



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC. CASE NO. 511 OF 2017

PETER KIMATA WACHIRA.....PLAINTIFF

VERSUS

FOLDERTEK INVESTMENTS LIMITED.....1ST DEFENDANT

DANIEL MUIRURI NJORGE.....2ND DEFENDANT

DISTRICT LANDS REGISTRAR, THIKA.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

JUDGMENT

Introduction:

1. In the Amended Plaintiff dated 30th September, 2011, the Plaintiff averred that at all material times, he was the proprietor of land known as Ruiru/Kiu Block 2 (*Githunguri*) 3620 (*the suit property*); that he was allocated the suit property pursuant to the shares he bought from Githunguri Constituency Ranching Company Limited in 1968 and that he was registered as the proprietor of the suit property on 13th March, 1996.
2. The Plaintiff has averred that the purported issuance of the Title Deed in respect of the suit property to the 2nd Defendant who subsequently transferred it to the 1st Defendant was void *ab initio* and that a declaration should issue that he is the duly registered proprietor of the suit land.
3. In its Amended Defence, the 1st Defendant averred that it is the *bona fide* purchaser for value of the suit property pursuant to an Agreement dated 16th September, 2008 between itself and the 2nd Defendant; that prior to executing the Sale Agreement, it conducted an official search at the Lands Registry, Thika, to authenticate the particulars of ownership of the suit property and that the Plaintiff's suit should be dismissed with costs.
4. The 2nd Defendant averred that he is the *bona fide* allottee of the suit land having acquired it from Githunguri Constituency Ranching Company Limited in settlement of the debt owed to him by the company; that he was issued with a certificate number 0334 and ballot number 1526 by the company and that he lawfully sold the suit land to the 1st Defendant.
5. The 3rd, 4th and 5th Defendants averred that they are strangers to the allegations raised in the Amended Plaintiff and that the suit should be dismissed with costs.

The Plaintiff's case:

6. The Plaintiff's father, PW1, informed the court he transferred to the Plaintiff his shares in Githunguri Ranching Company Limited (*the Company*) on 30th November, 1995 as a gift; that as at the time he transferred the said shares to the Plaintiff, he had been allocated two parcels of land measuring 1¼ acres each and that he was issued with share certificates in respect of the two parcels of land.
7. It was the evidence of PW1 that the Plaintiff was subsequently issued with two Title Deeds for parcels of land known as Ruiru/Kiu Block 2/ 3620 (*the suit land*) and parcel number Ruiru/Kiu Block 2(*Githunguri*) T. 657; that he purchased the shares in respect of the two parcels of

land on 30th July, 1968 and that he paid the survey fees as demanded by the company from 1973 upto 1990.

8. PW1 informed the court that he balloted for the two parcels of land on 13th March, 1985; that he handed to the Plaintiff all the original documents pertaining to the suit land and that when he conducted an official search in December, 1999, the results of the search confirmed that the Plaintiff was the registered proprietor of the suit land. PW1 produced in evidence several documents which I shall refer to later.

9. The Plaintiff, PW2, stated that the 2nd Defendant forged the Title Deed for parcel of land known as Ruiru/Kiu Block 2/3620 (*the suit land*); that he is the bona fide registered owner of the suit land and that the land was originally owned by his father having been allocated the same by Githunguri Ranching Company Limited.

10. According to PW2, after his father was allocated the land, he paid the transfer fees for processing of the Title Deed in his favour; that he was issued with a Title Deed in respect of two parcels of land, including the suit property and that the search that his father conducted in 1999 showed that he was the registered proprietor of the suit land.

11. It was the evidence of PW1 that in the year 2008, he discovered that the suit land had been registered in favour of the 1st Defendant having purchased it from the 2nd Defendant. That is when he instructed his advocates to file the present suit.

12. PW2 informed the court that after investigations by the police, the 2nd Defendant was charged in court for having forged the Title Deed in respect of the suit land; that the Defendants caused the Green card showing his proprietorship of the suit property to disappear and that the 2nd Defendant agreed to refund the 1st Defendant the purchase price.

13. The Chairman of Githunguri Constituency Ranching Company, PW3, informed the court that the suit land once formed part of the land belonging to the company; that the said land was allocated to PW1 by the company by virtue of his shareholding in the company and that PW1 later on transferred the land to the Plaintiff.

14. According to PW3, the company processed the Title Deed for the suit land in the name of the Plaintiff in 1996. It was the evidence of PW3 that the company's record does not show the 2nd Defendant having being a member of the company.

15. PW3 denied that the share certificate that the 2nd Defendant was holding was from their company and that the 2nd Defendant could not have obtained a clearance from the company after the Title Deed had been issued. According to PW3, Mr. Karanja could not have given the 2nd Defendant a share certificate of the company because Mr. Karanja was no longer an official of the company.

16. PW3 stated that the purported minutes of the company in possession of the Defendants were forged because other Directors of the company should have attended such a meeting. According to PW3, members used to pay to the company Kshs. 1,875 to have their Title Deeds processed. According to PW3, one must have a ballot card, a share certificate and a clearance certificate from the company before a Title Deed could be processed.

17. The evidence of PW3 was that before 1993, Title Deeds used to be issued by the Government directly to the allottees. However, later on the procedure changed. It was his evidence that before a Title Deed could be processed, a Transfer form duly executed by the company, the Commissioner of Lands and a Director of the company was required. That is when the Registrar of Lands would issue a Title Deed to the allottee. PW3 informed the court that between the years 1983-1996, the company was exempted from paying stamp duty.

18. The 1st Defendant's Director, DW1, informed the court that he met the 2nd Defendant in September, 2008; that the 2nd Defendant informed him that he was selling the suit land and that after confirming that the land is registered in his name, the 1st defendant entered into a Sale Agreement with the 2nd Defendant on 16th September, 2008. DW1 informed the court that upon payment of the purchase price, the 2nd Defendant transferred the suit land to the 1st Defendant. The evidence of DW2, the 1st Defendant's Director was similar to the evidence of DW1.

19. The 2nd Defendant, DW3, informed the court that he was appointed by Githunguri Ranching Company Limited in the year 2003 as its Surveyor; that he sub-divided the company's land into several portions and that when the company failed to pay him his fees, the Board of Directors resolved to pay him in kind by allocating him the suit land. According to DW3, the company issued to him a share certificate for the suit land and ballot number 1526.

20. DW3 stated that after being allocated the suit land, he sold the same to the 1st Defendant at an agreed price of Kshs. 500,000.

21. In cross-examination, DW3 stated that the process for allocation of land in the company required that one obtains a ballot paper and a clearance certificate from the company. That is when a Title Deed could be processed. It was the evidence of DW1 that the date indicated on his Title Deed was a Sunday and that public documents cannot be dated on a Sunday. DW1 produced several documents which I shall refer to shortly.

22. The Land Registrar, DW4, informed the court that a Title Deed used to be issued to the members of the Githunguri Ranching Limited after the company forwards to the Commissioner of Lands a duly signed Transfer form; that on the said Transfer document, the Government would be indicated as the transferor while the Allottee was the transferee and that the name of the allottee had to come from the company.

23. DW4 stated that he could not confirm if the search that was done by the Plaintiff in 1999 came from their offices or if indeed the Green card showing the Plaintiff as the registered proprietor of the suit land was plucked/stolen from the lands office. It was the evidence of DW4 that the Title Deed that was issued to the 1st Defendant emanated from their offices.

24. According to DW4, since Githunguri Constituency Ranching Company was the original owner of the suit land, and the Government only acted on its behalf, they are the ones to confirm who was the first owner of the parcel of land in dispute as per their register.

Submissions:

25. The Plaintiff's advocate submitted that the Title Deed held by the 1st Defendant in respect to the suit land is impeachable; that the 1st Defendant was well aware of the 2nd Defendant's fraudulent actions due to the complaint it made to the DCIO, Ruiru, to arrest and prosecute the 2nd Defendant for fraudulently obtaining money from the 1st Defendant and that the 2nd Defendant, together with one Francis Karanja, a former Secretary of Githunguri Ranching Company Limited were charged with conspiracy to defraud and obtaining land registration by false pretenses and were found guilty.

26. The Plaintiff's advocate submitted that although the Land Registrar asserted that the Plaintiff's Green card could not have been stolen, he was unable to produce the documents in support of the 1st Defendant's Title Deed and that the Title Deed that was issued to the 2nd Defendant was forged.

27. The 1st Defendant's advocate submitted that the Land Registrar, DW4, coherently testified on the official entries in the relevant register; that DW4 confirmed that the suit land is registered in favour of the 1st Defendant after the same was transferred from the 2nd Defendant and that the evidence of PW1, PW2 and PW3 was disputed.

28. The 2nd Defendant's advocate submitted that the Land Registrar testified that he is not aware of any documents being plucked, stolen, altered or interfered with from the Land Registry; that the Land Registrar confirmed that no entry in the register was made in favour of the Plaintiff and that the Plaintiff's alleged transactions are non-existent.

29. Counsel submitted that the receipts dated 13th March, 1998 and 19th October, 1996 shows the Plaintiff was still paying for the Title Deed which was issued on 13th March, 1996; that a Title Deed could only be issued after all the payments had been made and that the Plaintiff did not prove any fraudulent acts on the part of the 2nd Defendant.

30. The 3rd, 4th and 5th Defendants submitted that the Plaintiff had an obligation to prove each of the particulars of fraud in the Plaintiff which he failed to do; that the criminal case relied on by the Plaintiff was against the 2nd Defendant and not the 3rd-5th Defendants and that the Chairman of Githunguri Constituency Ranching Company Limited testified that the Plaintiff was the genuine allottee of the suit land.

31. The 3rd-5th Defendants' counsel submitted that since the 2nd Defendant's Title Deed was obtained through misrepresentation, he could not pass a better title than he had.

Analysis and findings:

32. The Plaintiff's father, PW1, informed the court that he was a member of Githunguri Constituency Farmers Co-operative Society (*the Society*). According to PW1, he was allocated two parcels of land measuring 1¼ acres each by virtue of his membership in the Company, including parcel of land known as Ruiru/Kiu Block 2/3620 (*the suit property*).

33. To prove that he was a member of the Company, the Plaintiff's father produced in evidence the receipt dated 30th July, 1968 which was issued to him by the Company for Kshs. 105 for payment of "share and entrance fee". The Plaintiff's father also produced in evidence the receipts of 4th May, 1984; 27th May, 1988 and 5th February, 1990 which were all issued by the Company.

34. The evidence before the court shows that the Plaintiff's father balloted for a plot as a member of the Company. According to PW1, the members of the Society balloted for plots on 13th July, 1968 whereafter each member was shown his respective land. It was the evidence of PW1 that he informally gifted the suit property, which is one of the parcels of land he balloted for, to his son.

35. To show that he is the one who was allocated the suit land which he later informally transferred to the Plaintiff, PW1 produced in evidence a Certificate number 6566 which was issued to the Plaintiff by the Company on 3rd January, 1996. The Plaintiff also produced a Title Deed that was issued in his favour for parcel of land known as Ruiru/Kiu Block 2 (Githunguri) 3620 on 13th March, 1996.

36. In addition to the Title Deed, the Plaintiff exhibited an official search that he conducted on 1st December, 1999 in respect of the suit land.

37. Although the Plaintiff was purportedly issued with a Title Deed for the suit property on 13th March, 1996, the Plaintiff produced in evidence an abstract of title showing the register in respect of the suit property was opened on 26th October, 2003 and not in 1996. According to the abstract of title, the 2nd Defendant was registered as the proprietor of the same land on 26th October, 2003 and then sold it to the 1st Defendant on 26th August, 2008.

38. The 2nd Defendant admitted that he was not a member of the Company. According to the 2nd Defendant, he did some work for the Company as a Surveyor, and that when the Company was unable to pay him his fees, he was told to identify a parcel of land in lieu of fees.

39. The 2nd Defendant's case is that he identified the suit land whereafter he was issued with a Certificate number 1526 and that he processed a Title Deed whereafter he sold the land to the 1st Defendant.

40. The 2nd Defendant did not produce in evidence the letter of instructions by the Company authorizing him to survey any land for the Society. Indeed, no evidence was produced by the 2nd Defendant showing that he raised fees in respect of the work done and that he demanded for the fees from the Company.

41. Indeed, the Chairman of Githunguri Ranching Company confirmed that the 2nd Defendant has never been a member of the Company. According to the said Chairman, the Company's Board has never appointed the 2nd Defendant as its Surveyor and that the Society could never have allocated land belonging to a member of the Society to a non-member.

42. The Chairman of the Company informed the court that the 2nd Defendant fraudulently had the suit land registered in his favour. According to the said Chairman, it was not possible for the 2nd Defendant to have obtained a Title Deed before obtaining a clearance certificate from the Company.

43. The evidence by the Company's Chairman is believable. I say so because by the time the 2nd Defendant obtained the Title Deed for the land, the Plaintiff's father had already balloted for the same land, transferred it to the Plaintiff and the Company had caused a Title Deed to be issued to the Plaintiff in 1996. The registration of the 2nd Defendant as the proprietor of the suit land in the year 2003 must have been procured fraudulently.

44. The 1st Defendant must have become aware that it had been defrauded by the 2nd Defendant. That explains why the 1st Defendant's Director lodged a complaint with the police and had the 2nd Defendant charged with a criminal offence. If the 1st Defendant truly believed that the suit land was registered in favour of the 2nd Defendant lawfully, then it could not have lodged a complaint with the police, which complaint led to the arrest and charging of the 2nd Defendant for receiving money by false pretenses.

45. The evidence by the Plaintiff and the Chairman of the Githunguri Constituency Ranching Company Limited shows that the 2nd Defendant procured the registration of the Title Deed for Ruiru/Kiu Block 2 (Githunguri) 3620 fraudulently. Indeed, the clearance certificate purportedly issued by the Company to the 2nd Defendant on 28th October, 2003 could not have been issued after the issuance of the Title Deed to the 2nd Defendant on 26th October, 2003. It is the clearance certificate which was to be issued first.

46. As correctly stated by the Chairman of the Company, a clearance certificate in favour of the 2nd Defendant in respect of the suit land should have come first before the Title Deed was issued to the 2nd Defendant, and not vice versa.

47. Having obtained the Title Deed in respect to the suit land fraudulently, the 2nd Defendant could not pass a good title to the 1st Defendant or at all. Indeed, the cancellation of the Title Deed that was issued to the 2nd Defendant means that the 1st Defendant's Title Deed also falls by the wayside.

48. That being so, I find that the Plaintiff has proved his case on a balance of probabilities. The Plaintiff's Amended Plaint dated 30th September, 2011 is allowed as follows:

a. A permanent injunction be and is hereby issued restraining the 1st Defendant, its servants, employees and or agents from selling, transferring, alienating, or otherwise dealing and or interfering with the Plaintiff's parcel of land known as Ruiru/Kiu Block 2 (Githunguri) 3620.

b. A declaration be and is hereby issued that the transfer and the registration of Title to Ruiru/Kiu Block 2 (Githunguri) 3620 to the 1st Defendant is null and void 'ab initio' and is hereby cancelled forthwith.

c. A declaration be and is hereby issued that the Plaintiff is the duly registered proprietor of the parcel of land known as Ruiru/Kiu Block 2 (Githunguri) 3620.

d. An order of rectification of the Register of Titles and reinstatement of the Plaintiff's name in the Register of Titles at Thika District Land Registry as the proprietor of Ruiru/Kiu Block 2 (Githunguri) 3620 be and is hereby issued.

e. The 2nd Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2019.

O.A. ANGOTE

JUDGE