



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT THIKA

ELC CAUSE NO. 604 OF 2017

MARY NYAMBURA KINYANJUI.....1ST PLAINTIFF

ANNA WANGARI.....2ND PLAINTIFF

VERSUS

TERESIAH WANJIRU NJUGUNA1ST DEFENDANT

THE NATIONAL LAND COMMISSION.....2ND DEFENDANT

JUDGMENT

By a Plaint dated 16th June 2017 the Plaintiffs herein filed a suit against the Defendants and sought for the following orders:

- 1. There be an inhibition or prohibitory order against the defendants by themselves and/or those claiming under them or any other person, body or officer restricting them from interfering, entering, alienating, selling, transferring, registering, charging and/or dealing with the suit premises Title No. RUIRU/EAST/JUJA EAST BLOCK 2/1667 pending the hearing and determination of this suit.**
- 2. There be a declaration that the suit premises Title No. RUIRU EAST/JUJA EAST BLOCK 2/1667 rightfully and lawfully belongs to the Plaintiffs.**
- 3. There be an order revoking and/or annulling the title issued to PATRICK NDUNGU NJUGUNA for the suit premises L.R No. RUIRU EAST/JUJA EAST BLOCK 2/1667.**
- 4. Costs of this suit plus interest.**

In their statement of claim, the Plaintiffs averred that the Defendants are next of kin of **Patrick Ndungu Njuguna** and are sued as such. It was their contention that the 1st Plaintiff's deceased husband was the registered proprietor of the suit land having been lawfully issued with an indefeasible title on the 3rd September 1990. Around September 2014, the 1st Plaintiff visited the suit premises when she learnt that third parties were claiming ownership of the suit premises following which she reported the matter to the police. Upon investigations by the Police, it was discovered that the suit plot had been fraudulently registered in the names of **Patrick Ndungu Njuguna** on 9th November 1993 giving rise to two titles.

The 1st plaintiff averred that her husband having been lawfully issued with a title to the suit plot earlier holds an indefeasible title to the suit ;land and the subsequent second title is fraudulent and unlawful. She averred that in April 2017, she was informed that the Defendants were insisting on being the rightful owners and had paid visits to the suit property with the intention of taking possession and occupation to their prejudice.

Further the Plaintiffs averred that the Defendants acted unlawfully and fraudulently in altering the records in respect of the suit plot with the full knowledge that the same had already been lawfully registered in the name of **Herman Kinyanjui(deceased)** as the proprietor. They particularised fraud by the Defendants as; colluding to alter the records knowing well that the suit premises had been registered in the name of **Herman C. Kinyanjui (deceased)** prior to the alteration, the 2nd defendant fraudulently registering the name of **Patrick Ndungu Njuguna** as the second owner of the suit plot in the Green Card and issuing another title knowing it to be unlawful, altering the record with intent to dispossess the original owner, the 2nd Defendant altering the records and fraudulently issuing another title to **Patrick Ndungu Njuguna** knowing very well the property was charged by the bank at the time.

The Plaintiffs further averred that the deceased had already taken possession and occupation of the suit land and charged the same with Kenya Commercial Bank which charge was discharged in 1997, four years after the suit land had been issued to **Patrick Ndungu Njuguna**.

It was their contention that the Defendants are making efforts to alienate the suit land and the same may be put to waste before the suit is heard and determined.

The suit is not contested. This Court issued an order on the **15th March 2018**, authorising the Plaintiffs to serve the 1sts Defendants by registered post and despite service the Defendants failed to enter appearance. On the other hand the 2nd Defendants were equally served but failed to enter appearance.

The matter therefore proceeded ex parte and proceeded for hearing on the **8th November 2018** and the Plaintiff called one witness.

PLAINTIFFS CASE

PW1 Mary Nyambura Kinyanjui and adopted her witness statement and her list of documents dated **16th June 2017**. She testified that the suit property is registered in her husband's name. It was her testimony that during his lifetime there was no complaint. She urged the Court to allow her claim.

The Court directed the Plaintiff to file written submissions to which the Court has now carefully read and considered together with the Pleadings, and the witness statement.

The Defendants having been duly served failed to appear and therefore the evidence of the Plaintiff remain uncontroverted. However this Court has an obligation to look into the evidence that has been adduced by the Plaintiff and ensure that the facts and allegations by the Plaintiff have been proved on a balance of probabilities. The Court therefore finds that the issues for determination are;

- 1. Was the allocation to the 1st Defendant fraudulent.***
- 2. Whether the Plaintiff has the indefeasible title and therefore the rightful owner of the suit property.***
- 3. Whether the Plaintiff is entitled to the prayers sought.***

1. Was the allocation to the 1st Defendant Fraudulent?

The Plaintiff testified and produced an official search conducted on **19th April 2017** that reflected **Herman C Kinyanjui (deceased)** as the registered proprietor of the suit property. Further in the Green Card and title deed produced, he was entered as a proprietor in **1990** and on the other hand, the 2nd Green Card reveals that the land was alienated from government in **1993** to **Patrick Njuguna (deceased)**

This court does not see how the land would be available for alienation after it was already alienated to the 1st Plaintiff's husband and further does not understand how a suit property would have a charge and still be alienated. How can one piece of land be allocated twice to two parties. It is even curious that the said document do not state that **Herman Kinyanjui (deceased)** transferred the suit land to **Patrick Njuguna(deceased)** and the search still indicates that he is the registered proprietor. Without an explanation to all these questions the only explanations then that remains is that there must have been fraud, illegal and unlawful alienation of the suit property in **1993** to the said **Patrick Njuguna** and this Court has no option but to believe the explanation that has been given by the Plaintiff which evidence has not been uncontroverted. The Court therefore finds that the allocation to the 1st defendant was fraudulent.

2. Whether the Plaintiff has the indefeasible title and therefore the rightful owner of the suit property

The provisions of **section 23 of cap 281** (Repealed) have been repealed in **Section 26 (1)** of the Land Registration Act and the same are to the effect that the registration of a proprietor as the owner of a suit land is a prima facie evidence that such proprietor is the indefeasible and absolute owner of the suit property but the same can be challenged on the grounds of fraud, misrepresentation or if the said certificate was issued illegally, irregularly or through a corrupt scheme. It is evident that the suit land was allocated to the plaintiff's husband in **1990** and to the 1st defendant in **1993**. The court has already found that there is no explanation as to how the suit land was allocated to the 1st defendant while already registered in forum of the Plaintiffs husband. Therefore if there is no evidence to controvert that of the Plaintiff and with no evidence of fraud, then the Plaintiffs' certificate of title having been first in time should prevail as was held in the case of **Darelle Ltd vs ASL Ltd & 2 others (2015)eklr the court quoted the case of Wreck Motors Enterprises Vs The commissioner of Lands & others , Civil Appeal No. 71 of 1997** where it was held that;

‘where there are competing titles, the one registered earlier is the one that takes priority.’

The Plaintiffs title having been acquired earlier, prevails and consequent thereto their title is indefeasible. The Court finds that they are the rightful owners of the suit property.

3. Whether the Plaintiff is entitled to the prayers sought.

Having found that the Plaintiffs as the Legal Representatives of the Estate of **Herman C Kinyanjui (deceased)** and are the rightful owners of the suit property, the Court therefore finds that they are entitled to the prayers sought. **Section 80(1) of the Land Registration Act (2012)** 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 by mistake.”

Having now carefully considered the available evidence, the court finds that the Plaintiffs have proved their case against the Defendants on the required standard of balance of probabilities. The Upshot of the foregoing is that the Plaintiff’s suit is merited. Judgment is entered for the Plaintiffs against the Defendants in terms of prayers no.1, 2 and 3 with costs to the Plaintiffs herein.

It is so ordered.

Dated, Signed and Delivered at Thika this 3rd of May 2019.

L. GACHERU

JUDGE

3/5/2019

In the presence of

M/S Matunda holding brief for Mr. Nduati for Plaintiff

No appearance for Defendant

Lucy - Court Assistant

Court – Judgment read in open court in the presence of the above stated advocate.

L. GACHERU

JUDGE

3/5/2019