



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 23 OF 2018**

**PATRICK MWANGI KARANJA**

**(suing as the duly appointed Attorney**

**of DANSON MURIITHI MURAGURI).....PLAINTIFF**

**VS**

**JULIUS KAMANDE NGUGI.....1<sup>ST</sup> DEFENDANT**

**THIKA LAND REGISTRAR, MURANGA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide a general power of Attorney dated the 2/11/17 and registered on the 8/11/18, the Plaintiff filed suit against the Defendants seeking the following orders;

- a. An order directing the Land Registrar Muranga to cancel the title deed by the 1<sup>st</sup> Defendant in respect to land parcel No LOC MAKUYU/KAMBITI/BLOCK II/479 (suit land) and register the said parcel in the name of DAMSON MURIITHI MURAGURI.
- b. Costs of the suit
- c. Interest on b), above.

2. It is the Plaintiff's case that the suit land was registered in the register of Muthengeta Farmers Limited in the name of Muraguri while the 1<sup>st</sup> Defendant is shown as the owner of LOC MAKUYU/KAMBITI/BLOCK II/480. He avers that the 1<sup>st</sup> Defendant with an intention to deceive, fraudulently caused the suit land to be registered in his name in the Lands office while Muraguri was wrongly issued with a title for parcel No. LOC MAKUYU/KAMBITI/BLOCK II/478. He attributes this to the mistake of the 2<sup>nd</sup> Defendant. It is his case that the title to the suit land was fraudulently registered in the name of the 1<sup>st</sup> Defendant and that the title should be cancelled and registered in the name of Muraguri. He asserts that the 1<sup>st</sup> Defendant knew that the suit land belonged to Muraguri.

3. In resisting the Plaintiff's claim, the 1<sup>st</sup> Defendant stated in his statement of defense filed on the 16/4/18 that he is the registered owner of the suit land and has occupied it for a period in excess of 30 years having been issued with the title in 1988. That the suit land was excised from LOC MAKUYU/KAMBITI/BLOCK II/186. The Plaintiff has no known interest in the suit land and he put him on strict proof. He denied the claim of fraud and termed it frivolous vexatious and made in bad faith.

4. The 2<sup>nd</sup> Defendant denied the claim of the Plaintiff and sought to put him on strictest of proof.

5. At the hearing of the case the Plaintiff testified solely and informed the Court that Muraguri was first given title on the 1/12/1988 for parcel No. LOC MAKUYU/KAMBITI/BLOCK II /478. That he realized in 2014 that he was issued with the wrong title. That on that realization, he reported the matter to the area chief who directed him to the Assistant Commissioner at Makuyu. He was shown the register of Mathengeta Farmers Limited which contained the name of the land owners. He stated that parcel No LOC MAKUYU/KAMBITI/BLOCK II/ 478 has a loan in favour of Muraguri as at 2014 which remains undischarged. That he reported the matter to the Director of Criminal Investigations (DCI) office where he was advised that the matter was a land issue and no charges were preferred against the 1<sup>st</sup> Defendant. He informed the Court that he does not know how Muraguri acquired the title for parcel No LOC MAKUYU/KAMBITI/BLOCK II /478. Further he explained that the 1<sup>st</sup> Defendant was neither an employee of Muthengeta Farmers Limited nor that of the 2<sup>nd</sup> Defendant. He did not produce the green card for LOC MAKUYU/KAMBITI/BLOCK II /479. He is unaware if the 1<sup>st</sup> Defendant is in occupation of the suit land.

6. Further he informed the Court that he was unaware of the shares that were purchased by both Muraguri and the 1<sup>st</sup> Defendant. That the list of shareholders was prepared by Muthengeta Farmers Limited which is no longer in existence. He stated that he based his claim on the company's register which showed that Muraguri is registered as against parcel LOC MAKUYU/KAMBITI/BLOCK II /479 and the 1<sup>st</sup> Defendant's parcel is/ MAKUYU/KAMBITI/BLOCK II/480.

7. DWI -1 Julius Kamande Ngugi informed the Court that his father was a member of the Muthengeta Farmers Limited. He bought shares and registered them in the name of his brother namely Samuel Mwangi. That parcel No LOC MAKUYU/KAMBITI/BLOCK II/479 was a subdivision of parcel LOC MAKUYU/KAMBITI/BLOCK II/186 which measured approx.2.9 acres. That his brother remained with the original parcel LOC MAKUYU/KAMBITI/BLOCK II /186 and the new parcel MAKUYU/KAMBITI/BLOCK II /479 was registered in his name and issued with a title deed in 1988. He explained that the original parcel was all aprox 2.9 acres and were LOC MAKUYU/KAMBITI/BLOCK II/430 in number and later subsequent sub divisions on the original parcels were carried out, which gave birth to smaller plots. That during the allocation of the lands, consideration was given to where the shareholders had constructed their houses. He denied owning parcel No LOC MAKUYU/KAMBITI/BLOCK II/ 480 and asserted that he does not know its owner. That he has lived on LOC MAKUYU/KAMBITI/BLOCK II /479 since 1980. That he does not know Muraguri but met the Plaintiff in 2016 at the office of the Director of Criminal Investigating Officer. He informed the Court that parcel LOC MAKUYU/KAMBITI/BLOCK II /478 is about 20 plots away from his parcel of land and is occupied by third parties. It is one of the smallest plots. Once a shareholder, one was allowed to built a house where one chose before the allocation. Titling was done according to the places where members had already constructed their houses. That he and his brother did construct houses before the titling process in 1988.

8. Ms Alice Gisemba, the Land Registrar Muranga and stated that she cannot tell if there was any fraud in respect to the registration of the parcel No LOC MAKUYU/KAMBITI/BLOCK II /479. She produced the green card for parcel LOC MAKUYU/KAMBITI/BLOCK II /479 which became registered in the name of the 2<sup>nd</sup> Defendant in 1988. She explained that the transfers of the land were done by the presidential commission and not the land registry. That she would need to check the green card for parcel MAKUYU/KAMBITI/BLOCK II/186 to confirm that it was the mother title for parcel LOC MAKUYU/KAMBITI/BLOCK II /479. She informed the Court that the land registry does not maintain the records of the members of the Muthengata Farmers Limited. However according to her records, the owner of the suit land is the 1<sup>st</sup> Defendant. She explained that there is nothing wrong with multiple entries being done the same day. She explained that according to the green card parcel LOC MAKUYU/KAMBITI/BLOCK II/ 479 was a first registration. That if it was a resultant subdivision, it would have indicated the original parcel number as well as the previous registered owner.

9. The parties have filed Written Submissions with authorities which I have read and considered.

10. The Plaintiff submitted that the suit land belongs to Muraguri and was fraudulently registered in the name of the 1<sup>st</sup> Defendant. That the register of the Mathengata Farmers Limited produced by the Plaintiff shows that the 1<sup>st</sup> Defendants parcel is LOC MAKUYU/KAMBITI/BLOCK II /480. That the allegation of subdivision of parcel No. MAKUYU/KAMBITI/BLOCK II/186 is not supported by the green card for LOC MAKUYU/KAMBITI/BLOCK II /479. He submitted that parcel MAKUYU/KAMBITI/BLOCK II/186 is registered in favour of the 1<sup>st</sup> Defendants' brother, Samuel Mwangi Ngugi. It therefore shows that no subdivision was carried out on parcel No. LOC MAKUYU/KAMBITI/BLOCK II/ 186 as if it had the original title that was produced by the 1<sup>st</sup> Defendant would have been surrendered and new parcel numbers given to the parties. The 1<sup>st</sup> Defendant has in his possession two titles for parcel LOC MAKUYU/KAMBITI/BLOCK II /186 and LOC MAKUYU/KAMBITI/BLOCK II 479 and did not produce any other register which supported his registration of parcel No LOC MAKUYU/KAMBITI/BLOCK II /479

11. The 1<sup>st</sup> Defendant submitted and reiterated the facts of the case as given in evidence. He submitted that the suit land resulted from the subdivision of parcel MAKUYU/KAMBITI/BLOCK II/186 which was jointly held with his brother Samuel Mwangi Ngugi. The shares were bought by their father from Mathengeta Farmers Limited for his two sons. That upon subdivision parcel no LOC MAKUYU/KAMBITI/BLOCK II /186 remained with his brother while parcel LOC MAKUYU/KAMBITI/BLOCK II /479 went to the 1<sup>st</sup> Defendant. That he took possession of the suit land in 1980 and was given the title in 1988 during the Presidential Commission programme that issued titles to members in large scale land buying Companies. He submitted that the Plaintiff has not proved fraud on the part of the 1<sup>st</sup> Defendant in the manner in which the suit land was acquired. Contending that allegations of fraud are serious and must be proved, he submitted that the register relied by the Plaintiff was refuted by the Muthengeta Farmers Limited and therefore cannot be the basis of cancelling the 1<sup>st</sup> Defendant's title.

12. The 1<sup>st</sup> Defendant stated that according to the evidence of the Land Registrar the suit land is registered in the name of the 1<sup>st</sup> Defendant and there is no record of the same having been registered in the name of the Plaintiff. Relying on section 24 and 26 of the Registration of Land Act, the 1<sup>st</sup> Defendant urged the Court to declare that the 1<sup>st</sup> Defendant has a good title.

13. Finally, the 1<sup>st</sup> Defendant submitted that the Plaintiff has not explained the long delay in bringing this action. The 1<sup>st</sup> Defendant cast doubt as to how it took the Plaintiff over a decade to realize that the suit land was not registered in his name, more so when he had taken a loan against his own title.

14. The 2<sup>nd</sup> Defendant made submissions which incorporated a summary of the evidence as adduced by the parties in the case. In respect to the allegation of fraud the 2<sup>nd</sup> Defendant stated that the Plaintiff did not produce any evidence to support his allegation. It submitted that the Land Registrar exercised its statutory duty by registering the titles as presented by the Presidential commission and cannot be said to have been involved in fraud as alleged.

15. Having considered the pleadings, the evidence, the submissions and the material placed before me the issues for determination are;

- a. Whether the Plaintiff has proved fraud.

b. Who owns parcel No LOC MAKUYU/KAMBITI/BLOCK II /479.

c. Whether the suit is statute barred.

d. Who meets the cost of the suit?

16. It is commonly accepted that parcel No LOC MAKUYU/KAMBITI/BLOCK II /479 is registered in the name of the 1<sup>st</sup> Defendant and parcel No. LOC MAKUYU/KAMBITI/BLOCK II/ 478 is registered in the name of the Plaintiff. It is not in dispute that the Plaintiff has taken a loan that remains undischarged on the parcel No LOC MAKUYU/KAMBITI/BLOCK II /478. There is no dispute that the 1<sup>st</sup> Defendant has been living on the land since 1980 and that the title became registered in his name in 1988 during the presidential registration programme on land titling of large-scale farms.

#### **Whether the Plaintiff proved fraud**

17. The Plaintiff has alleged that the 1<sup>st</sup> Defendant with intent to deceive fraudulently caused the parcel LOC MAKUYU/KAMBITI/BLOCK II /479 to be registered in his name at the lands office and the donor was wrongly issued with title for parcel No LOC MAKUYU/KAMBITI/BLOCK II/ 478, which he claims was a mistake on the part of the 2<sup>nd</sup> Defendant. The Plaintiff did not state the particulars of fraud in his pleadings to enable the Defendants to respond with precision to the nature of the fraudulent activities being alleged against them.

18. The 1<sup>st</sup> Defendant presented to the Court the original title in his name for parcel No LOC MAKUYU/KAMBITI/BLOCK II /479. He explained that his father bought shares which were held jointly by him and his brother. That the shares represented land, which was initially given to them under parcel No LOC MAKUYU/KAMBITI/BLOCK II /186, but on their request the land was subdivided under the presidential commission who brought surveyors and he and his brother got one parcel each arising from the sub division of the original land. He then got title as given by the then H. E President Moi in 1988. He claimed that allocation was done according to occupation of the members on the ground. He stated that a person could not be registered if he did not have the original ballot. He produced payment receipts in Court. He testified that land parcel LOC MAKUYU/KAMBITI/BLOCK II /478 is about 20 plots from LOC MAKUYU/KAMBITI/BLOCK II /479 and is occupied by other third parties, besides Muraguri has charged it which loan remains undischarged. The witness stated that subdivision of the larger plot was done before registration of both parcels which made it possible for his brother to retain parcel MAKUYU/KAMBITI/BLOCK II/186 and he got parcel LOC MAKUYU/KAMBITI/BLOCK II /479. This explanation sounds plausible because ordinarily a registered parcel when subdivided would be given new titles and the old title would be surrendered. This was supported by the Land Registrar who stated that there was no anomaly in the manner in which the title of the 1<sup>st</sup> Defendant was registered. He explained that the mistake being rectified on the green card was in respect to the anomaly where the brothers were building on each other's lands and the rectification was to align the title with the occupation and ownership on the ground.

19. I have examined the green cards for parcel No LOC MAKUYU/KAMBITI/BLOCK II /479 and note that is a first registration. According to the titles for LOC MAKUYU/KAMBITI/BLOCK II/ 479 and LOC MAKUYU/KAMBITI/BLOCK II /186 the areas are indicated to be 0.6090 Ha which translates to 1.5 acres each. The 1<sup>st</sup> Defendant gave evidence that the original land parcel LOC MAKUYU/KAMBITI/BLOCK II /186 was approx 2.9 acres and after subdivisions between the two brothers each got half share meaning 1.5 acres. This evidence is consistent with the acreage as they appear on the titles. The acreage for MAKUYU/KAMBITI/BLOCK II/478 is 0.3064 which is 0.75 acres.

20. I have also perused the record and saw the ballot for parcel No LOC MAKUYU/KAMBITI/BLOCK II /186 and LOC MAKUYU/KAMBITI/BLOCK II /479 under the names of Julius Kamande and Samuel Mwangi and the Court has no reason to disbelieve the evidence of the 1<sup>st</sup> Defendant.

21. It is trite law that where a claim is based on fraud the particulars as to the said fraud must be pleaded and proved in evidence. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

22. **Black's Law Dictionary** defines fraud as follows;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

23. In the case of **Ratilal Gordhanbhai Patel Vs Lalji Makanji (1957) EA 314** the Court established the threshold of the burden of proof required in claims founded on fraud as thus;

“... allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

24. In the case of **Vijay Morjaria Vs Nansingh Madhusingh Darbar & Anor (2000) EKLR** the Court stated as follows;

“it is well established that fraud must be specifically pleaded and that particulars of the fraud must be stated on the face of the pleading. The

acts alleged to be fraudulent must of course be set out and it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

25. It is the view of this Court that the Plaintiff has not proved fraud. It is even strange that the Plaintiff has taken a loan on the plot that he claims to have been wrongly allotted. This loan was expressed to have been taken in 1990.

It is not explained the circumstances under which the loan was acquired. Whatever the case may be, the Court cannot infer fraud from the facts on record and it is the holding of the Court that the Plaintiff has not discharged the burden of proof as required by law. His claim fails.

26. It is the evidence of the 1<sup>st</sup> Defendant that he has lived on the suit land since 1980 and got the title in 1988. Section 28(h) of the Land Registration Act creates rights and when applied to this case it is clear that the 1<sup>st</sup> Defendant besides being the registered owner has acquired rights by means of long possession and occupation. These rights are termed as the rights to prescription which are protected under section 28(h) of the Land Registration Act.

27. Before I pen off, there is an issue that is borne out of the evidence of the Plaintiff on limitation period which I would like to address. The Plaintiff avers that the suit land was registered in the name of the donor, Muraguri in the register of Muthengeta Farmers Limited which is currently been wound up. He stated that the said Muraguri discovered that he was issued with the wrong title of parcel No LOC MAKUYU/KAMBITI/BLOCK II /478 in the year 2014. That they reported the matter to the chief who referred them to the Assistant Commissioner Makuyu. That upon being shown the register of the members they noticed that the suit land belonged to the said Muraguri and not LOC MAKUYU/KAMBITI/BLOCK II /478. That Muraguri discovered the fraud in 2014.

28. Section 7 of the Limitations of Actions Act provides 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.”

29. Actions based on tort are expressed to be brought within a period of 3 years. Section 4 (2) of the Limitations of Actions Act provides as follows;

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

30. Section 26 of the said Act provides that 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. It is the evidence of the Plaintiff that the donor discovered the fraud in 2014 therefore time started running for purposes of the period of limitation in 2014 and the suit ought to have been filed in 2017 to conform with the limitation period provided for under section 4 (2) of the Act. This suit was filed in the year 2018, 4 years after the discovery of the alleged fraud.

31. The Court holds and finds that the suit is time barred.

32. In either case the suit is dismissed.

33. Costs follow the event. The Plaintiff has failed to prove his claim, I condemn him to pay the costs of the suit.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25<sup>TH</sup> DAY OF MARCH 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Opiyo HB for Njoroge for the Plaintiff

Makori HB for Nyasani for the 1<sup>st</sup> Defendant

2<sup>nd</sup> Defendant – Absent

Irene and Njeri, Court Assistants