



**REPUBLIC OF KENYA**

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

**E.L.C NO. 93 OF 2017**

**CYRUS MWAURA KAMAU.....PLAINTIFF**

**VS**

**JOHN MBUGUA WANYOIKE.....1<sup>ST</sup> DEFENDANT**

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

**PETER WANYOIKE.....1<sup>ST</sup> INTERESTED PARTY**

**ANTONY WANYOIKE.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. The Plaintiff filed suit on the 3/10/16 seeking the following orders;

- a. Order of perpetual injunction restraining the 1<sup>st</sup> Defendant, his servants, agents and any other persons claiming through him from entering attempting to enter trespassing and or in any manner interfering with the Plaintiff's ownership usage and occupation of land parcel Number NGINDA/SAMAR BLOCK1/343(suit land).
- b. An order compelling the 2<sup>nd</sup> Defendant to remove the restriction placed by the 1<sup>st</sup> Defendant against land parcel No. NGINDA/SAMAR BLOCK1/343.
- c. General damages
- d. Costs of this suit.

2. The Plaintiff avers that he is the registered owner of the suit land. That in 2016 without any valid reason the 1<sup>st</sup> Defendant caused a restriction to be placed on the title by the 2<sup>nd</sup> Defendant interfering with his exclusive and absolute ownership of the suit land.

3. The particulars of the unlawful acts on the part of the 1<sup>st</sup> Defendant are pleaded as follows;

- a. Causing the placement of the restriction without any justifiable cause.
- b. Inflicting unnecessary costs on the Plaintiff in removing the restriction.

4. The 1<sup>st</sup> Defendant denied the Plaintiffs' claims and averred that the suit land is the property of one Josephat Mburu Wanyoike, his deceased brother. He admittedly caused the restriction on the suit land to protect the interest of the estate of the late Wanyoike from the Plaintiff whom he accused of having trespassed upon the suit land.

5. The interested parties on the other hand whilst denying the Plaintiffs claim reiterated the plea of the 1<sup>st</sup> Defendant that the suit land is the property of the late Wanyoike, their deceased father. They admitted that the restriction was registered on the title on their instructions through the 1<sup>st</sup> Defendant. They deny that the Plaintiff has suffered any loss or damage.

6. In their Counterclaim, they averred that the land belongs to the estate of Wanyoike deceased. They urged the Court to dismiss the suit and hold that the suit land is the property of Wanyoike, deceased.

7. The 2<sup>nd</sup> Defendant neither entered appearance nor filed any statement of defence. The claim of the Plaintiff is therefore undefended against the 2<sup>nd</sup> Defendant.

8. At the hearing the Plaintiff testified and reiterated the contents of his claim as set out in the plaint. In addition, he informed the Court that he bought the suit land from Geoffrey Njuguna Gatere in 1991. He produced a copy of the agreement of sale dated the 22/2/1991. He admitted that the agreement of sale is not stamped with the appropriate stamp duty. He also informed the Court that he did not produce a transfer in respect to the transfer of the suit land. Further he produced an official search dated the 9/8/16 which shows that he became registered owner of the suit land on the 26/2/91. A green card of the suit land was also exhibited by the Plaintiff which shows at entry No 6 that he is the registered owner.

9. The 1<sup>st</sup> Defendant informed the Court that Josephat Mburu Wanyoike was his brother. That he informed him in 1991 that he was allocated the suit land by the Muranga County Council. Shortly he showed him the property and allowed him to cultivate the same which he did about 2 acres between 2012-2014. That he carried out a search in 2011 and found out that the ownership of the land was still in the name of Wanyoike. That around 2016 he was alerted by a caretaker that there was a person selling the suit land and visited the land and found a "land for sale" signage which he duly removed and later the same signage was put up whereupon he replaced it with a signage "not for sale". That he carried out another search on the title in 2016 and the results were empty but later his Advocate advised him that the land was registered in the name of the Plaintiff. He reported the matter to the area chief. He caused a restriction to be placed on the land and reported the matter to the interested parties and the DCIO Muranga where the matter is still under investigation.

10. Under cross examination by Mr Memusi for the Plaintiff the 1<sup>st</sup> Defendant stated that he was shown the land by his brother in 1994. That he did not produce any witness to support his averments that he cultivated the suit land. He stated that he was unaware if his late brother knew the Plaintiff. He further stated that he was not informed by his late brother whether he sold the suit land.

11. The 2<sup>nd</sup> Interested Party, Anthony Wanyoike informed the Court that he is the legal administrator of the estate of the late Wanyoike who was registered owner of the suit land in 1990 upon being allocated by the Muranga County Council. That he was informed by their uncle the 1<sup>st</sup> Defendant in 2016 that there were suspicious person on the land purporting to carry out some measurements thereon. That in response he instructed him to cause a restriction to be placed on the land. He produced an original title in his name, receipts for payment of rates to Muranga County Council dated the 18/9/1996 and copy of the official certificate of search dated 17/8/2011 showing the land was registered in the name of Josphat Mburu Wanyoike but devoid of dates.

12. Further he informed the Court that the land had been vacant and had permitted the 1<sup>st</sup> Defendant to farm on it.

13. Alice Gisemba the Land Registrar gave evidence that according to the records at the Lands office Josphat Mburu Wanyoike was the registered owner of the land as at 11/10/90 when he was issued with a title deed. She stated that there was no transfer from the said Wanyoike to the Plaintiff. She however confirmed that the green card produced in evidence by the Plaintiff is the same one in her records. She stated that entries Nos. 1-7 seem to have been signed by person who was no the Land Registrar then. She stated that the said signatures are forgeries. She asserted that entry No 8 is genuine. When shown the two titles in the names of the Plaintiff and the deceased Wanyoike, she stated that the title in the name of Wanyoike is the genuine one whilst that in the name of the Plaintiff is a forgery on the face of it as it appears old. She suspected that the Plaintiff may have intended that the title to appear old to justify the forgery.

14. Further she confirmed that the original green card is in her records. She reasoned that the signatures on entries 1-7 are suspect on account that they do not belong to the Land Registrar. She stated that she is not a trained expert on handwriting or handwriting examiner. That she does not know the person who signed the green card. That she did not subject the signatures to examination by a handwriting expert. That the signatures on the green card struck her as suspect. That the forgeries are from her own opinion that she formed from seeing the signatures. That on receipt of a letter from an undisclosed Advocate the Land Registrar registered the restriction. That she was not the Land Registrar when the transaction took place.

15. She explained that there is no transfer, Land Control Board consent from the said Wanyoike to the Plaintiff.

16. She produced the original title file which the Court ordered be kept in safe custody of the Registry incharge and be released back to the Land Register upon the delivery of the judgement.

17. The Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not file any submissions.

18. In their submissions the interested parties submitted that the sale agreement produced by the Plaintiff was not stamped and therefore inadmissible in evidence. That there is unchallenged evidence that the late Wanyoike was issued with a title in 1990. That the Plaintiff did not discharge the duty of proof by showing how the property was transferred from the original owner to the purported seller one Godfrey Njuguna Gatere. The purported seller was not called to adduce evidence and neither transfer documents were produced in Court. That the extract of the green card produced by the Plaintiff was dismissed as forgery by the Land Registrar. She also dismissed the title of the Plaintiff as a forgery. That there was no evidence of the transfer by the deceased of the property to the Plaintiff or any other person. The records from the Land Registry shows that the suit land belonged to the said Wanyoike. That the Plaintiff tried to acquire the land through fraud and forgery. They relied on the evidence of the Land Registrar which they have strongly contented are in support of the case of the Interested parties.

19. The issues for determination;

a. Who owns the suit land?

b. Whether the restriction should be removed.

c. Is the Plaintiff entitled to general damages?

d. Who meets the costs of the suit?

20. The 1<sup>st</sup> Defendant and the interested parties are related. The 1<sup>st</sup> Defendant is the uncle of the interested parties and a brother of Josphat Mburu Wanyoike, deceased who was the father of the interested parties. It is not in dispute that the restriction was registered on the instructions of the 1<sup>st</sup> Defendant and the interested parties. The interested parties are the legal administrators of the estate of the late Wanyoike.

21. The background of this case is that the suit land was first registered on the 11/10/90 in the Government of Kenya and on even date it became registered in the name of the late Josphat Wanyoike. The legal administrators of the estate of the late Wanyoike have laid claim on the suit land and in their Counterclaim have made a simple plea that the suit land belongs to the estate of their father and have asked the Court to order as such. The Plaintiff on the other hand asserts that the suit land belongs to him having purchased it from one Godfrey Njuguna Gatere. He produced an agreement of sale dated the 22/2/1991 to support his averments. He also produced a copy of title; an official search dated the 9/8/16 and an extract of the green card to evidence his proprietorship of the suit land.

22. According to the green card on record which was confirmed by the Land Registrar as being similar to what she has in her record, the suit land was registered in name of Godfrey Njuguna Gitere on the 19/12/90 and a title issued the same date. On the 26/2/91 the title became registered in the name of the Plaintiff.

23. The Interested parties have averred that their late father did not transfer the suit land to the Plaintiff. That may be so because according to the green card the entries show that the land moved from Wanyoike to Gatere and to the Plaintiff. The Plaintiff has stated that he bought the land from Gatere and not Wanyoike.

24. The Land Registrar informed the Court that the entries Nos. 1-7 were forgeries and that only entry No 8 is genuine. In effect she was saying that even the title of the late Wanyoike was not genuine. She however did not adduce evidence in form of a hand writing expert nor the Land registrar who signed the entries to testify and authenticate the signatures. Her evidence was mere opinion speculation and conjecture so much so that it cannot be relied to support a cause of action of forgery and or fraud. The Land Registrar was sued as a party and would have assisted the Court if she had filed the necessary pleadings so that the Court could determine the issue of fraud/forgery.

25. It is on record that the Interested parties have not explained how the land was transferred from their father to Gatere. They contend that it was the responsibility of the Plaintiff to call the said Gatere as a witness. Their Counterclaim is devoid of a cause of action against the Plaintiff. The duty to plead a clear and proper cause of action and prove their case rested on their shoulders. They failed to discharge that duty.

26. The Land Registrar introduced a cause of action of fraud and forgery which was not pleaded by the Interested parties in their Counterclaim. In the case of **Gandy v Caspar Air Charters Ltd [1956] 23 EACA, 139** the Court stated as;

“[T]he object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given”

Also in the case of **Galaxy Paints Co Ltd v Falcon Guards Ltd [2000] 2 EA 385**, the Court reiterated that the issues for determination in a suit generally flowed from the pleadings and that a trial Court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the Courts determination. The Court added that unless pleadings were amended, parties were confined to their pleadings.

27. It is trite law that fraud must be pleaded particularized and proved in evidence. It cannot be inferred from the pleadings in a case. In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, where *Tunoi, JA. (as he then was)* stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then 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.” [Emphasis added].

28. In the case of **Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others Civil Appeal No. 246 of 2013**, 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 Moijo ole Keiwua & 5 others, Civil Appeal No. 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 take 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.”

29. Equally in the cases of **Ratilal Gordhanbhai Patel V. Lalji Makanji [1957] EA 314** and **Umlila Mahindra Shah v. Barclays Bank International and Anor [1979] KLR** the Courts have stated that Fraud has everything to do with one’s state of mind and intentions, and not

the outcome of actions and that the standard of proof for fraud is very high beyond the usual standard of balance of probabilities in civil cases approaching but below proof beyond reasonable doubt.

30. Courts in Kenya are mandated to take a title issued by the Land Registrar as prima facie evidence of ownership. Section 22 and Section 26 of the Land Registration Act provides that a certificate of title issued by the land registrar is prima facie evidence of ownership. That a person registered is the absolute owner of the land with all rights and privileges appurtenant to the land. Section 24 of the Land Registration Act No 3 of 2012 provides as follows:

*“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

31. I have examined the Register as produced by the Land Registrar in evidence in Court and the following are my findings;

- a. There is a land control board consent transferring the suit land from Gatere to the Plaintiff dated the 11/2/91.
- b. There is transfer on record from Gatere to the Plaintiff dated 20/2/91.
- c. The original title in the name of Gatere is on record having been surrendered.

32. It is the finding of this Court that the Interested parties have not proved that the title held by the Plaintiff is tainted with fraud either under section 26(a) or (b) or at all. The Court is not persuaded that the deceased Wanyoike is the registered proprietor of the suit land. There is no evidence that has been adduced to satisfy the Court that the title of the current holder is impugned. The circumstances of cancelling a title is provided under section 80 of the Land Registration Act that is to say if the Court finds that there was fraud or mistake for which the person was a party. None has been adduced in this case. The burden to prove their Counterclaim rested with the interested parties.

33. As to whether the restriction should be removed, the provisions of Section 76 of the Land Registration Act provide that

*“(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.*

*(2) A restriction may be expressed to endure—*

- (a) for a particular period;*
- (b) until the occurrence of a particular event; or*
- (c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.*

*(2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.”*

34. The Land Registrar has discretion to register restriction upon an application of a party. The purpose of the restriction is to prevent a fraud or protect title from such dealings. In this case the evidence suggests that the restriction was pursuant to a letter dated 7/9/2016. This letter was not produced in Court. The Court is therefore at a loss since the reasons for the restriction cannot be known or addressed. The registrar's evidence was also silent on this issue. It is trite that before the Registrar exercises his power under statute within the said section, he must inform the proprietors of the land and further satisfy himself that the restriction ought to be lodged. This is in satisfaction of the protection of the right to land under Article 40 of the Constitution, the right to fair administrative action under art 47, the right to access to justice (the land Registrar exercise quasi-judicial powers) and the right to be heard in Art 50. The Land Registrar in proceeding to registrar a restriction contrary to statute violated the rights of the Plaintiff as guaranteed in the supreme law.

35. Having held that the interested parties did not plead nor prove fraud, there is no reason why the restriction should be left on the land. The Plaintiff is entitled to the enjoyment of his land as provided by law. I concur with the decision of the Court in **Matoya versus Standard Chartered Bank (K) LTD & others (2003) I EA 140** where it was held that;

*“A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented”.*

36. The Land Registrar did not explain the justification for keeping the restriction on the title. I exercise the powers vested in me to remove to order the removal of the restriction under section 78 (2) of the Land Registration Act.

37. Is the Plaintiff entitled to general damages? The Plaintiff did not lead any evidence on this claim and he who asserts must proof. I decline to make any orders in respect to this claim.

38. The costs follow the event.

**39. Final orders;**

- a. The Plaintiffs case succeeds partially in terms of prayer (a) & (b).
- b. The Counterclaim is dismissed.
- c. The restriction registered on the suit land on the 8/9/2016 be and is hereby removed.
- d. Costs shall be paid by the Defendants and the Interested parties jointly and severally.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27<sup>TH</sup> DAY OF JUNE, 2019**

**J G KEMEI**

**JUDGE**

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

Kabaru HB for Memusi for the Plaintiff

1<sup>st</sup> & 2<sup>nd</sup> Defendants: Absent

Kabaru for the 1<sup>st</sup> & 2<sup>nd</sup> interested party

Kuiyaki and Njeri, Court Assistants