



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 568 OF 2017

JACQUILINE MUTHONI WACHIRA.....PLAINTIFF

VERSUS

MWALIMU INVESTMENT COMPANY LIMITED.....1ST DEFENDANT

MWALIMU SUKARI COMPANY LIMITED.....2ND DEFENDANT

ANNE WANJIKU MWAURA.....3RD DEFENDANT

THE LAND REGISTRAR.....4TH DEFENDANT

JUDGMENT

By a Plaint dated 15th May 2017, and filed on 30th May 2017, the Plaintiff sought for Judgment against the Defendants for the following orders;

- a) A declaration that the transfer of land in the scheme executed by the 1st and 2nd Defendants in favour of the 3rd Defendant was fraudulent and null and void*
- b) A declaration that the Plaintiff is the legal owner of the property known as Ruiru/Ruiru East Block 3/1715 and is entitled to ownership and exclusive use and occupation and vacant possession of the property to the exclusion of the 3rd Defendant or anyone claiming under her.*
- c) A permanent injunction restraining the 3rd Defendant whether by herself, her servants and/or agents howsoever from entering, remaining upon, using, offering for sale, selling, transferring, assigning, charging or in any other manner howsoever interfering with the Plaintiff's use, occupation and quiet enjoyment of the property known as Ruiru/Ruiru East Blo 3/1715.*
- d) An order that the register and the title issued to the 3rd Defendant be cancelled/revoked and a fresh title be issued to the Plaintiff*
- e) damages*
- f) Special damages of Kshs. 16,890/=*
- g) Costs and interests*
- h) Such further or other relief as this Court may deem fit to grant.*

The Plaintiff averred that she was the owner of the suit property by virtue of having purchased the same from Mwalimu **Investment Limited**, which had invited members of **Mwalimu Savings and Credit Co-operative Society (Mwalimu Sacco)**, to purchase plots in a Scheme owned/purchased by the 1st Defendant.

She contended that she applied to purchase **4 acres** of land and by letter dated **18th December 1982**, the 1st Defendant confirmed the success of the her Application and required her acceptance of **4 acres** of land by paying the requisite fees which she paid. That during a balloting exercise conducted by the 1st Defendant for eligible members, the Plaintiff picked **ballot 888**, representing her acreage and she was advised to await allocation of her title. Further that by a letter dated **24th September 1990**, the 2nd Defendant whose Directors are the same ones as

the 1st Defendant confirmed to the Plaintiff that her ballot card **No. 8888** had morphed into **Title L.R Ruiru/Ruiru East Block 3/1715**, the suit property herein .

She relocated abroad and was a resident in Canada from the **December 1990** to **July 1997**. Upon her return to Kenya, she tried in

vain to get the 1st and 2nd Defendants to sign a transfer so that she could get the suit property formally registered in her name. That on **14th October 2014**, the Plaintiff conducted an official search on the suit property and learnt that it was registered in the name of the 3rd Defendant. That the Plaintiff did not have knowledge of the transactions involving the 3rd Defendant, did not authorize or permit any transactions and the same was occasioned by **fraud and misrepresentation** on the part of the 1st, 2nd and 3rd Defendants and were calculated to **defraud** the Plaintiff of her property.

She particularized **fraud and misrepresentations** by the Defendants as; illegally acquiring title to the property without her authority, purported transfer was a conspiracy to deprive her of her rights in the suit property and defeat her rights, fraudulently benefitting from the suit property without any consideration being paid to the Plaintiff, holding themselves out as the registered owners of her property, causing illegal registration of the land in the name of the 3rd Defendant's name.

Further that the title acquired by the 3rd Defendant was not one that deserves the protection of the law, as the 3rd Defendant ought to have known that the Plaintiff owned the suit property. That the 1st and 2nd Defendants had no residual power to deal with the suit property and as such the 1st Defendant is seeking to assert illegal; occupation by

preparing to permanently alter the suit property to her detriment. It was her contention that the registration of the suit property in the name of the 3rd Defendant cannot vest any interests or rights over the property in the 3rd Defendant's name or any other person claiming an interest adverse to hers.

The suit was contested and the 4th Defendant filed its statement of Defence dated **14th September 2017**, and denied all the allegations made in the Plaintiff and averred that the suit property is registered in the name of **Anne Wanjiku Mwaura**. Further there was failure to serve **Notice** to the Attorney General as per **Section 13 A of the Government Proceedings Act**. The Court was urged to strike out the suit.

Despite service, the 1st, 2nd and 3rd Defendants did not **Enter Appearance** nor file their **Defence**. The matter proceeded by way of viva voce evidence wherein the Plaintiff testified for herself and called one witness. Though the 4th Defendant filed a Statement of defence, it did not call any witness.

PLAINTIFFS CASE

PW1 Jacqueline Muthoni Wachira testified that in **1981 to 1985**, she was working with at **Teachers Service Commission** Headquarters and in **1986 to 1990** she was working with the Ministry of Water .That she left employment in **1990**, and she had acquired the suit property in **1983**. She adopted her witness statement as part of her evidence and produced a list of document as Exhibit 1. That she had a letter of offer from **Mwalimu Sacco**, which she produced as Exhibit 2, a Membership Card Exhibit 3 and a bundle of receipts for payment for the suit property as Exhibit No. 4

That the suit land was sold for kshs.**10,320/=** which she paid in instalments . She deposited the money in the bank and took receipts to the office. She produced the bank slips as Exhibit 5. That she balloted for the plot and her number was **888**. She produced the ballot documents Exhibit 6. She also produced a Certificate of incorporation of **Mwalimu Investment Company Limited** as Exhibit 7. A search for the Directors being CR12 as Exhibit 8 and a letter from **Mwalimu Sacco Company Limited** as Exhibit 8, which stated that her land was **L.R 4/1715**.

She further produced a Certificate of incorporation for **Mwalimu Sukari** as Exhibit 9 and search for Directors i.e CR12 as Exhibit 10 . It was her testimony that she was out of the Country for long as she relocated to Canada with her husband. She produced her husband's letter of posting as Exhibit 11.

She had been shown the land that she balloted for in **1993** , and when she came back and tried to look for **Mwalimu Investment** she could not locate them. When she failed to locate the offices of **Mwalimu**

Investment she did a search at the Lands Registry and found the same was registered in the name of the 3rd Defendant **Anne Wanjiku Mwaura**, and she lodged a caution dated **31st August**. That the land could be identified from the map and she produced the map as Exhibit 12 and a search from the lands office as Exhibit 13. She urged the Court to allow her claim.

PW2 Wilson Wachira Nyaga, husband to the Plaintiff , adopted his witness statement as his evidence in Court. He further testified that his wife was an employee of the **Teachers Service Commission** and when **Mwalimu Sacco** invited teachers to purchase land through their Sacco, the Plaintiff made payments for **4 acres**. However, the Plaintiff never got a title deed and **Mwalimu Sacco** had not issued her with any title deed but sold the land to someone else. That they were out of the Country from **1990-1997** and later **Mwalimu Investment limited** changed to **Mwalimu Sacco Company limited** and that the two companies are one and the same.

It was his evidence that the Plaintiff made efforts to obtain a title deed, but she was not issued with any. That they went to see the land in **1997** and there was no cultivation or encroachment. However, when he visited the land in **2014**, he found cultivation going on and he informed his wife. That a search was conducted and they discovered the land had been transferred to the 3rd Defendant.

The Plaintiff filed written submissions through the **Law Firm of Maguta Kimemia & Associates Advocates**, which the Court has carefully read and considered. The 4th Defendant also through **Freedom Kubai** State Counsel, filed its written submissions on **12th October 2020**, and submitted that the 4th Defendant relied on the documents presented by **Mwalimu Investment Company Limited**, to register the suit property. That there was no way the 4th defendant could have colluded with the 3rd Defendant as she did not process the title herself.

The Court has read and considered the pleadings by the Plaintiff and the evidence adduced and finds that the issue for determination is ***Whether the Plaintiff is entitled to the orders sought.***

It is the Plaintiff's contention that she is the rightful owner of the suit property having bought the land **No. 888, which** was a subdivision of the scheme belonging to the 1st Defendant. That when the subdivisions were registered, the Plot **No.888** was given title Reference No. **Ruiru/Ruiru East Block 3/1715.**

Though the 4th Defendant filed a statement of Defence, It did not call any witness. The 1st to 3rd Defendants had been served, but they did not file any documents or defence and therefore they did not participate in the proceedings. The Plaintiff's evidence remains uncontested. However, her evidence is not automatic as she still has an obligation to prove her claim on the required standard.

The Plaintiff has averred that she bought the land from **Mwalimu Investment Company**. To buttress her testimony, the Plaintiff produced in evidence a letter dated **18th December 1982**, evidencing that she was allocated a parcel of land by **Mwalimu Investment** subject to her paying various amounts of money. The Plaintiff has also produced in evidence receipts from the said **Mwalimu Investment** evidencing that she paid the said amount of money and a ballot paper **No. 888** as further proof that she did ballot for a plot on the 1st Defendant's scheme.

It is the Plaintiff's evidence that the said **Mwalimu Investment Company** changed its name to **Mwalimu Sukari Company**, and as per the name search of the said Directors, the Directors did not change. As already held by the Court, the evidence by the Plaintiff has not been challenged. Further the fact that the Plaintiff bought the parcel of land from **Mwalimu Investment Company** and received the letter dated **24th September 1990**, from **Mwalimu Sukari Company Limited** which indicated the process of the title deed over the plot bought, reinforces the Plaintiff's claim. The Court is thus satisfied that the two Companies are one and the same and in the absence of any evidence to the contrary, the Court holds and finds that the two companies are one and the same .

The letter dated **24th September 1990**, signed by the Company's secretary, indicated that the processing of the Plaintiff's title deed was in the final stages and the title was Reference **No. Ruiru/Ruiru East Block 3/1715**. The letter also required the Plaintiff to pay **Kshs. 1,170/=** before the processing of the title deed was finalised. As per the said letter, the parcel of land had already been allocated to the Plaintiff and the monies were only for the processing of the title deed. Therefore, it follows that the Plaintiff having been allotted the suit property, then the same could not be allocated to anyone else. See the case of **Ashmi Investment Limited v...Vs...Riakina Limited & another [2017] eKLR where** the Court held that

“the court finds that by 2013 when the Plaintiff paid for plot D it was no longer available as the plot had already been allotted by the Commissioner of Lands and to the 1st Defendant who had paid for it and taken up possession and was in the process of procuring a certificate of title over it.”

Further in the case of **Republic ...Vs... City Council of Nairobi & 3 Others (2014) eKLR**, Odunga, J. had this to say about land that has already been allotted:

“once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

In this case, the suit property was already allotted to the Plaintiff and she had fulfilled the conditions and the only condition that remained was for processing of the title deed which in the Court considered view could not in any way invalidate an allocation.

The 3rd Defendant is the registered owner of the suit property. **Section 26(1) of the Land Registration Act** provides for circumstances under which a title held by a registered owner may be impeached. Further it is trite that when a person's title to the suit property is called into question, then the registered owner has to prove the root of such title. In this case, the 3rd Defendant failed to show the root of her title. Since the Court has held that the suit property had already been allocated to the Plaintiff, and could not be allocated to anyone else, the Court finds and holds that the title held by the 3rd defendant must be impeached .See the case of **Daudi Kiptugen ...Vs...Commissioner of Lands & 4 Others [2015] eKLR** where 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.”

The Plaintiff has sought for a declaration that the transfer of the suit property to the 3rd Defendant was **fraudulent, null and void** and a

further declaration that she is the rightful owner of the suit property.

The Court having held that the Plaintiff had been allocated the said land, then the said land could not be allocated to anyone else. Therefore, the Court finds and holds that the prayers sought are merited.

The Plaintiff needs to be allowed a peaceful and quiet enjoyment of the suit property and to that end, a Permanent Injunction is justified.

Section 80 of the Land Registration Act gives the Court the powers to cancel any Certificate of Title if the said title was improperly acquired. The Court having found that the 3rd Defendant could not be allocated land which had already been allocated to the Plaintiff, finds the 3rd Defendant's Certificate of title ought to be cancelled.

The Plaintiff had also sought for Special damages. It is trite that Special Damages must not only be specifically pleaded, but they must also be proved. The Plaintiff claimed Special Damage of **Kshs.16,890/=**. However, in her evidence, she did not prove what the said Special Damages were for as the receipts adduced were for payment of the plot allocated to her. Therefore, the Court finds that the Plaintiff has failed to prove that she is entitled to the Special Damages.

On costs, the Plaintiff as the successful party is entitled to the **COSTS of the suit**

Having now carefully considered the available evidence, the Court finds and holds that the Plaintiff has proved her case on the required standard of balance of probabilities. Consequently, the Court enters Judgment for the Plaintiff against the Defendants jointly and severally as prayed in the Plaint dated **15th May 2017** in terms of prayers **No. a, b, c, d and g.**

It is so ordered

Dated, signed and Delivered at Thika this 10th day of December, 2020.

L. GACHERU

JUDGE

10/12/2020

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 **Ruling** 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. Kimemia for the Plaintiff

No Appearance for the 1st Defendant

No Appearance for the 2nd Defendant

No Appearance for the 3rd Defendant

M/s Kubai for the 4th Defendant

L. GACHERU

JUDGE

10/12/2020