



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT LAND COURT AT KAJIADO**

**MISCELLANEOUS APPLICATION NO. 16 OF 2018**

**IN THE MATTER OF RECTIFICATION OF A GREEN CARD IN RESPECT OF LAND REGISTRATION NO. KAJIADO/  
KITENGELA/ 2929**

**MARGARET WAMBUI MWANGI.....APPLICANT**

**VERSUS**

**CHIEF LANDS REGISTRAR, KAJIADO.....RESPONDENT**

**RULING**

What is before Court for determination is the Applicant's Notice of Motion dated the 25<sup>th</sup> April, 2018 brought pursuant to Order 51 Rule of the Civil Procedure Rules, Section 1, 1A, 3, 3A, 63 ( e) of the Civil Procedure Act and Section 79 (2) and 80 (1) of the Land Registration Act.

The Applicant seeks the following orders:

- 1) Spent
- 2) That the District Lands Registrar Kajiado be compelled to rectify the Green Card in regards to entry No. 8 and 9 respectively of title No. Kajiado/ Kitengela/ 2929 registered in the names of the Applicant herein MARGARET WAMBUI MWANGI by cancelling the said entries.
- 3) That cost of this application be provided for.

The application is premised on the grounds that the Applicant is the registered proprietor of land registration number Kajiado/ Kitengela/ 2929 hereinafter referred to as the suit land. The Applicant was registered as owner of the suit land after being granted with letters of administration Intestate vide Nairobi High Court Succession Cause No. 1316 of 1993 in the estate of David Mwangi Kibe (deceased). That one Elias Oyamo Nguche was criminally charged at the Kibera Chief Magistrates Court in Criminal Case No. 5023 of 2011 for forgery and uttering a false document being title deed to the suit land including the Green Card and duly convicted for the said offence. The Green Card in respect of the suit land was illegally forged and false entries made on it being entry no. 8 and 9 respectively. The Green Card ought to be rectified by the Chief Lands Registrar Kajiado to erase the entries No. 8 and 9 respectively to enable the Applicant obtain a valid search including deal with her property as she deems fit.

The application is supported by the affidavit of the applicant MARGARET WAMBUI MWANGI where she reiterates her claim above and avers that she has tried on several occasions since 2015 after the judgment was pronounced to get the original Green Card returned to Kajiado Lands Registry but only received the same for onward transmission to the District Lands Registrar, after the intervention of her advocates. She explains that in order for the District Lands Registrar, Kajiado to cancel the fraudulent entries on her Green Card in entry nos. 8 and 9, the Court should issue an Order to that effect.

The application was not opposed by the Respondent who though duly served on 11<sup>th</sup> May, 2018 failed to enter an appearance nor file a response.

The Applicant filed her submissions that I have considered.

**Analysis and Determination**

Upon consideration of the Notice of Motion dated the 25<sup>th</sup> April, 2018 including the supporting affidavit and submissions herein, the only issue for determination is whether the District Land Registrar Kajiado should be compelled to rectify the Green Card in regards to entry No. 8 and 9 respectively of title No. Kajiado/ Kitengela/ 2929 registered in the name of MARGARET WAMBUI MWANGI by cancelling the

said entries.

The Applicant claims to be the proprietor of the suit land and seeks for rectification of Land Register to cancel entries 8 and 9 in the Green Card. She has relied on section 26(1) of the Land Registration Act, Article 40 of the Constitution and the cases of ***Dr. Joseph NK arap Ngok V Justice Moiyo Ole Keiuwa & Others Nairobi Civil Application No. NAI 60 of 1997 (unreported); Koinange and 13 others Vs Koinange (1986); Ratilal Gordharibhai Patel Vs Lalji Makanji (1957) EA 314 and Chesulut Vs Timothy Sangok Appeal No. 265 of 1999*** to support her averments that she is entitled to the orders sought.

Section 80 of the Land Registration Act provides that ***'(1) 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. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'***

I opine that the said legal provisions can only be implemented by the Court once proper evidence is adduced by respective parties.

From the proceedings herein, the Applicant has failed to enjoin the accused person Elias Oyamo Nguche who was criminally charged at the Kibera Chief Magistrates Court in Criminal Case No. 5023 of 2011 and convicted for fraud, yet he is still the registered owner of the suit land as per the Green Card. I note the orders sought in this cause cannot be implemented without the presence of the said Elias Oyamo Nguche and yet he has not been included in the proceedings herein as envisaged in Order 1 Rule 3 of the Civil Procedure Rules. Further, the Applicant did not annex a copy of Certificate for Confirmation of Grant to confirm the root of her title nor a copy of the title deed she holds.

In the case of ***R. G. Patel v. Lalji Makanji [1957] EA 314*** the former Court of Appeal for Eastern Africa stated thus:

***“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”***

Since this is a claim for rectification of title, it was pertinent for the Applicant to enjoin the person who allegedly committed the fraud culminating in the change of the entries within the Green Card. Further, allegations of fraud as well as a claim for rectification of title are substantive issues which can only be determined once viva voce evidence is adduced and not through affidavit evidence. I wish to associate myself with the findings in the case of ***Joseph Kibowen Chemjor v William C Kisera [2013] eKLR*** where my brother Justice Munyao found a ***suit commenced by way of miscellaneous cause incompetent as it was seeking substantive orders and should have hence been commenced by way of Plaintiff.***

Insofar as the Applicant raises pertinent issues but failure to include the party who committed the fraud as well as furnishing the documents I have alluded to above, I find that this miscellaneous cause as it stands is incompetent and will proceed to strike it out and direct the Applicant to file a substantive suit.

Costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 29<sup>th</sup> day of July, 2019**

**CHRISTINE OCHIENG**

**JUDGE**