



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**E.L.C CASE NO. 92 OF 2017**

**(FORMERLY NAIROBI H.C.C. NO. 1408 OF 2001)**

**CHEGE MBUTHIA.....PLAINTIFF**

**-VS-**

**MARY NYAWIRA (Sued as the Legal Representatives of the Estate of**

**Alexander Muriuki - Deceased.....1<sup>st</sup> DEFENDANT**

**ATTORNEY GENERAL (Sued on behalf of the**

**Commissioner of Lands.....2<sup>nd</sup> DEFENDANT**

**JUDGMENT**

**Background/the Record**

1. The plaintiff, CHEGE MBUTHIA initially sued one Sebastian Njiraini vide a plaint filed on 20.8.2001 in NAIROBI H.C.C. NO. 1408 OF 2001. He was claiming entitlement to land parcel no. Escarpment/ Kinari/Block1/ 1686. An amendment was done on 3.4.2009 to include the Attorney General as a second defendant. A further amended plaint was filed on 22.3.2011 to substitute the defendant who had passed on with his legal representatives . At some point, the suit appears to have been consolidated with another one NBI. H.C.C. No. 101 of 2011 ( Formerly Milimani CMCC NO. 11448 of 2006), where one George Muiro Njoroge had also sued Sebastian Njiraini claiming entitlement to parcel no Escarpment/Kinare Block 1/1685. However, the case of George and Sebastian was settled vide a consent filed on 10.10.2016.

2. On 23.6.2016, Chege Mbuthia had his plaint amended further and further again. This time round, he brought on board Mary Nyawira Muriuki (legal representative of the estate of Alexander Muriuki) to replace Sebastian Njiraini altogether. The orders sought there in are ;

- a) A declaration that Land Parcel Number Escarpment/ Kinari/Block No 1/1686 belongs to the plaintiff.**
- b) An order cancelling the fraudulent transfer of the property to the 1<sup>st</sup> defendant.**
- c) A declaration that that the 1<sup>st</sup> defendant is a trespasser on the suit property.**
- d) An order that the 1<sup>st</sup> defendant be evicted from the said parcel of land.**
- e) Costs of the suit.**
- f) Interests at court rates.**

3. The 1<sup>st</sup> defendant on the other hand filed a statement of defence with a counterclaim on 7.11.2018 contending inter alia that the plaintiff had never been registered as proprietor of the suit property and that he should give vacant possession of the same as he is a mere trespasser on the suit property.

4. I handled this matter for the very first time during the ELC Thika service week exercise on 13.11.2018 where I dismissed the matter for want of prosecution. However, the suit was reinstated by consent of the rival parties on 22.11.2018. I also gave directions for parties to file a paginated bundle of the documents they wished to rely on during the trial. I have seen plaintiffs bundle filed on 3.12.2018.

## The Evidence

5. **PW1, Chege** Mbutia testified and he also adopted as his evidence, his witness statements dated 5.7.2012, and 23.6.2016. He also relied on the documents in his list dated 22.6.2016 (item 1-8). All these documents along with the pleadings have been availed in a paginated and bound bundle filed in court on 3.12.2018 by the plaintiff.
6. It is his evidence that in the year 1988, the Government of Kenya through Kenya Gazette Legal Notice No. 19, altered the Kikuyu Escarpment forest boundaries and as a result, an area of land approximately 3,522.7 Hectares known as Escarpment/Kinale /Block 1 was created. Later through the Office of the President, the government decided to settle the Kinale squatters in the said Escarpment and that subsequently thereafter, squatters were resettled and subdivision of Escarpment/Kinale/Block 1 was done giving rise to Escarpment/Kinale/Block 1/1441. This Block 1/1441 was further subdivided giving rise to 8 parcels of land being 1683 to 1690. It was his further evidence that he was among the squatters to be settled after he had made his application to the Office of the President to be settled. In 1993, he was allotted one of the parcels being escarpment/Kinale/Block/1/1686 and he applied to be issued with a Title Deed but was informed there was no register at the time.
7. It was his further evidence that later on, while still pursuing the issuance of his Title Deed, he was informed that his parcel of land had been allocated to someone else namely Alexander Muriuki Ndwiga on 21<sup>st</sup> December 1992, which was before the subdivision of the main parcel of land (Escarpment/Kinale/Block 1/1441).
8. **PW2, Atanya Joy** is a government land surveyor from Kiambu District Survey office. She testified that subdivision of Escarpment/Kinale/Block/1441 was done in 1992, where it was subdivided into 8 parcels namely 1683-1690 where parcel number 1686 was given 5 acres. She produced as exhibits a map and a report to that effect.
9. **PW3, John Matheka** is a current Land Registrar at Kiambu Land Registry. He produced a green card in respect of the suit property and testified that the property was 1<sup>st</sup> registered in 1992 in the name of Alexander Muriuki and Michael Ndwiga and that the title was issued. It was his further evidence that on 6<sup>th</sup> November 1997, a caution was lodged by the plaintiff claiming a beneficial interest but on 24<sup>th</sup> May 2004, the caution was withdrawn. On 30<sup>th</sup> January 2013, Mary Nyawira Muriuki became the registered owner through transmission in succession and on the same date there was another entry in the green card which was not signed meaning the registration was rejected and the documents returned. It was his further evidence that as at now, the current registered owner is Alexander Muriuki Ndwiga and transfer by transmission has never taken place.
10. **DW1, Mary Nyawira Muriuki** testified that she is the Legal Representative of the estate of Alexander Muriuki (Deceased) and that the suit property was initially registered in her husband's name as a first registration and that at no particular time was the same registered in the name of the plaintiff. It was her evidence that there was no fraud on the part of her husband nor was there fraud during registration which was proper and procedural and that by virtue of transmission, she was now the registered owner of the land.
11. In support of her case, DW1 produced as exhibits the documents in her list dated 7.12.2018 as D Exhibits 1 and 2 respectively.

## Submissions

12. It has been submitted for the plaintiff that he has satisfied the court that he was a squatter living in Kinari and that he was one of the squatters whom the government was settling after excursion of Kinale forest and that he had clearly explained to the court the procedure that was being followed in settling the squatters whereby one was required to make an application and his position as a squatter is confirmed by a letter dated 25<sup>th</sup> February 1992. The plaintiff thus contended that he was a genuine squatter but his title deed was unlawfully issued to Alexander Muriuki Ndwiga and urged the court to allow his claim.
13. Plaintiff has further submitted that the title to the suit land was acquired fraudulently, and hence, such a title should not be allowed to stand. Plaintiff has proffered the following authorities to support his claim;
- **Arthi Highway Developers Limited vs. West End Butchery Limited & Others Court of Appeal NBI Civil Appeal No. 246 of 2013 (2015) Eklr.**
  - **Isaac Gathungu Wanjohi & Another vs. AG & 6 Others (2012)Eklr.**
14. For the 1<sup>st</sup> defendant, it has been submitted that the plaintiff has not produced any document to intimate that the land was allocated/allotted to him. Further, it was submitted that allegations of fraud and or corrupt schemes have not been established as far as the title of Alexander Muriuki is concerned.
15. It was also submitted that under section **26 (1) of the Land Registration Act**, the title of a registered proprietor is *prima facie* evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements restrictions and conditions contained or endorsed in the certificate and that the same could only be challenged on the ground of fraud or misrepresentation to which the proprietor was a party.
16. The following authorities were proffered on behalf of the 1<sup>st</sup> defendant;
- **Joseph Komen Somek vs. Patrick Kenedy Suter (2018) eKLR.**
  - **Gichinga Kibutha vs. Caroline Nduku (2018) Eklr.**

## **Determination**

17. I have carefully considered the evidence tendered by the parties, the rival submissions and the authorities relied upon. PW1's evidence was that in the year 1988, the Government of Kenya through Kenya Gazette Legal Notice No. 19 altered the Kikuyu Escarpment forest boundaries and as a result, an area of land approximately 3522.7 Hectares known as Escarpment/Kinale /Block 1 was created. It was his further evidence that the government later through the Office of the President decided to settle the Kinale squatters in the said Escarpment and that subsequently squatters were resettled and subdivision of Escarpment /Kinale/Block 1 was done giving rise to Escarpment/Kinale/Block 1/1441 and that the said Block was further subdivided giving rise to 8 parcels of land being 1683 to 1690. It was his further evidence that he was among the squatters to be settled after he had made his application to the Office of the President to be settled and that in 1993, he was allotted one of the parcels being Escarpment/Kinale/Block/1/1686. He later learnt that a title deed had been issued to Alexander Muriuki. On the other hand, 1<sup>st</sup> defendant avers that she is the owner of the land, as the same belonged to her husband who became the registered owner of that land in 1992.

18. From the circumstances of this case and the evidence on record, plaintiff was not able to show that he had been allocated the suit property by the Government as alleged. His own witnesses (PW2 and 3) did not offer any evidence to support his case. Plaintiff had stated that the title was issued before even the subdivision to give rise to block 1/1686 was done. However, the Surveyor (PW2) confirmed that the land 1686 was subdivided in 1992, and the mutations he presented to court were for 1992. The survey had been done far much earlier in 1987(see the map produced by pw2). The land Registrar added that the green card of parcel no.1686 showed that first registration was done on 1.12.1992.

19. The main documents that plaintiff appears to base his claim on are the letter by a Mr. Chesinya dated 25.2.1992, and the one by a Mr. Issa dated 15.4.1999. None of the two letters confer an interest in land. In the first letter of 25.2.1992, E.C. Chesinya who is identified as a deputy Commissioner of lands is asking the District Commissioner to assist the plaintiff. In the Second letter of 15.4.1999, there is no mention of the suit land. There is nothing to indicate that plaintiff was ever in the list of squatters. Still, even if he was in such a list, there is nothing to show that he was actually allocated the suit land.

20. Similarly Plaintiff's contention that registration of the suit property to the 1<sup>st</sup> defendant was tainted by illegalities/fraud was not supported by any evidence. Its trite law that the burden of proof where fraud is alleged is higher than the ordinary standard of proof on a balance of probability in civil cases. I am afraid that the plaintiff did not discharge this burden.

21. On the other hand, the 1<sup>st</sup> defendant's evidence that the suit property belonged to her deceased husband remained unchallenged through the trial. This was indeed confirmed by the plaintiff's own witness (PW3) who stated that the current registered owner of the suit land is Alexander Muriuki, that transmission had not taken place, but even though the 1<sup>st</sup> defendant's documents for transmission were rejected, the same did not change the entry reflecting the defendant's deceased husband as the owner of the suit property.

22. The **Black's Law Dictionary** has described 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 Civil Appeal No. 246 of 2013 Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others** the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok – Vs - Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** where the Court categorically declared that;-

*“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”*

24. Taking into totality all the circumstances in this case and considering that plaintiff has been unable to prove the allegations of fraud/illegalities, I proceed to make a finding that plaintiff has been unable to prove his case on a balance of probability as by law required. On the other hand, I do find that on a balance of probability, 1<sup>st</sup> defendant's counterclaim is merited.

## **25. Final orders:**

1) Plaintiff's suit is hereby dismissed.

2) 1<sup>st</sup> defendant's counterclaim is allowed in the following terms;

a) An order is hereby issued for the plaintiff, Chege Mbutia to give vacant possession of the two acres which he has been leasing out.

**b) An order of permanent injunction is hereby issued restraining the plaintiff, his agents, servants, legal representatives, employees and or any other person acting for or through the plaintiff from ever trespassing on the parcel no. L.R. Escarpment/Kinari Block1/1686.**

**3) Plaintiff is condemned to pay the costs of the suit to the 1<sup>st</sup> defendant.**

**Dated, signed and delivered at Thika this 2<sup>nd</sup> day of May, 2019.**

**MBUGUA LUCY**

**JUDGE**

**2/5/2019**

In the presence of

Court Assistant: Diana

M/s Thungu for Plaintiff

M/s Wambui H/B for M/s Ndegwa for 1<sup>st</sup> Defendant

M/s Ndundu for 2<sup>nd</sup> Defendant

Defendant: Present

Plaintiff: Absent