



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 815 OF 2017

DAVID WACHIRA KINUU.....PLAINTIFF

VERSUS

BETTY WAMBUI GITHUA.....DEFENDANT

AND

THE KIAMBU DISTRICT LAND REGISTRAR.....INTERESTED PARTY

JUDGMENT

By a Plaint dated 23rd October 2017, the Plaintiff herein brought this suit against the Defendant for orders that;

- a. A declaration that the transfer of the property to the Defendant was illegal , fraudulent and void ab initio**
- b. An order issued to the interested party to cancel the registration of the fraudulent transfer and the title deed issued to the Defendant**
- c. An order issued to the interested party to rectify the Land Register by reinstating the Plaintiff as the registered owner of the property**
- d. An order restraining the Defendant from transferring, alienating, using, leasing or in any other way dealing with the property.**
- e. Costs of the suit.**

In his statement of claim, the Plaintiff averred that he is the owner of the property known as Land Title Number **NACHU/MIKUYUINI/54**, situated in **Limuru area**, having purchased it in **2011**, and was registered as the owner on **19th July 2011**. He further averred that he has never relinquished his title to the property. It was his contention that around **April 2014**, the **Kenya Electricity Transmission Company Limited (KETRACCO)** erected across the property some high voltage electricity transmission lines. It was then that he received an offer for compensation of **Kshs.1,750,808.11/=** from **KETRACCO** for acquiring a wayleave over his land which offer he accepted. He further averred that since then he has been in the process of securing compensation from **KETRACCO** by providing the necessary documentation and conducting periodic follow ups.

However, on the **21st of July 2017**, when he applied for an official search, he learnt that the property had been fraudulently transferred to the Defendant. He alleged that the Defendant is a stranger to him and that he has never contracted nor transferred the property to her.

Further that the property being Agricultural land, he would have been required to apply for and obtain **Land Control Board Consent** to transfer in order for such a transfer to be valid. He denied ever authorizing any person to make such **consent** and therefore the purported transfer of the property to the Defendant is **void ab initio** for want of valid Land Control Board Consent. He further averred that the Defendant without any colour of right illegally and fraudulently transferred or caused to be transferred the property to herself.

He particularized fraud by the Defendant as; procuring through fraud the registration of the property, presenting forged documentation to the Land Registrar for the transfer of the property, purporting to be the registered owner of the property, procuring fake National Identity Card appearing as though it belonged to the Plaintiff, fraudulently procuring a Kenya Revenue Authority Personal Identification Number(P.I.N) to appear as though it belonged to the Plaintiff.

On the 22nd of March 2018, the Plaintiff was granted leave to serve the Defendant by way of substituted service and on the 11th of April 2018, the Defendant was served by an advertisement in the Daily Nation Newspaper. Despite service, the Defendant failed to enter appearance and/or defend the suit and therefore the suit proceeded for hearing by formal proof wherein the Plaintiff gave evidence and closed his case.

PLAINTIFF'S CASE

David Wachira Kinuu adopted his witness statement dated 23rd October 2017 and further adopted his list of documents and produced it as exhibit 1. It was his testimony that the suit land was fraudulently transferred to the Defendant who is a stranger to him. He further testified that the original title issued to him being Nachu/Mikuyuini/54 was issued on 19th July 2011, should be reinstated to him. He further alleged that the Identity Card used by the person who transferred the land is not his.

The Plaintiff was directed to file written submissions to which the Court has now carefully read and considered together with the Pleadings and the documents produced in evidence and the Court finds that the issues for determination are as follows;

- 1. Whether the Plaintiff was the Legal Owner of the suit property before it was transferred to the Defendant**
- 2. Whether the Title Deed in the Defendant's name was acquired fraudulently or through a corrupt scheme**
- 3. If the Plaintiff is entitled to the Orders sought**

1. Whether the Plaintiff is the Legal Owner of the suit property before it was transferred to the Defendant

The Defendant failed to enter appearance and thereby defend the suit. The fact that the suit has not been opposed means that the Plaintiff's evidence remained unchallenged and uncontroverted. However the Plaintiff is still required to prove his case on the required standard of balance of probability. See the case of *Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR*, where the Court cited the case of *Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988*, where it was held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaintiff and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of *Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR*, where the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason

only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further the case of *Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR*, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

The Plaintiff has alleged that he was the registered owner of the suit property until when he conducted a search and found out that the suit land had been transferred to the Defendant. The plaintiff produced a title deed to prove ownership of the land and he further produced a sale agreement that evidenced that he bought the suit land. Without evidence to controvert these documentations, the Court finds that indeed the Plaintiff was the registered owner of the suit property and therefore its legal owner before it was transferred to the Defendant herein.

2. Whether the Title Deed in the Defendant's name was acquired fraudulently or through a corrupt scheme

The Plaintiff has also alleged that the Defendant fraudulently and with forged documents purported to transfer the suit land to her name and he has further produced a Title Deed that bears the name of the Defendant as the proprietor of the suit land. The Plaintiff has also produced before this Court a letter dated 25th September 2017, from the Directorate of Immigration and Registration of Persons that indicated that the registration particulars on the copy of the Identity Card Number 11292522 S/No.203475365 (David Wachira Kinuu) are not identical to the ones on their register.

This Court notes that the Identity Card referred to is the one that was used by the alleged David Wachira Kinuu to transfer the suit property to the Defendant.

Was the suit land therefore transferred fraudulently to the Defendant? **Fraud** has been defined in *Blacks Laws Dictionary* as;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

Further *Black Laws Dictionary Ninth Edition at Page 731* also defines fraud as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”

With the definition of fraud in mind and having held that the documentation that was used to transfer the suit property was not proper documentation, this Court finds that the deceitful acts of providing documentation that are not genuine amounted to fraud. Further for disposition of Agricultural, land, the **Land Control Board Consent** must be sought. However it is clear that the Plaintiff as the registered owner of the suit property never participated towards the said process and as such the **consent** that was given must have been acquired fraudulently by the parties in question having used forged documents to procure the same.

This Court therefore finds that the party allegedly named as **David Wachira Kinuu**, in the transfer document and the Defendant herein misrepresented facts that enabled the transfer of the suit property from the name of the Plaintiff to that of the Defendant and therefore the transfer was fraudulent. This Court therefore finds that the transfer of the suit land to the Defendant was fraudulent and therefore illegal thereby **null and void ab initio**.

3. If the Plaintiff is entitled to the Orders sought

The law is clear that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that they are the owner of the property. However, the law is also clear on the circumstances that the said title may be impeached. **Section 26 (1)** of the Land Registration Act provides;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

This Court having held and found that the transfer of the suit property was through **fraud** as the documentations that were used to transfer the suit property were forged, It is this Court’s opinion that the Title held by the Defendant is one that falls under the category of that which must be impeached. The protection that was provided to the Defendant by law must then be impeached once the Court holds that there was fraud and misrepresentation of facts. See the case of *Alice Chemutai Too ...Vs... Nickson Kipkurui Korir & 2 others [2015] eKLR* where the Court held that;

“it will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

The Court having found and held that the Title held by the Defendant was procured by fraud and therefore null and void must then determine whether it is in a position to cancel the said title. **Section 80(1)** of the Land Registration Act provides;

“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.”

This Court is satisfied that the Certificate of Title held by the Defendant was procured by fraud and as such it is impeachable and ought to be cancelled. Further this Court has already held and found that the Plaintiff was the legal owner of the suit property and it is only fair that the register is rectified to cure the fraud perpetrated and return to him his rightfully earned property.

Consequently this Court finds that the Plaintiff has proved his case on a balance of probability and that his prayers as sought are merited.

Having now carefully read and considered the pleadings, the exhibits before Court and the written submissions by the Plaintiff. This Court finds

that the Plaintiff has proved his case on a balance of probability and therefore allows the Plaintiffs claim entirely with costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 26th day of July 2019.

L. GACHERU

26/7/2019

JUDGE

In the presence of

Mr. Kimani Kimotho for Plaintiff

No Appearance for Defendant

No Appearance for Interested party

Lucy- Court Assistant.

Court; Judgment read in Open Court in the presence of the above

Advocates

L. GACHERU

26/7/2019

JUDGE