



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO 330 OF 2017

ALICE NJERI KAMAU.....1ST PLAINTIFF

MERCY NJERI WANAINA.....2ND PLAINTIFF

PRISCILLA WAMBUI WANAINA.....3RD PLAINTIFF

VERSUS

THE HON.ATTORNEY GENERAL.....1ST DEFENDANT

KIAMBU LAND REGISTRAR.....2ND DEFENDANT

ALICE WANJIRU KARANJA.....3RD DEFENDANT

JUDGMENT

By a Plaint dated **14th March 2017**, the Plaintiffs herein sought for Judgment against the Defendants for the following orders:-

- a) A Declaration that the Plaintiffs' Title No. Kabete/ Lower Kabete/696 in the name of Peter Ndungu Wainaina is the genuine and valid title.
- b) An order that the 2nd Defendant be ordered to cancel the fraudulent entry, the fraudulent transfer and the fraudulent name Alice Wanjiru Karanja, 3rd Defendant from the register for Title No. Kabete/Lower Kabete/696 forthwith.
- c) A Declaration that the fraudulent Title Deed No. Kabete/Lower Kabete/696, in the name of Alice Wanjiru Karanja, 3rd Defendant was fraudulently obtained and be deemed as cancelled, wherever it is, if it surfaces up or it is surrendered to the Kiambu District Land Registrar, 2nd Defendant.
- d) An order that the Register for Title No. Kabete /Lower Kabete/696 be rectified to reinstate the name of the genuine registered owner Peter Ndungu Wainaina.
- e) An order that the Kiambu District Land Registrar / 2nd Defendant proceeds to use the genuine Title No. Kabete/Lower Kabete/696 in the name of Peter Ndungu Wainaina for purposes of registering Transfer Form RL7 and RL19 as ordered in the Certificate of Confirmation of Grant to the Administratrix and 6 Beneficiaries of the Estate of Peter Ndungu Wainaina dated 2nd October 2015.
- f) An order that the restriction and caution registered against the title be removed forthwith to enable the Land Registrar to effect the orders granted herein.
- g) General Damages for fraud against all Defendants jointly.
- h) Costs of the suit and interest.
- i) Any other relief that the Honourable Court may deem just to grant.

The Plaintiffs averred that they are the Co -Administrators of the Estate of **Peter Ndungu Wainaina (Deceased) Vide Succession Cause No. 2432 of 2012**, in the Matter of the Estate of **Peter Ndungu Wainaina (Deceased)** who is the bonafide registered owner of the suit

property valued at **Kshs. 72 million**. That the Plaintiffs are in possession of the original title deed of the suit property which they intend to subdivide into **6 equal plots** and register in the name of the 6 Beneficiaries as per the Certificate of Confirmation of Grant dated **2nd October 2015**.

The Plaintiffs contended that on **29th July 2015**, they conducted a search at the Kiambu District Land Registrar's offices and were issued with a certified copy of Green Card extract dated **29th July 2015**, which showed that one **Alice Wanjiru Karanja I.D 1026415**, was the current registered owner of the suit property. That their deceased father did not sell the suit property to anyone during his lifetime as he left the original title deed in their custody. Further that the fraudulent title in the name of the 3rd Defendant was issued on **14th June 2006**, yet their deceased father was still alive and had the custody of the genuine title deed and was still registered under his name.

It was their contention that there is neither any supporting transfer of land Form RL1 nor any **Land Control Board Consent**, I.D Card or PIN Certificate the alleged transfer to the 3rd Defendant on record in the Kiambu Land Registry file on **29th July 2015**. Hence the transfer transaction was fraudulent and illegal, which has been confirmed by the District Land Registrar. Further that the fraudulent transfer, entry and name in the Green Card has blocked and delayed the registration of transfer of Form **RL19** and **RL17** of the title to its rightful 6 joint beneficiaries by the Co Administrators as per the Certificate of Confirmation of Grant. That it is only fair and just that the Plaintiffs be granted an order for the cancellation of the fraudulent entry.

They particularized joint liability for fraud by the Defendants as ; fraudulent transfer and causing fraudulent entry on the suit property and issuance of an invalid title deed to the 3rd Defendant without any genuine sale from the registered owner and without any lawful record of transfer in the register to support the transfer, subjecting the Plaintiffs to dispossession, impunity, corrupt, illegal, unlawful and fraudulent transactions on the suit property which is detrimental to their beneficial interests, persisting with the fraudulent transactions on the suit property, advertising the suit property for sale to the public by the 3rd Defendant, the 3rd Defendant failing to appear before the 2nd Defendant with original transfer documents for verification. The Plaintiff's contended that they have suffered immense General Damages for fraud, imminent loss and dispossession of their beneficial rights in the suit property.

The suit is contested and the 1st and 2nd Defendants filed a Defence dated **3rd May 2017**, and denied all the allegations made in the Plaint and averred that they were not aware of the proceedings in the captioned Succession Cause as they were not parties. They contended that if any alleged transfer was done, then the same was carried out in good faith after the submissions of the requisite documents for registration. It was further averred that the Plaintiffs must prove that the alleged missing forms do not exist and denied colluding with anyone to defraud the Plaintiffs.

The matter was canvassed via Viva voce evidence wherein the Plaintiffs called one witness and closed their case. The 1st and 2nd Defendants did not call any witness. Despite Service of **Summons to Enter Appearance**, being served on the 3rd Defendant, she did not Enter Appearance nor file any defence. The matter proceeded without her participation.

PLAINTIFFS' CASE

PW1 Alice Njeri Kamau adopted her witness statement dated **14th March 2017**, as her evidence in Court. She produced her list of documents as Exhibit 1 and Transfer Form RL 19 and RL17 executed by Co Administrators as Exhibit 2. She had the original title dated **13th June 1996**, in the name of **Peter Ndungu Wainaina**. She urged the Court to allow their claim.

She further testified that she sued the Land Registrar because the Green Card had another person's name who was a stranger to them. That the Land Registrar is the custodian of all the land documents and they wondered how the land was transferred without their knowledge.

After close of Viva voce evidence, the Plaintiffs filed written submissions which the Court has carefully read and considered and renders itself as follows:-

Though the Defendants were duly served, the 3rd Defendant did not enter appearance nor defend the suit. The 1st and 2nd Defendants however only filed a defence, but did not call any witness to advance its defence. The suit has not been defended, and that means that the Plaintiffs' evidence remained unchallenged and uncontroverted.

However, the Court will not enter Judgment without interrogating the veracity of the evidence placed before it by the Plaintiffs. The Plaintiffs who have alleged still required to prove their case on the required standard of balance of probabilities. See the case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR**, where the Court cited the case of **Karuru Munyororo.....Vs.....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988**, and held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

The Plaintiffs have to discharge the burden of proof as exparte evidence is not automatic prove of a case on the required standard. See the case of **Kenya Power & Lighting Company Limited... Vs...Nathan Karanja Gachoka & another [2016] eKLR**, the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Having considered the available evidence, the Court finds the issue for determination is whether the **Plaintiffs are entitled to the orders sought.**

It is the Plaintiffs contention that the suit property belongs to the Estate of **Peter Ndung'u Wainaina**. To support their assertion the Plaintiffs produced in evidence a Copy of a title deed indicating the said **Peter Ndung'u Wainaina (Decesaed)** was issued with same on **13th June 1996**. Further the Plaintiffs have contended that the 2nd Defendant fraudulently effected the transfer of the suit property to the 3rd Defendant without any proper documentation.

The Court has seen the green card that has been produced as exhibit. The said Green Card indicates that the late **Peter Ndung'u** was the registered owner and as per the said Green card, and he transferred the suit property to the 3rd defendant on **14th June 2006**. The Plaintiffs have denied that this transfer ever occurred and have challenged the defendants to prove that there was sale of the suit property to the 3rd Defendant. As already noted by the Court, the evidence by the Plaintiffs has not been controverted and the Court sees no justification to find that it is not truthful.

According to the Green card, the 3rd Defendant was issued with a title deed. It is not in doubt that when the ownership of a registered proprietor is challenged, the onus is on the person to prove the root of its title. See the case of **Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, where the Court of Appeal held that:-

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

Further in the case of **Daudi Kiptugen ...Vs... Commissioner of Lands & 4 Others [2015] eKLR** the Court held that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

Therefore, it follows that the 3rd Defendant had an obligation to give evidence and establish the root of her title. Having failed to do so, the Court finds and holds that as per the Plaintiffs testimony, the title was acquired improperly and the Court further finds and holds that the said Certificate of title should be cancelled.

Section 26 (1) of the Land Registration Act of 2012 provides that:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or***
- b. Where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.***

The 3rd Defendant having been issued with a certificate of title that the Court has found to have been improperly issued as the consent of the registered owner was never given to transfer the said property, the Court further finds and holds that the 3rd defendant's title was acquired illegally and therefore is **null and void**.

The Plaintiffs have also averred that the registration of the suit property in the name of the 3rd Defendant was procured by fraud. **'Fraud'**

has been defined in **Blacks Laws Dictionary** as;

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

Further **Black's Law Dictionary Ninth Edition at Page 731** also defines 'fraud' as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”

To be registered as a proprietor, of a property the party must sign transfer forms from the registered owner to the purchaser. The 3rd Defendant must therefore have produced illegal documents as the Plaintiffs have averred that **Peter Ndungu** never signed any transfer forms and that the same amounted to misrepresentation hence Fraud.

The Plaintiffs have sought for various orders including cancellation of the 3rd Defendant's title, declaration that the title to the suit property held by **Peter Ndung'u** is genuine and rectification of the order. The Court has already found that the 3rd Defendant did not explain the root of her title and her title was fraudulently acquired and therefore impeachable. The Court proceeded to impeach the said Certificate of title held by the 3rd Defendant.

Section 80(1) of the **Land Registration Act** comes into play herein and it provides:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

This Court is satisfied that the Certificate of title held by the 3rd Defendant was procured by fraud and this Court has impeached the same. Therefore the said title ought to be cancelled. The Estate of **Peter Ndungu Wainaina** holds a title deed to the suit property and his title has not been challenged by anyone.

The Court finds and holds that the said estate has a valid title. The said estate of **Peter Ndungu**, being the registered owner of the suit property, ought to be allowed to enjoy all the rights and privileges that relate to it as provided by **Sections 24 and 25 of the Land Registration Act**.

Further the Plaintiffs being the legal owners of the suit property, then it is only fair that the register should be rectified to cure the fraud perpetrated by the 3rd Defendant and return the suit property to its rightfully owners who have demonstrated how he purchased or earned the same.

Consequently, the Court finds that the Plaintiffs have proved their case on the required standard of balance of probabilities and that their prayers as sought in the **Plaint** are merited.

Having now carefully considered the pleadings, the evidence adduced in Court, the exhibits produced thereto and the written submissions by the Plaintiffs, the Court enters Judgment for the Plaintiffs against the Defendants jointly and severally as prayed in the **Plaint** dated 14th March 2017, in terms of prayers **No.(a), (b), (c), (d), (e), (f) and (h)** with costs to the Plaintiffs.

It is so ordered.

Dated, signed and Delivered at Thika this 17th day of December 2020

L. GACHERU

JUDGE

17/12/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Gitau for the Plaintiffs

No appearance for Defendants

L. GACHERU

JUDGE

17/12/2020