



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MERU**

**ELC. CASE NO. 70 OF 2012**

**GEORGE GATEMBO** (Suing as the legal representative of the Estate of  
**JOSEPH MUGUNA (DECEASED)**.....**PLAINTIFF**

**Versus**

**ELIJAH MUTEGI RWITO & 10 OTHERS**.....**DEFENDANTS**

**JUDGMENT**

**The Plaint**

1. This suit was commenced by way of Plaint dated **27/8/2012** and filed on **28/8/2012** seeking the following reliefs

**(1) A declaration that the 1<sup>st</sup> Defendant had no capacity to pass good title or transfer the initial parcel of land Ntima/Igoki/552 or to deal with it in any manner and therefore the subsequent transfers are null and void.**

**(2) A declaration that 2<sup>nd</sup> to 11<sup>th</sup> Defendants do not hold good title to the resultant subdivisions to wit Ntima/Igoki/2601,2602,5471,5472 and 2209.**

**(3) An order of cancellation of all the resultant titles to wit Ntima/Igoki/2601, 2602, 5471, 5472 and 2209 of the original parcel No. Ntima/Igoki/552 and the same to revert back to the estate of Joseph Muguna (deceased).**

**(4) Any further or better relief that this court may deem fit and proper to grant in the interest of justice.**

2. The defendants filed their respective defences denying the claim.

**The Defence**

3. In their defence dated **20/2/2013** and filed on the same day, the 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants pleaded as follows: that the 1<sup>st</sup>, 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants are deceased and thus wrongfully sued rendering the suit incompetent *ab initio*; that they are bonafide purchasers for value of land from **JOSEPH MUGUNA**, whose identity was established and confirmed; that they never got any land from the 1<sup>st</sup> defendant and that further, the transfer of L.R. Nos. **NTIMA/IGOKI/2207** and **2208** was made in 1971 and by the year 1993, the Plaintiff's father was alive, but never filed any suit against the Defendants even until his death in the year 2006.

4. The 5<sup>th</sup> Defendant filed his statement of defence on **4/6/2014**. In the said defence, he avers that the entire claim does not disclose any cause of action against him; that he is a bona fide purchaser for value without notice and that the relief sought by prayer on in the plaint is untenable against a deceased defendant who cannot defend himself.

5. The matter was then set down for hearing on **5/11/2014** and **27/11/14**, **15/6/2015** and **22/9/2015** where the plaintiff testified and advanced his case. The defence case was heard on **2/11/2015** and **13/12/2018**.

6. Upon close of the defence case, the court ordered the parties to file written submissions which submissions have been duly filed.

7. I have considered the said submissions, the pleadings and the evidence adduced and in my view the issues that arise for determination in this matter are as follows:-

a. Whether the leave obtained to file suit out of time was proper.

b. Whether the suit was a nullity ab initio as it was filed against some of the defendants who were deceased at the time of institution.

c. Whether the Plaintiff is entitled to the remedies sought in the plaint?

d. Who should bear the costs of this suit?

8. The issues listed above are addressed as hereunder:

**(a) Whether the leave obtained to file suit out of time was proper**

9. PW1, the Plaintiff herein testified on 5/11/2014 and stated that he sought leave to file suit out of time vide an originating summons which he produced PExh 1 and a ruling to that effect as PEh 2.

10. In his submissions, the plaintiff is of the view that leave of court to sue out of time was obtained and that it is therefore for him to choose who to sue or enjoin in as long as he had obtained the leave.

11. In their submissions, the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants averred that in the said originating summons no leave was sought against as against the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants and that therefore the suit against them is time barred by reason of **Section 7 of the Limitation of Actions Act**.

12. I have perused the said originating summons and the ruling and I do not agree with the argument advanced by the Defendants. The fact that leave was sought to file suit out of time related to the same cause of action; it therefore matters not who is enjoined or sued thereafter.

**b. Whether the suit was a nullity ab initio as it was filed against some of the defendants who were deceased at the time of institution.**

13. The 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendant have averred from the word go that the suit is incompetent as it was filed against deceased persons at the time of institution. From the record, on the 31/7/2013 when the matter was in court for mention, it was directed that the plaintiff's advocate to address the issue of substitution of the 1<sup>st</sup>, 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants as it emerged that they were deceased at the institution of the suit. The plaintiff's advocate on the 17/9/2014 withdrew the suit against the deceased defendants and the matter proceeded to hearing. There is also a notice of withdrawal against the deceased defendants filed in court.

14. Having found that the suit is proper before court, I will then proceed to the next issue.

**c. What orders should then issue with regards to the remedies sought in the plaint?**

15. From the plaint and the evidence adduced in court, the main bone of contention in this case is the plaintiff's allegation that the 1<sup>st</sup> defendant fraudulently transferred the suitland to the other defendants by impersonating the plaintiff's father one **Joseph Muguna**, and presenting himself to the board and attaining consents.

16. PW1 on the 5/11/2014 testified that the 1<sup>st</sup> defendant, one **Elijah Muregi M'Rwito** was convicted in Meru Criminal Case no. 2919 of 1981 for the offence of personation contrary to Section 382 of the Penal code. He produced a charge sheet and proceedings as **P Exb 4** and **PExb 5** respectively.

17. DW1 and DW2 on the other hand testified that they did not know of any criminal case relating to the suit land in question and that he was never called to testify. DW2 testified that he never even knew most of the persons who preceded him in the ownership of the suit land.

18. I have examined the said proceedings relating to the criminal charge preferred against the deceased 1<sup>st</sup> Defendant and I am satisfied that the same is related to the suit land in question and the subsequent transfers to the third parties.

19. The plaintiff's evidence comprises of a grant of letters of administration to his father's estate which shows that he died in 2006. According to the criminal case proceedings the fraud orchestrated by the 1<sup>st</sup> defendant was discovered, not by the plaintiff's father, but by one of his sons in 1991. The plaintiff conceded that he is the one who discovered the fraud in 1991 and gave the excuse of sickness as then reason why his father never filed a suit against the defendants. The plaintiff filed this suit in 2012.

20. Upon analyzing all the evidence placed before court, it is clearly evident that indeed there was fraud on the part of the 1<sup>st</sup> Defendant. Should the consequences of that fraud be visited upon the defendants who are alive? How should this court deal with the titles held by the defendants who are still alive and who are defending themselves in this case?

21. Section 26 of the **Land Registration Act** provides as follows:-

**“26. (1) 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

22. Considering that the 1<sup>st</sup> defendant’s title, was procured by way of fraud the said title is clearly impeachable.

23. Clearly it is incumbent upon the defendants to establish that they were bona fide purchasers for value without notice and that they were not involved in the fraud.

24. In the case of **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR** the Court Of Appeal nullified titles held by alleged purchasers who had no sale agreements or other evidence to back up their claims of purchase of the suit land subject matter of that case. It stated as follows:

**“29. The conduct of the 3<sup>rd</sup> respondent in deliberately failing to enter into a written sale agreement with the 2<sup>nd</sup> respondent; failing to pay stamp duty for the transfer (if any); and failing to keep a copy of the transfer, if at all, raises more questions than answers and portrays him quite negligent in his business transactions. In our view, he cannot be described as a bona fide purchaser for value. The trial court should therefore have ordered rectification of the register.”**

24. In the instant suit the defendants did not do much to justify their claims of being innocent purchasers for value without notice.

25. In **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court of Appeal, while dealing with a case of this nature had this to say:

**”Furthermore, the protection accorded by law in the event of fraud, is to a “bona fide purchaser without notice” and even then, only against equitable interests. The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner....**

26. The plaintiff stressed that the accused in **Meru Magistrates Criminal Case 2919** was not the proprietor who could pass good title to the purchasers. He cited various cases including **Alberta Mae Gachie Vs the Hon. Attorney General & 4 Others 2006 eKLR** and **Dr. Joseph N.K.Arap Ngok Vs Justice Moijo Ole Keiwua & Others CA No. 60 of 1997**. He cited the following passage from the **Alberta Mae Gachie** decision:

**“Thirdly, the Grant issued to and held by Peter Waithaka Gacii, was not, in my opinion, worth more than the paper it was written on. Peter Waithaka Gacii could not surely have magically become the proprietor of the land already registered in the ownership of Peter Gacii (Prof.) whose title was absolute and indefeasible by provisions of Section 23 (1) of the relevant Act. If such were to occur, what would happen to or remain of “the sanctity of a title”? Where would the security of a title have flown to? Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legally registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come.”**

27. In the **Alberta Mae** case (supra) the court (Onyancha J) declared the transfers by the 4<sup>th</sup> defendant to the 3<sup>rd</sup> defendant.

28. The defendant on the other hand, relying on the case of **Dakianga Distributors K Ltd vs Kenya Seed Co. Ltd (2015) eKLR**, asserts that the plaintiff’s claims are directed against the 1<sup>st</sup> defendant who is deceased and a non-party. However I find that paragraphs 18 and 19 of the plaint dated 27/8/2012 include all the defendants in the allegations of fraud.

29. On the issue of delay in filing the suit I have considered the averments of the plaintiff who was cross examined on the same and he indicated that his father was unwell and that he was not within Kenya for a period of time. He also explained that financial difficulties contributed to the delay and he also had difficulties with the power of attorney which was not regular, thus leading to the withdrawal of the first suit that he had filed in the year 1993.

30. In this court’s view, leave had been granted to institute this suit and the defendants had occasion to cross examine on the issue of limitation, and in my view, the same was satisfactorily explained by the plaintiff and the leave is hereby confirmed as having been properly granted.

31. It is my finding that the defendants have not sufficiently proved that they were bona fide purchasers for value without notice. Even if they had, this status appears to be incapable of enabling the disregard of the true land title holder’s legal rights. In the **Arthi case** (supra) the Court Of Appeal observed as follows:

**“68. It is also stated therein that “the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests”. So that, even if the issue of *bonafide* purchaser arose in this matter which, in our finding, it did not, we are not satisfied that the evidence tendered by Arthi supports a credible finding that it was a bona fide purchaser of the disputed land.”**

32. In the final analysis I find that the plaintiff’s claim has merits and I enter judgment against the defendants and grant prayers Nos. (1), (2) and (3) of the plaint dated 27/8/2012 as prayed.

**Who should bear the costs of this suit?**

33. Each party shall bear their own costs of this suit.

**Dated and signed at Kitale this    day of    2019.**

**MWANGI NJOROGI**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE**

**Delivered in open court at Meru this 31st day of October, 2019.**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, MERU**