows:

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.

(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.

22. Either way, title to property that is obtained fraudulently or illegally in violation of the provisions of the statute is not sacrosanct both under the new and the repealed statutes. See **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR**.

23. Fraud is a serious allegation which must be pleaded, particularised and strictly proven. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR**. The burden of proof facing a party alleging fraud is higher than the usual one in civil cases of proof on a balance of probabilities but lower than proof beyond reasonable doubt. See **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**.

24. In an effort to attack first defendant's title, the plaintiff pleaded at paragraph 11 of her plaint that "*the 1st defendant, without any colour of right, ... colluded with the 2nd defendant and caused to be registered as the owner of the suit premises ...*" and further at paragraph 12 that "*the 1st defendant worked in cohorts with the 2nd defendant and fraudulently obtained a title deed ...*". She further alleged that the first defendant could not justify or explain how he obtained the title deed. She also pleaded particulars of fraud in respect of the defendants such as making false presentations, issuing a title deed without authenticated documents and transferring the land in a clandestine surreptitious manner. In the circumstances, the first defendant's argument that there is no allegation of illegality, corruption or unprocedural acquisition on his part cannot stand.

25. While the first defendant claimed that his father purchased the suit property from the plaintiff's deceased husband through a sale agreement dated 24th October 1989, the plaintiff supported her allegations of fraud by demonstrating both through the letter from Law Society of Kenya dated 15th February 2013 and letter from Registrar of Companies dated 16th September 2016 that there was no advocate practising in the name of G. Ngure & Company and that no such business name existed. It follows therefore that the sale agreement which is purported to have been attested by G. Ngure & Company Advocates cannot be vouched for. Further, a perusal of the said agreement shows that the signature of the vendor was not attested. Additionally, the stamp does not disclose the name of the particular advocate who attested the purchaser's signature. Considering that the first defendant stated in his testimony that he does not know the said advocates yet he relies on the agreement to support his title, the inescapable conclusion is that agreement is not authentic.

26. A registered proprietor whose title is under challenge cannot simply wave the very same title which is being questioned. Particularly when it is alleged that his title is tainted by fraud and where the plaintiff has adduced sufficient evidence to shift the evidential burden of proof as is the situation in this case, the registered proprietor must do more to demonstrate the whole process of the acquisition of his title. To require so is not to shift the legal burden of proof but is simply an acknowledgment that title to land is the end product of a process that entails extensive documentation most of which is particularly within the knowledge of the registered proprietor. While every plaintiff must always prove her case, there is a lot of inference to be drawn from the stance of a proprietor who while claiming to have lawfully acquired a property, is unwilling to place before the court the supporting documents that yielded his title. In **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** the Court of Appeal held thus:

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.

27. The first defendant has not offered any explanation as to how the property transitioned from the deceased to the purchaser in the sale agreement and ultimately to him. He could not show that he executed any transfer or paid any stamp duty. When asked whether he gave his father any of his documents such as national identity card and tax PIN, he could not recall having done so. Similarly, when asked whether his father obtained consent of land control board, his answer was that he did not know. I further note that the sale agreement is dated 24th October 1989, a date which falls after 6th October 1989 when the first defendant became the registered proprietor. No explanation has been offered by the first defendant as to how he could become the registered owner of the property before purchasing it. His explanation that he just found the agreement and the title among his father's possessions after his said father's death does not also add up considering that he stated that he does not remember the date when his father passed away. While it was argued that the plaintiff's claim ought not to be allowed since no allegation of fraud was made against the first defendant's father, I do not think it was necessary to allege fraud against the first defendant's father. The first defendant is the registered proprietor. It is him who has to answer to any fraud regarding his acquisition of the property. He has not demonstrated that he got the property from his said father.

28. In view of the foregoing discourse, I am satisfied that the plaintiff has demonstrated that the registration of the first defendant as proprietor of the suit property was tainted by fraud and that the first defendant was party to that fraud. Consequently, the answer to the second issue for determination is that the first defendant's title was indeed issued fraudulently. It follows therefore that the plaintiff is entitled to the reliefs sought.

29. I therefore enter judgment against the defendants jointly and severally as follows:

i) A declaration is hereby made that the transactions that led to the 1st defendant being issued with a title deed for land parcel number Kiambogo/Kiambogo Block 2/498 were tainted by fraud.

ii) The registration of the 1st defendant as the proprietor of land parcel number Kiambogo/Kiambogo Block 2/498 as well as the 1st defendant's title deed in respect of the said parcel are hereby cancelled.

iii) The 2nd defendant is hereby ordered to register the plaintiff as the proprietor of land parcel number Kiambogo/Kiambogo Block 2/498 and to issue to her a title deed in respect the said parcel.

iv) A permanent injunction is hereby issued restraining the 1st defendant, his agents, representatives, servants and anybody acting under him from dealing with and interfering in any manner whatsoever with land parcel number Kiambogo/Kiambogo Block 2/498.

v) The 1st defendant is awarded costs of the suit and interest thereon.

Dated, signed and delivered at Nakuru this 1st day of October 2020.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

Mr Ikua for the 1st defendant

No appearance for the 2nd defendant

Court Assistants: Beatrice Jelimo & Julius Lotkomoi