



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELCC CASE NO. 256 OF 2017**

**(FORMERLY NAIROBI ELCC NO. 87 OF 2010)**

**SYMPHOSIA CONSULT LIMITED.....PLAINTIFF**

**VERSUS**

**GEORGE GIKERE KABURU.....1<sup>ST</sup> DEFENDANT**

**COMMISSIONER FOR LANDS.....2<sup>ND</sup> DEFENDANT**

**RICHARD NJOROGE KYAMBUTHI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The property in dispute in this suit is title number Dagoretti/Kinoo/816 which is approximately 0.10 hectares in area (Herein after referred to as the suit land). It is situate within Kiambu County in Kenya.

2. The plaintiff, Symphosia Consult Limited in represented by learned Counsel Mr. Martin Mwaniki Njuguna instructed by Gakoi Maina and Company Advocates. The 1<sup>st</sup> defendant George Gikere Kaburu is represented by learned counsel, Mr. Gaita. The 2<sup>nd</sup> defendant Commissioner for Lands is represented by two (2) litigation counsel namely Rose Nyawira and Ruth Kerubo instructed by the Honourable Attorney General.

3. The suit against the 3<sup>rd</sup> defendant Richard Njoroge Kiambuthi (deceased) was marked as abated on 3<sup>rd</sup> December, 2018. He had filed his statement of defence dated 16<sup>th</sup> December, 2010 in person.

4. The plaintiff has sued the defendant jointly and severally by way of a plaint dated 2<sup>nd</sup> March, 2010, amended on 19<sup>th</sup> July, 2010 for orders;

**a) An injunction restraining the 1<sup>st</sup> Defendant whether by himself, his servants and/or agents from selling, offering for sale, transferring, alienating or dealing in any manner whatsoever with the suit land.**

**b) A declaration that the Plaintiff is the bona fide registered proprietor of the suit land.**

**c) Costs of this suit.**

**d) Such further or other relief that this Honourable Court may deem just to grant.**

5. Briefly the plaintiff's case is that suit land is lawfully registered in the name of the plaintiff with effect from 4<sup>th</sup> February, 1993 as shown on title deed issued on 5<sup>th</sup> February, 1993 (P Exhibit 9). Suddenly, the plaintiff discovered through an official search carried out by the plaintiff at the Lands Registry, Kiambu that the suit property had been purportedly and fraudulently transferred to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant in collision with 3<sup>rd</sup> defendant without the plaintiff's knowledge or authority. The plaintiff had not sold or transferred the suit land to any party including the defendants who are strangers to the plaintiff hence precipitating the instant suit.

6. PW1, Almable Rudakemwa Rumongi gave evidence for and on behalf of the plaintiff. He testified that he is the plaintiff's managing director and that the suit land is owned by the plaintiff. He relied on the plaintiff's list of documents dated 29<sup>th</sup> May, 2013 (P Exhibits 1 to 13).

7. The 1<sup>st</sup> defendant filed his statement of defence dated 30<sup>th</sup> August, 2010 wherein he denied the plaintiff's claim and sought its dismissal with cost. He stated that he is the lawful proprietor of the suit land having purchased it from the 3<sup>rd</sup> defendant for value and without notice of any defect in its title. That he is a bonafide purchaser hence protected by the law.

8. The 1<sup>st</sup> defendant (DW1) testified and relied on his statement dated 25<sup>th</sup> June, 2015 that by his list of documents of even date (D1 Exhibits 1 to 7), he owns the suit property. That he followed all the laid down procedures in obtaining its title issued on 1<sup>st</sup> February, 2010 (D1 Exhibit 4). He urged the court to dismiss the suit with costs.

9. The 2<sup>nd</sup> defendant denied the plaintiff's claim in a statement of defence filed on 27<sup>th</sup> September, 2010 wherein it is stated that the transfer and subsequent registration of the 1<sup>st</sup> defendants (DW1) as the proprietor of the suit land was lawful and proper as the laid down procedures were followed. That the 3<sup>rd</sup> defendant (Deceased) was registered as the proprietor of the suit land on 7<sup>th</sup> January, 2010 before he transferred the land to DW1 on 1<sup>st</sup> February, 2010. The 2<sup>nd</sup> defendant denied the plaintiff's claim.

10. DW2, John Matheka Land Registrar Kiambu testified and relied on a statement dated 18<sup>th</sup> May, 2016 by Isaac Njiru, who was a Land Registrar at the time. He relied on a list of documents dated 18<sup>th</sup> May, 2016 (D2 Exhibits 1 to 13). He stated, among other things, that the records at Kiambu Land Registry show that DW1 owns the suit land.

11. Learned counsel for the plaintiff filed submissions dated 21<sup>st</sup> January, 2019 wherein he gave the genesis of the present suit, the parties' respective cases and analysed the evidence and record. He submitted that the 3<sup>rd</sup> defendant declined to testify and that he did not pass good for the suit land to DW1. He cited Article 40 of the Constitution of Kenya, 2010 on the right to acquire and own property. He urged the court to order cancellation of the title held by DW1 and grant orders sought in the further amended plaint.

12. In his submissions dated 1<sup>st</sup> February, 2019, learned counsel for the 1<sup>st</sup> defendant urged the court to dismiss the suit with costs to the 1<sup>st</sup> defendant (DW1). He submitted, inter alia, that DW1 acted lawfully, and prudently in the purchase of the suit land. He cited sections 6,9 and 24 of the Land Control Act (Cap 302) and sections 27 of the Registered Land Act (Cap 300) repealed in support of his submissions.

13. Learned counsel for the 2<sup>nd</sup> defendant filed submissions dated 10<sup>th</sup> January 2019 where reference was made to the plaintiff's claim, framed two (2) issues for determination namely, whether the plaintiff entered into any agreement for purchase of the suit land and whether the land was fraudulently transferred to the 1<sup>st</sup> defendant. Counsel submitted that the transfer of the suit land to DW1 was not fraudulent as the laid down procedure was followed by the 2<sup>nd</sup> defendant. Counsel further relied on the Court of Appeal decision in the case of **Funzi Island Development Limited and 2 others-vs-County council of Kwale and 2 others (2011) eKLR** and the case of **Munyu Maina-vs-Hiram Gathiha Maina (2013) eKLR**, in support of the submissions.

14. I have considered the entire pleadings, evidence and submissions by counsel. Being guided by the decision in **Great Lakes Company (U) Limited KLR 720**, the plaintiff's list of issues dated 25<sup>th</sup> September, 2013 and issues (a) and (b) in the 2<sup>nd</sup> defendant's submissions, I am of the considered view that the issues for determination boil down to;

(a) Who is the lawful proprietor of the suit land?

(b) Are the parties entitled to the orders sought in their respective pleadings?

15. According to PW1, the suit land is owned by the plaintiff having bought the same from the 3<sup>rd</sup> defendant (deceased) at a consideration of Kshs. 230,000/- on 29<sup>th</sup> May, 1992. That the plaintiff was a business name at the time of the sale. That title deed was issued on 5<sup>th</sup> February, 1993 after the existence of the plaintiff. He stated that the plaintiff never sold the suit land to either Peter Kiambuthi, a brother of the 3<sup>rd</sup> defendant or any other person.

16. DW1 stated that he bought the suit land for the 3<sup>rd</sup> defendant at Kshs. 3,850,000/- as per D Exhibit 6. That he owns the suit land having followed all the laid down procedure in obtaining D1 Exhibit 4.

17. Upon relying on D2 Exhibits 1 to 13, DW2 stated in cross examination that:

**“D2 Exhibits 2 to 13 were used to transfer the suit land to DW1. The plaintiff is not the owner of the suit land; L.R. No. Dagoretti/Kinoo/ 876 as per our record. The 1<sup>st</sup> defendant (DW1) owns the land”**

18. It is quite clear that the, Symposia Consult bought the suit land from one Jones Reuben Kyambuthi (deceased) as shown on P Exhibits 3, 4,5,6,7 and 8. The plaintiff was incorporated on 24<sup>th</sup> September, 1992 and obtained P Exhibit 9 on 4<sup>th</sup> April, 1993. However, P Exhibits 1,3,4,5 and 8 relate to a different entity and the plaintiff was nonexistent at the time the time of the transaction.

19. Moreover, PW1 admitted in cross-examination that P Exhibit 8 was not signed. That P Exhibit 5 has no date and is not witnessed. That there is no evidence of payment of stamp duty and that he (PW1) was not legally permitted to acquire and own land in Kenya in 1992. That there is no certificate of official search to show that the deceased Jones Reuben Kyambuthi owned the suit land at the time P Exhibit 3 to 9 were prepared.

20. In the case of **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura-vs- Attorney General and - 4 others (2017) eKLR**, the Court of Appeal held that deliberate failure to enter into agreement, failure to pay stamp duty (if any) and failure to keep a copy

of the transfer regarding the suit property, portrayed the appellant quite negligent in the land transaction. A similar situation obtains as regards PW1 in the instant matter. Quite clearly, he was not bonafide in the transaction relating to the suit land.

21. PW1 told the court that DW1 holds a fake title to the land. There are allegations of fraud pleaded at paragraph 11 of the further amended plaint. In the case of **Koinange and 3 others-vs-Koinange (1986) KLR 23**, it was held that the allegations of fraud must be specifically pleaded and strictly proved.

22. It was the testimony of DW2 that DW1 owns the suit land and that D Exhibit 4 is not suspicious. Having considered P Exhibits 1 to 3 vis-à-vis D1 Exhibits 1 to 7 and D2 Exhibits 1 to 3 coupled with the fact that PW1 was not a bonafide purchaser of the suit land for value, I find that acquisition of P Exhibit 9 was not legal, formal and free for encumbrances including the proprietary interest of DW1 in this matter, see the case of **Munyu Maina case** (supra).

23. DW1 pleaded at paragraph 11 of his statement of defence dated 30<sup>th</sup> August 2010 that he is a bonafide registered proprietor of the suit land. D1 Exhibit 1 to 7 reveal that DW1 obtained D1 Exhibit 4 which is under challenge as it was not obtained through legal and formal process which was free from any encumbrances; see **Munyu Maina case** (Ibid).

24. Applying the foregoing authorities to the facts of the case and the evidence on record, I am inclined to find and hold that P Exhibit 9 is impeached under sections 26(1) and 80(1) of the Land Registration Act 2016 (2012). D Exhibit 4 is valid at law in the circumstances. The plaintiff has failed to prove his claim against the defendants jointly and severally to the requisite standard and he is not entitled to the relief sought in the plaint. The 1<sup>st</sup> defendant (DW1) has proved by way of D1 Exhibits 1 to 7 that he is the bonafide registered proprietor of the suit land. He has established his claim against the plaintiff on a balance of probabilities.

25. In the result, this suit is determined as hereunder:

- (a) The plaintiff's suit filed by way of a further amended plaint dated 19<sup>th</sup> July, 2010 be and is hereby dismissed.
- (b) The 1<sup>st</sup> defendant be and is hereby declared the bonafide registered proprietor of the suit land, L.R No Dagoretti/Kinoo/876.
- (c) Each party will bear their own costs of this suit in view of the proviso to section 27(1) of the Civil Procedure Act (Cap 21 laws of Kenya) and the circumstances of the case.

**Dated and signed at Migori this 10<sup>th</sup> day of May, 2019**

**G.M.A ONGONDO**

**JUDGE**

**Delivered, SIGNED and Dated in open court at Thika this 14<sup>th</sup> day of JUNE,2019**

**L.N.GACHERU**

**JUDGE**

In the presence of

1. M/s Mwangi holding brief for Mr. Gokoi for the plaintiff
2. Mr. Kimani holding brief for Mr. Gaita for the defendant
3. Lucy – Court Assistant