



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC 523 OF 2017

(FORMERLY NAIROBI ELC NO. 594 OF 2011)

KIRANGI JAMES NGUGI, DAVID GITANGU, NGANGA KAMAU

(Suing as the trustee of Mwihoko Mwega Self Help Group.....PLAINTIFFS

VERSUS

VERONICAH NDINDA KIMENDE.....1ST DEFENDANT

LAND REGISTRAR THIKA.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

The Plaintiffs herein filed this suit against the Defendants vide a Plaint dated **26th October 2011** and sought for the following orders;

- a) A declaration that the allocation and registration of Title No. Ruiru Kiu Block 2/3065 to the 1st Defendant by the 2nd Defendant was fraudulent, illegal and unmerited and the same should be revoked and cancelled forthwith.***
- b) An order directing the Land Registrar, Thika to reinstate and register the Plaintiffs as the sole owners of L.R No. Ruiru Kiu Block 2/3065.***
- c) A permanent injunction restraining the 1st Defendant or her servants or agents or assignees or any other party authorised by the 1st Defendant from sub dividing, selling, disposing, transferring, alienating with quiet user, possession or in any manner whatsoever with the plaintiffs occupation and quiet enjoyment of L.R No. Ruiru Kiu Block 2/3065.***
- d) An order directing the 1st Defendant or her servants, agents assignees or persons acting under her direction to give vacant possession of L.R No Ruiru Kiu Block 2/3065***
- e) Mesne profits***
- f) Damages for trespass***
- g) Costs of the suit and interests***
- h) Any other order that this Court may deem fit and expedient to grant.***

In their statement of Claim, the Plaintiffs averred that on **the 5th of November 2004**, members of the **Mwihoko Mwega Self Help Group** bought the suit land from one **Wilson Mwangi Ngoni**. A transfer was effected and a title deed was issued on the **6th May 2005**, in their favour and they took possession. However in the month of **January 2010**, they learnt that persons were persistently viewing the suit land without their authority. Upon investigations, they found that the 1st Defendant had colluded with land officials and transferred the suit land to herself and another title deed was issued and she has further subdivided the suit land. That despite their attempts to get help from various authorities, their attempts have been futile. It was therefore their contention that the 1st and 2nd Defendants acted fraudulently. They

particularized fraud by the Defendants under paragraph 10.

They averred that the fraudulent actions cannot confer any legal and valid title upon the 1st defendant and that their rights have been infringed upon.

The suit is contested and the 1st defendant via statement of Defence and Counter claim dated **12th May 2015**, wherein she sought for orders that;

a) A permanent injunction restraining the Plaintiffs, their

servants and/ or agents in any manner whatsoever from interfering, trespassing, or disposing off land known as Ruiru Kiu Block 2(Githunguri)3065

b) A Declaration that the 1st Defendant is the lawful owner of land known as Ruiru Kiu Block 2 (Githunguri)3065.

c) A declaration that Ruiru Kiu Block 2/3065 was irregularly and unlawfully obtained and registered in the name of the Plaintiffs and should be cancelled forthwith.

d) Costs of this suit.

She denied all the allegations made in the Plaint. She averred that she had a legal claim over the suit property having been issued with a title deed on the **16th of August 2010**. Further that the same has since changed hands to third parties. That she was in possession of the suit land after purchase and that she obtained a good title over the said land. That the Plaintiffs suit is defective for failing to comply with mandatory provisions of law.

She further averred that she bought the suit land from one **John Maina Mburu** on **6th July 2010**, a sale agreement was executed and she presented her ownership documents to **Githunguri Ranching Company** and she was issued with a clearance certificate. That she took possession after buying the suit land from the said **John Mburu**, who had bought it from **Isaack Wanyoike Chege** and only learnt of the Plaintiffs interest in the suit land when this suit was filed. She further averred that the Plaintiffs documents of ownership are fraudulent.

The 2nd and 3rd Defendants also filed a Defence dated **4th September 2014**, and denied the allegations made in the Plaint.

The Plaintiffs filed a Reply to Defence and Defence to Counter Claim and denied the contents of the Counter claim. They averred that they obtained a good title on **16th May 2005**, and had obtained Consent from the **Land Control Board** before the 1st Defendant acquired ownership.

After various Applications, the matter was set down for hearing wherein the Plaintiff called one witness and the Defendants called three witnesses and parties closed their cases.

PLAINTIFFS' CASE

PW1 Kirangi James Ngugi adopted his witness statement dated **26th October 2011**, produced the list of documents and testified that he is a member of the **Mwihoko Mwega Self-Help Group**. That the group bought the suit land in the year **2004**. They then executed the sale agreement and went to Thika Land Control Board on the **6th May 2005**. Further the land was registered in their names through the trustees. However when they visited the land in **2010**, they found their beacons had been uprooted and a sign post stating that it was for sale. They reported the matter to the Chief and when the 1st Defendant was called by the Chief, she also produced a title deed and this was confirmed by search. The vendor who sold to them the suit land was locked in.

It was his testimony that the green card at the lands office showed that the land was in their name and a caution was placed on the **6th of October 2010**, by one of their members. That they have suffered loss as they cannot sell or develop the land.

Further that the group was registered on the **5th of October 2005**, and the title was issued before registration. He further produced the green card which showed that the land was owned by **Wilson Mwangi Ngoni**, who sold the land to them. He testified that there was a restriction by **Githunguri Ranching Co. Ltd** and the 1st Defendant obtained a green card on the **30th of July 2010**, and he was informed that the suit land has two green cards and that their land is Sheet No. 5 and the map is for sheet No. 4 Block 2

1st DEFENDANT'S CASE

DW1 Veronicah Ndinda Kimende adopted her witness statement dated **12th May 2015** and produced her list of documents. She testified that she bought the suit land from **John Maina** on the **5th of July 2010** being **Ruiru/Kiu Block 2/Githunguri 3065**, and she was given the **Share Certificate** for half an acre and that the ballot number was **1717**.

Further that she was issued with a clearance certificate and when she produced it at the Lands Registry, she was issued with an original title

deed on the **16th of August 2010**. It was her testimony that she conducted a search and confirmed that her documents were in order and she

subdivided the land for sale. However she was later informed that the land belonged to a Self Help Group, but when the matter was referred to the Chief office, it was confirmed that she was the legitimate owner. She testified that map no. 5 has no land on the ground. Further that some of the Plaintiffs were arrested and she confirmed that the Plaintiffs received registration before hers. She acknowledged that she did not attached the **Land Control Board** consent

DW2 Leonard Leitich adopted his witness statement dated **25th August 2015**, and testified that the suit land has two green cards one for the Plaintiffs and it was opened on **8th April 2003**, and the second one in the name of the 1st defendant opened on **30th July 2010**. He testified that **Githunguri Ranching Co.** was the original owners, though he did not have any documents to show they are the owners. Further that the instant case is a case of double allocation. It was his testimony that the land initially belonged to the government and it was transferred to **Wilson Mwangi** as per transfer dated **15th March 2005**. That there is also Consent for Land Control Board. He informed the Court that the 2nd green card was opened on the **30th July 2010**, and that he did not get supporting documents. He confirmed that the green card has discrepancies in the number of maps but that there cannot be two maps sheets unless there is duplication of the plots.

Further that the Company used to send transfers directly to its members and that both green cards are legitimate.

DW3 Peter Mwangi Muturi adopted his witness statement dated **10th October 2018**, and testified that he is the Secretary of **Githunguri Ranching Co. Ltd.** That the suit property, **Ruiru/Kiu Block 2/ (Githunguri)/3065** is for ballot number **1717** as per their records and it belonged to **Wanjiku Njoroge** who later transferred to **Isaak Wanyoike**, who transferred it to **John Mburu** and subsequently to the 1st Defendant. He testified that all documents were transferred to the 1st Defendant and only the share certificate changed. That clearance certificate and transfer form were forwarded to the lands office.

He acknowledged that he did not produce the minutes of the transfer of land to various persons and that they started to issue the receipt when the land was sub divided. He confirmed that he had the register and that **Wilson Mwangi Ngoni** was **not** a member of Githunguri Ranching Company.

After the close of *viva voce* hearing the parties filed rival written submissions which the Court has now carefully read and considered.

The Court finds the issues for determination are;

- 1. Who between the Plaintiff and the 1st Defendant is the bonafide owner of the suit property***
- 2. Is the Plaintiff entitled to the orders sought***
- 3. Is the 1st Defendant entitled to the orders sought***
- 4. who should bear the costs of the suit***

1. Who between the Plaintiff and the 1st Defendant is the bonafide owner of the suit property

There are two titles that have been issued with regards to the suit property. The First title is the one issued on the **6th May 2005**, to the Plaintiffs and the 2nd title deed is the one issued to the 1st defendant on the **16th of August 2010**. Further it is also not in doubt that there are two green cards to the same title of land one indicating that the Plaintiffs are the owners of the suit land while the other one indicates that the 1st defendant is the owner of the suit land having been transferred to her by **Githunguri Ranching Company Limited**. The existence of the two green cards which have been termed legitimate by DW2 has been acknowledged. Further DW2, the Thika Land Registrar also acknowledged that there was a double allocation of the suit land.

This land was registered under the **Registered Land Act Cap 300 (now repealed)** and under **Section 27** of the said **Act**, a registration of a person as a proprietor of land vests in that person the absolute ownership with rights and privileges appurtenant thereto. See **Section 27(a)** of the said Act which states:-

“Subject to this Act -

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

Further, these rights can only be defeated by operation of law. See **Section 28 of the said Cap 300(repealed)** which states;-

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever”.

Further **Section 26** of the **Land Registration Act 2012** provides that a certificate of title is a *prima-facie* evidence that the person registered as such is the **absolute** and **indefeasible** owner of the said land.

However, there can be no two absolute owners and a parcel of land cannot be held by two persons who have two separate titles in their respective names unless they are joint holders or the persons are tenants in common. This is not the case herein. Further, there are also

instances where a certificate of title can be impeached;- such as if the title was acquired through **fraud, misrepresentation** or **illegally**. For the purpose of this case, the court will consider **Section 143(1)** of the **Registered Land Act (repealed)** which provides:-.

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake”.

In order for a proprietor of property to prove that he is the *bonafide* owners of a suit land, he must be able to prove that he acquired the property lawfully and that the process through which the land was acquired can be traced. See the case of **Hubert L. Martin & 2 Others ... Vs... Margaret J. Kamar & 5 Others[2016] eKLR**, where the Court held that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

DW2 testified that the suit land originally belonged to the **Githunguri Constituency Ranching Company** and that it was common practice that all the dealings of the Company were sorted at the Company and the member would only come to the Land office to acquire a title Deed. Further DW3 testified that he was the Secretary to the Company and gave the process through which a member would acquire proprietorship and that the same involved balloting and then the member would be given a share certificate and clearance certificate and that is what the member would take to the land registration for the registration of their title.

The Plaintiffs have averred that they bought the suit property from one **Wilson Ngoni** and to this effect they produced a sale agreement and couple of receipts evidencing that indeed they did follow the due process. Further DW2 in his evidence confirmed that he was able to get documentation that pertained to the transfer of the suit property to the Plaintiffs and that the same was in order. This Court is therefore satisfied that the process of transfer of the suit land from the said **Wilson Mwangi Ngoni** was proper and without any defect. However the process to which the said **Wilson Ngoni** got registration has not been explained to this Court. While DW2 testified that **Githunguri Ranching Company Limited**

was the initial owner of the suit property, the said Company has averred that the said **Wilson Ngoni** was never allotted the suit property as he was never given the ballot nor was he given a share certificate nor a clearance certificate. None of these documents have been produced before this Court to show that indeed the said **Wilson Ngoni** had any interest in the suit land. Further the green card produced before Court by the Plaintiffs shows that the said **Wilson Ngoni** acquired the suit property from the government and a Certificate of title was issued but DW2 had alleged that the said **Wilson Ngoni** was never a member of **Githunguri Ranching Co.**

There was no evidence produced to show the process through which **Wilson Ngoni** acquired the suit property. There is no Grant, no nothing. This Court therefore finds and holds that the Plaintiffs have failed to prove how the said **Wilson Ngoni** acquired proprietorship as he was not called as a witness. As the root of his registration cannot be explained, it then follows that he did not have any proper title to pass to the Plaintiffs and therefore their title is impeachable due to lack of lawfulness. See the case of **Elijah Makeri Nyangw’ra ...Vs... Stephen Mungai Njuguna & Another (2013) eKLR** where the court held that

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

For the first limb, it appears to me that the title of the 1st defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1st defendant was a party to the fraud or misrepresentation. Indeed, to me the 1st defendant was an innocent purchaser for value. He was probably conned of his money by the 2nd Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2nd Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2nd defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).

Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.

On the other hand the 1st Defendant has averred that she bought the suit land from **John Maina Mburu** and after that the Company gave her a clearance certificate and then she went to the Lands Registry in Thika wherein she was issued with a title deed. DW3 in his testimony stated that

he was the Secretary to **Githunguri Ranching Co.** and that from their records, the 1st Defendant was the owner of the ballot number that

pertains to the suit property. Further that the suit property initially belonged to **Wanjiku Njoroge** who passed it on to **Isaac Wanyoike** who also passed it to **John Maina Mburu** and eventually it was passed on to the 1st Defendant. This Court has seen the exhibits produced in Court and they confirm that indeed the said **Wanjiku Njoroge** was the initial owner and she had been issued with a share certificate. Further the 1st Defendant was also issued with a share certificate and clearance certificate.

From the above evidence, the Court finds that the 1st Defendant has satisfactorily explained the root of her title. It is also evident that DW2 confirmed that the green card over the title held by 1st Defendant was legitimate, then the process through which she acquired the title was lawful. It is not lost on the Court that the fact that there are documents missing might just be a mishap on the part of the Lands Registry as it is clear in this instant case that the Lands Registry was disorganized and caused hell of a mess.

Having found that there is no fraud that has been proved on the part of the 1st Defendant, this Court therefore holds and finds that she is the lawful proprietor of the suit property. Though the Plaintiffs had the suit

land legitimately transferred to them, the person who transferred the suit land to them did not have a good title that could be transferred to the Plaintiffs. The root of the title held by the said person who sold the suit property to the Plaintiffs could not be properly traced without a break in the chain.

2. Is the Plaintiff entitled to the orders sought?

The Plaintiffs had sought for various declarations and orders amongst them a permanent injunction and an order that the 1st Defendant acquired the suit property illegal and damages for trespass and mesne profit. However this Court has found and held that the Plaintiffs have failed to prove that the 1st defendant acquired the suit property by fraud or misrepresentation. Therefore the Court finds that the Plaintiffs are not entitled to the orders sought. Having held that the 1st defendant is the lawful registered proprietor of the suit land, then the Court finds that the Plaintiffs have failed to prove their case on the required balance of probabilities and consequently their claim is not merited and cannot be granted.

3. Is the 1st Defendant entitled to the orders sought

In her Counter Claim the 1st Defendant had sought for various orders amongst them the cancellation of the Plaintiffs' title. The Court has held that 1st Defendant holds a good title. Therefore, this Court finds that 1st Defendant is entitled to the orders sought.

Having found that the 1st Defendant is the lawful owner of the suit property, then the court proceeds further and directs that the Plaintiffs title herein be cancelled and the Land Register be rectified as provided by **Section 143(1)** of the **Registered Land Act (repealed)** and later captured in **Section 80(1)** of the **Land Registration Act**, which 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.”

For the above reasons, the Court finds that the 1st Defendant is entitled to the prayers sought in the Counter-Claim.

4. Who should bear the costs of the suit

Under Section 27 of the Civil Procedure Act, costs are normally awarded at the discretion of the court. Though in most case, costs are awarded to the successful litigant, the court finds that the circumstances of this case militates that the court goes against that norm. Consequently, the court directs each party to bear their own costs.

Having now carefully analysed the available evidence, the court finds that the Plaintiffs' suit is not merited and it is dismissed entirely. However the court finds that the 1st Defendant's case has been proved as per the required standard and it is allowed entirely in terms of prayers no.(a), (b) & (c) of the Counter Claim. However on costs, each party to bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 29th day of November 2019.

L. GACHERU

JUDGE

29/11/2019

In the presence of

Mr. Ondaga holding brief for M/S Waiganjo for Plaintiffs

M/S Wangui holding brief for Mr. Omulama for 1st Defendant

No appearance for 2nd Defendant

No appearance for 3rd Defendant

Lucy - Court Assistant.

Court – Judgment read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

29/11/2019