



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 340 OF 2016**

**DENNIS MOYA.....PLAINTIFF**

**VERSUS**

**VIRGINIA WANJIKU NGUNJIRI.....1<sup>ST</sup> DEFENDANT**

**ELISAFAN NYANUMBA SIKINI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

***(Plaintiff claiming that his title deed was stolen by the 2<sup>nd</sup> defendant who then fraudulently transferred the land to himself and then sold and transferred it to the 1<sup>st</sup> plaintiff; no evidence led of any theft of his title deed; no evidence tabled of the documents claimed to be fraudulent or forged; no evidence that transfer was effected without the requisite documents, title presumed to be prima facie genuine and burden of proof is upon that alleging that the title is flawed; burden of proof in cases of fraud being beyond a balance of probabilities, burden of proof not discharged in this case; plaintiff's case dismissed).***

1. This suit was commenced by way of a plaint which was filed on 19 August 2016. In the plaint, the plaintiff has pleaded that he ordinarily resides in the United States of America (USA) and that in December 2015, he was unable to trace his title documents to the land parcel Dundori/Lanet Block 5/1656 (New Gakoe) (the suit land), which he avers that he was the registered proprietor. He reported the matter to the Nakuru Police Station and obtained a police abstract and when he conducted an official search, he discovered that the title has been transferred to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant who pretended to be the owner of the property. It is his position that this transfer was tainted by fraud inter alia that the title was stolen from him and transferred without his authority. In the suit, the plaintiff has asked for a declaration that the suit property belongs to him, and order to cancel the title of the defendants, an order of eviction and a permanent injunction.

2. The 2<sup>nd</sup> defendant did not enter appearance nor participate in any way in these proceedings. The 1st defendant did file a defence vide which she inter alia averred that she purchased the suit land from the 2<sup>nd</sup> defendant on 7 March 2013 after satisfying herself that the 2<sup>nd</sup> defendant is the registered proprietor. She has contended that she is an innocent purchaser for value and that her title is indefeasible and has asked for the dismissal of the plaintiff's suit.

3. On behalf of the 3<sup>rd</sup> and 4<sup>th</sup> defendants, it was pleaded in their defence that any entries recorded by the Land Registrar were done after exercise of due diligence, with utmost honesty and good faith. It was pleaded that if any transactions occurred this was due to misrepresentation and fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants inter alia by presenting forged documents, and misrepresenting and concealing facts from the Land Registrar.

4. In his evidence, the plaintiff testified inter alia that he resides in the USA and is a nurse by profession. He testified that he was a member of Nakuru Workers (probably a land buying cooperative) and that by virtue of his membership, he was allocated the Plot No. 240. He was eventually issued with a title deed in the year 2001 with the new registration number 1656 and he left this land to his cousin to take care of. The same cousin came to the USA in the year 2013, and in the year 2015, the plaintiff came to see the land, as one of his friends in the USA wished to purchase the land for his mother. When he got to the land he found a construction going on, and on inquiry, he was informed that it is the 1<sup>st</sup> defendant who was constructing. He managed to trace her and she informed him that she had purchased the said land. The plaintiff then travelled to his home in Kisii to look for his title deed but found that it had disappeared. He then reported to the police and was given a police abstract and also swore an affidavit on the loss of the title. He applied for a search which revealed that the land was transferred to the 2<sup>nd</sup> defendant on 27 February 2013 and to the 1st defendant on 30 April 2013. He refuted selling the land to the 2<sup>nd</sup> defendant.

5. Cross-examined, he was questioned at length as to why his affidavit reporting loss and request to be issued with a duplicate title bore the title Dundori/Lanet Block 5/240 and not Dundori/Lanet Block 5/1656 and why the measurement of the land disclosed is 0.0456 Ha and not 0.0556 as contained in the title under dispute. His explanation was that the number 240 was given before issuance of titles. He did

acknowledge that there are different addresses noted in the title abstract, the affidavit, and what he considers to be his address. He testified that he kept the title deed in a box in his house in Kisii where his wife and children reside. He did not know how the same left his house, although he was informed that the 2<sup>nd</sup> defendant, who is his cousin, would visit his house alongside his mother (aunt to the plaintiff). He stated that the 2<sup>nd</sup> defendant has now disappeared and no longer comes home. He did not know how the 2<sup>nd</sup> defendant could have gotten hold of his ID, PIN and photograph to enable him transfer the property, although according to him, it would not be too hard for him to get them since he is his cousin. He denied having signed any transfer forms, but neither did he avail any, and he affirmed that he has not gone to the Lands Office to ask to be given a copy of what transferred the land from him to the 2<sup>nd</sup> defendant.

6. The 1<sup>st</sup> defendant inter alia testified that she sent word that she was looking for land and was connected to the 2<sup>nd</sup> defendant as owner of the suit land. They met and she took a copy of the title deed and later did a search which disclosed him (2<sup>nd</sup> defendant) as owner of the land. They then entered into an agreement for sale where she purchased the land at Kshs. 500,000/= which she paid. She applied for consent to transfer which was granted and she paid the requisite rates; the property was then transferred to her name on 30 April 2013. She thereafter commenced construction, and it was when she was doing so, that the plaintiff emerged, claiming to be the owner of the land. She testified that she followed all steps before the property was transferred to her and she has now built a permanent house in which she resides.

7. Cross-examined, she acknowledged that she did not make inquiries from the neighbours. She stated that she contracted an agent to follow up on transfer of the land to her and was not sure about issues such as payment of stamp duty or whether the transfer forms were witnessed.

8. With the above evidence the 1<sup>st</sup> defendant closed her case.

9. The state on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> defendants did not call any evidence.

10. Only counsel for the plaintiff and 1<sup>st</sup> defendant filed submissions and I have taken note of these. Inter alia, counsel for the plaintiff submitted that the 2<sup>nd</sup> defendant stole the plaintiff's title deed and transferred the title to the 1<sup>st</sup> defendant. Counsel wondered how title was transferred to the 1<sup>st</sup> defendant without the 2<sup>nd</sup> defendant having been issued with a title deed. She also wondered why the 1<sup>st</sup> defendant did not question why the 2<sup>nd</sup> defendant was selling the land barely two months after acquiring it. She queried why the 1<sup>st</sup> defendant did not investigate ownership on the ground and raised the issue that the 1<sup>st</sup> defendant did not recall whether she paid stamp duty. She submitted that the transfer to the 2<sup>nd</sup> defendant was fraudulent and her title was thus capable of being nullified pursuant to the provisions of Section 26 of the Land Registration Act. She relied on various authorities to argue the point that one cannot pass a better title than he holds.

11. On the part of the 1<sup>st</sup> defendant, it was submitted inter alia that the 1<sup>st</sup> defendant was an innocent purchaser for value without any notice of defect of title. He pointed out that the 1<sup>st</sup> defendant carried out a search which revealed that the owner of the property was the 2<sup>nd</sup> defendant. He relied on Section 80 of the Land Registration Act, to argue that the title of the 1<sup>st</sup> defendant cannot be revoked.

12. If I am to summarize the plaintiff's case, it is that his title deed was stolen, probably by the 2<sup>nd</sup> defendant, and the 2<sup>nd</sup> defendant then proceeded to irregularly transfer the property to himself. The property was thereafter transferred to the 1<sup>st</sup> defendant and it is the position of the plaintiff that these transactions were fraudulent and ought to be nullified. The case of the 1<sup>st</sup> defendant, in a nutshell, is that she did her due diligence which revealed that the owner of the suit land is the 2<sup>nd</sup> defendant and she thus proceeded to deal with him on that basis.

13. There is a wealth of authorities which support the jurisprudence that if one acquired title fraudulently, then a purchaser from such fraudster may not get a good title, for the fraudster never held a good title in the first place that he was capable of transferring. (See for example the Court of Appeal decision in the case of **Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, (2015) eKLR**). Indeed, pursuant to the provisions of Section 26 of the Land Registration Act, title is capable of being nullified and I think it is prudent if I lay down the whole of the said Section to put into context its import.

*Section 26. (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.*

14. When we read the above section, the first striking issue is that the law is generally protective of title. That is why Section 26 starts by stating that a Certificate of title is to be taken as prima facie evidence that the person named therein as proprietor is the absolute and indefeasible owner. The starting point therefore is that when one has title, the law presumes that the said title is a good title which deserves protection. Section 26 continues to outline the situations where such title will lose its inviolability, that is, where the title was acquired through fraud or misrepresentation to which the title holder is proved to be a party, or secondly, where the title was acquired illegally, unprocedurally or through a corrupt scheme. In the latter case, it is not necessary for the person trying to impeach the title to prove that the title holder was party to the illegal, unprocedural or corrupt scheme. This is the interpretation given to Section 26 as demonstrated in the case of **Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012**. Going back to where I started from, when a person holds a title, the person already is at an advantage, as the presumption of the law is that such person holds a good title. It follows that the onus and burden of proving that this title is not a good title, rests on the person who claims that this title is blemished, and who seeks to have it nullified. It is not enough for one to say, without offering any evidence, that the registered proprietor's title is flawed; cogent evidence of this must be tendered, for nullifying a title is serious business and not a task that ought to be taken lightly. If that were not the case, then all a person would need to do is claim that any registered proprietor has a bad title, then the burden would shift to the proprietor to demonstrate that his title is good. But as I have pointed out, the law already takes it that prima facie, the title is authentic,

and it worthwhile repeating that it is upon the person claiming that the title is defective to prove as much.

15. In this case, the plaintiff claims that his title deed was stolen from his house and he has in fact pointed a finger at the 2<sup>nd</sup> defendant as being the perpetrator. Now, I have no evidence of any theft; no evidence of any report of any theft; and no evidence from the persons who were having the custody of the title deed, on how the said title deed of the plaintiff came to be in the hands of the 2<sup>nd</sup> defendant. All that was produced was an abstract that the title deed is lost. Without any such evidence, can I really hold with certainty that the 2<sup>nd</sup> defendant stole the title deed of the plaintiff? I am afraid not.

16. Secondly, the plaintiff claims that the 2<sup>nd</sup> defendant fraudulently transferred the said title to himself. He claims that he never signed any transfer documents and never gave out his PIN, ID or photographs. Now, the plaintiff never displayed to this court the transfer form that transferred title to the 2<sup>nd</sup> defendant, or if the transfer was done without any transfer form being executed, he never brought forth any evidence that the transfer was effected without the requisite instruments. If his case is that forged documents were used to transfer his land, then he needed to present these documents and point to this court what is improper or illegal with the said documents. Is it that the transfer did not bear his photograph? or was the ID used not his ID? or was the signature therein a forged signature? I am afraid that this court cannot assume that this is what transpired without being shown the actual documents sought to be impugned. And it is not that these documents are not available, they are actually available at the office of the Ministry of Lands. It could of course happen that transfer is fraudulently effected without any such documents being presented, but if this is the case, then such evidence needs to be led, that there are no transfer forms, and no documents executed to transfer the title. If indeed the transfer to the 2<sup>nd</sup> defendant happened while the plaintiff was away in the USA, what was so hard for the plaintiff to present his passport to show that he could not have transferred the land on the dates shown as he was not within the country? No such evidence was led. I am sorry, but given the circumstances of this case, it is not enough to just say by word of mouth, without anything else to buttress, that a transaction was done fraudulently and hope that you will have proved fraud.

17. It must be remembered that the law imposes a heavy burden when it comes to proving fraud. The burden of proof in fraud as explained in the case of *Urmila s/o Mahendra Shah vs Barclays Bank International Limited & Another (1976-80) 1 KLR 1168*, is one beyond a balance of probabilities. It is not therefore sufficient merely to state that a person has fraudulently acquired title without giving evidence of what sort of fraud the person has committed. As I have pointed out, I have no evidence of theft, I have no evidence of any forged documents, and I have no evidence that transfer was effected in absence of documents. I have no evidence that the plaintiff was not within the country when the transfer to the 2<sup>nd</sup> defendant was done. Can it therefore be said that the plaintiff has proved that the 2<sup>nd</sup> defendant obtained title fraudulently? I am afraid not. Without any evidence that the title of the 2<sup>nd</sup> defendant was illegally obtained, it should be recalled that my starting theme was that the law will presume that his title was a good title, and that being the case, I have no reason to impugn the title of the 1<sup>st</sup> defendant.

18. I regret to tell the plaintiff that he has failed to prove his case to the required standard and I have no option but to dismiss his case with costs to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

19. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of February 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In the Presence of:**

Ms. Cheloti for the plaintiff

Mr. R.K Langat holding brief for Mr. Ngure for the defendant.

Court Assistant: Nelima Janepher

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**