



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 731 OF 2012

VIRGINIA NGENDO KAMAU (Suing as the

Administrator of the Estate of the late KAMAU WANGI).....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

JOSHUA WACHIRA MATHERI.....2ND DEFENDANT

JUDGMENT

By a *Plaint* dated **10th September 2012**, the Plaintiff herein who is the Administrator of the Estate of *Kamau Wangi* has sought for judgment against the Defendants in the following terms;

- a) The Plaintiff as the legal administrator of the Estate of the Late Kamau Wangi and beneficiary is owner and entitled to sole possession of NAIROBI/BLOCK 110/885.***
- b) An order that the 2nd defendant is wrongly and unlawfully through fraud registered as proprietor of NAIROBI/BLOCK 110/885.***
- c) An order for rectification of the register by directing the Nairobi Land Registrar that registration of NAIROBI/BLOCK 110/885 in favour of the 2nd Defendant be cancelled as it is obtained or made by fraud or through a mistake and the cancellation be substituted by registering the plaintiff as the sole proprietor of NAIROBI/BLOCK 110/885, instead of the 2nd Defendant herein and the defendant be caused to refund costs for cancellation and registration.***
- d) That the 2nd Defendant do execute all relevant transfer documents and effect transfer in favour of the Plaintiff at the 2nd defendant's costs in default the executive officer of this Court do execute relevant documents in favour to the Plaintiff and costs to be met by the 2nd Defendant.***
- e) Costs of the suit to the Plaintiff.***
- f) Interest on (e) to the Plaintiff***
- g) Any other relief that this Court may deem fit and just do grant to the Plaintiff.***

In her statement of claim, the Plaintiff averred that on **29th August 1990**, *Kamau Wangi* (deceased) was the registered proprietor of the suit land and as per the grant issued on **15th October 2003**, she is the sole beneficiary of the suit property from his Estate. When she applied for an official search on **5th October 2001**, the late *Kamau Wangi* was reflected as the registered owner but on **27th July 2005**, she applied for a Green Card at the **Lands Registry in Nairobi**, the 2nd Defendant was reflected as the registered owner and the transaction was backdated to **21st September 1995**. She then lodged a restriction on the suit property on **9th August 2005**.

She averred that the 2nd Defendant fraudulently acquired the suit property and particularized the particulars of fraud as;

the late **Kamau Wangi** did not sell the suit property to the 2nd Defendant, She has never sold or transferred the suit property to the 2nd Defendant in her capacity as its beneficiary, the 2nd Defendant caused and/or obtained transfer by misrepresentation misleading and cheating the Land Registrar that the documents for the application of transfer were valid, the 2nd Defendant knows that the suit property was for the Plaintiff and wrongfully and unlawfully and through deceit caused the transfer documents to be forged in the Defendants favour, the 2nd Defendant has wrongfully and illegally acquired the suit property to which he has no legal claim, That the lands registry office at Nairobi has colluded with the 2nd Defendant to effect the transfer of the suit property in favour of the 2nd Defendant.

She further averred that she wrote to the *Commissioner of land* on **12th September 2005**, notifying him of the fraudulent dealing of the suit property by the office of **Nairobi District Land Registrar** but the land Registrar has failed to rectify the register whilst the 2nd Defendant continues to trespass on the same. It was her contention that on **2nd November 2005**, the **Land Registrar** wrote to her informing her that the suit property has been restricted for her own interest and no transaction can be registered without her consent.

She averred that despite restriction placed on the suit property, the 2nd Defendant continue to transact business with respect to the suit property. She further averred that the 2nd Defendant has no valid legal proprietary rights over the suit premises and his refusal to surrender the property is unlawful and injurious to her.

The suit is not opposed as the Defendants failed to file any statement of Defence. All the same the suit proceeded by way of **viva voce** evidence and the Plaintiff called one witness and closed their case.

Plaintiff Case

PW1 - Virginia Ngendo Kamau testified that she is in Court because her plot was taken away as she was told that the plot is no longer hers. It was her testimony that she sent somebody who found that the plot was not in **Kamau Wangi's** her husband's name but in another name. She stated that she has never sold the property nor given it to somebody and she has been using it.

It was her testimony that she did not know **Joshua Matheri**, and she was surprised to learn that the property had been registered in his name and she went and fenced and nobody came to claim it. She further testified that she has been in occupation of the suit property and she has the title of the land. She asked the Court to enter Judgment in her favour and the title to be reverted back to her. She adopted her list of documents as exhibits in Court.

On cross examination by the Advocate for the 1st Defendant, she testified that she has never met the 2nd Defendant and that there was collusion between him and the land officers though she had no evidence to that effect. She further testified that the 2nd Defendant is no longer on the suit property as she already fenced it. It was her evidence that though she reported the matter to the **Land Registrar Nairobi**, she did not know the steps taken by the Land Registrar. She has the Original Title and does not know of any restriction.

On re-examination she stated that after fencing the property nobody has interfered with it.

The 1st Defendant did not call any witness nor did it file any Defence and chose to close their case.

The 2nd Defendant despite being served by way of substituted service via Court order issued on **29th July 2013**, failed to appear in Court and therefore the evidence of the Plaintiff as against the Defendants remain uncontroverted.

On the **7th of March 2016**, the Court directed the Plaintiff to file their written submissions and in compliance with the said order the Plaintiff through the Law firm of **Rachier & Amollo Co. Advocates**, filed her submissions on **20th April 2016** and submitted that the only issue for determination is who is the real owner of the suit property. It was their submission that without an iota of doubt the Plaintiff is the rightful and legal owner of the suit property having inherited it from her deceased husband and therefore it was their submission that it is on the greater interest of Justice that the Plaintiffs prayers be granted. They also relied on provisions of law and case law which the Court has now carefully considered.

The Court has carefully read and considered the pleadings, evidence and submissions and finds that the issues for determination are:

- i. Whether the 2nd Defendant's Title was obtained by fraud.*
- ii. Whether the Plaintiff is entitled to the reliefs sought.*
- iii. Who will bear costs of the suit?*

The 1st defendant though appeared in Court to cross examine the Plaintiff did not file a defence and therefore it is the Courts opinion that having no pleadings filed on its behalf, the 1st Defendant, failed to set forth its case. On the other hand, the 2nd Defendant though served by the Plaintiff with leave of Court by way of substituted service and advertisement published in the Daily Nation on **19th August 2013**, he failed to file a Defence or appear in Court. In this regard therefore the Plaintiff's evidence as produced in Court remain uncontroverted and unchallenged and therefore there is no reason as to why the Court should not believe it. 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**, where the Court 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”

However this evidence is not automatic and the Court is obligated to carefully examine the evidence and determine whether the Plaintiff has discharged the burden of proof. See the case of **Gichinga Kibutha...Vs...Caroline Nduku (2018)eKLR**, where the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have is way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

i) Whether the 2nd Defendant's title was obtained by fraud.

The Plaintiff gave evidence and stated that she is the Administrator of the Estate of **Kamau Wangi** who is the registered proprietor of the suit property. She produced grant to this effect. Further she produced a Green Card that shows that the said deceased became the owner in **1995** and it was her evidence that the deceased had never sold the suit property to the 2nd Defendant nor has she in her capacity as the Administrator ever sold the suit property to anyone. She produced an official Certificate of search dated **5th October 2001** that indicated that in **2001** the deceased was still the registered proprietor of the suit property and I would agree with Plaintiff that it would be impossible for the 2nd Defendant to also be a proprietor in the same year as the green card produced reflected that the suit property was transferred to the 2nd defendant in **1995**. In this instant one would then expect that a search done in **2001** would reflect the 2nd Defendant as the Proprietor.

The 2nd Defendant did not come to Court to explain how he acquired the suit property and therefore there would be no reason as to why this Court should doubt the Plaintiff's sequence of events.

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 Laws 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.”

The Green Cards produced in this Court indicates that two different people own the suit property. Though there is an indication that the suit was transferred to the 2nd Defendant, the Plaintiff still holds the original title and the failure by the Defendant to explain how title was obtained leaves the court with no option but finds and holds that there was outright evidence of forgery .

In the case of **Sai Office Supplies Limited...Vs....Rosemary Alivista Luseno & Another (2014) eKLR**, the Court held that:-

“The very existence and issuance of a second title to the 1st Defendant with respect to the suit property after the said property had been transferred to the Plaintiff and in the absence of any supporting documents is also in my view a misrepresentation of facts made by the Defendants.”

“In addition the existence of two different titles with respect to the same property and with all the necessary endorsements made thereon is in itself evidence of participation of forgery and negligence”

Allegations of fraud must be pleaded and strictly proved. The Plaintiff having testified that she still has the original title that has not been cancelled and further also evidencing that the 2nd Defendant was also issued with a Title document. And without any tangible explanation or documentation as to how the 2nd Defendant obtained the title deed or even how the property was transferred to him, it is the Court’s opinion that the Plaintiff has proved the allegations of fraud.

ii) Whether the Plaintiff is entitled to the Reliefs Sought

From the foregoing, the Plaintiff’s evidence of its ownership of the suit property is not contested and having further established that there was fraud in the transactions that led to the 2nd Defendant being transferred to the suit property and subsequently gaining title, the Plaintiff is therefore entitled to declaration sought of ownership and consequential orders arising from such ownership.

Section 80(1) of the Land Registration Act provides that;

“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.”

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

The certificate of title issued by the Registrar upon registration, or to 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

This Court therefore finds that having found and held that the title issued to the 2nd Defendant was issued through fraud and therefore acquired illegally, then this Court is in a position to cancel the said title and order a cancellation of the registration of the suit property in favour of the 2nd Defendant.

iii) Who will bear costs of the suit?

Costs will always follow the events and therefore the Plaintiff being the successful party is entitled to costs. It is the Courts opinion that the 1st Defendant’s officers in the ***Ministry of land*** were negligent by the mere fact that the issued two titles and therefore the costs will be shared between the two defendants jointly and severally.

Having now carefully considered the available evidence, the exhibits produced in court, the written submissions and cited authorities together with the relevant provisions of law, the Court finds that the Plaintiff has proved her case on the required standard of balance of probabilities.

Consequently, Judgment is entered for the Plaintiff against the Defendants jointly and severally as prayed in the Plaint in terms of prayers (a),(b),(c), (d), (e) & (f).

It is so ordered.

Dated, Signed and Delivered at Thika this 9th of April 2019.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff (though aware of Judgment date)

No appearance for 1st Defendant

No appearance for 2nd Defendant

Lucy- Court Assistant

L. GACHERU

JUDGE

9/4/2019