



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO.224 OF 2017**

**(FORMERLY NAIROBI ELC NO.1471 OF 2014)**

**GRACE WAIRIMU NJIHIA.....PLAINTIFF**

**VERSUS**

**JOANINA WAIRIMU MBURU.....DEFENDANT**

**JUDGMENT**

By a **Plaint** dated **20<sup>th</sup> November 2014**, the Plaintiff herein brought this suit against the Defendant and sought for the following orders;

- 1. A Declaration that former Title No.Ruiru/Kiu Block 2/2627 was validly subdivided vide the mutation from dated 11<sup>th</sup> April 2011 and cancelled.***
- 2. A Declaration that the subsequent subdivisions resulting from Title No.Ruiru/Kiu Block 2/2627, cancelled being Titles Ruiru/Kiu Block 2/7658, 2/7659, 2/7660 2/7661, 2/7664, 2/7665, 2/7666, 2/7667, 2/7668 and Ruiru /Kiu Block 2/7669 were registered legally and valid.***
- 3. A permanent mandatory injunction restraining the Defendant whether by himself, her servants, agents, assignees and/or nominees or whomsoever under or through her with her authority from interfering, dealing with .selling, transferring, charging, trespassing and or alienating and/or having any other registrable dealings whatsoever encumbering in any other manner at all that property known as formerly Title No. Ruiru/Kiu Block 2/2627 cancelled and the subsequent subdivisions resulting from Title No. Ruiru/Kiu Block 2/7658 2/7659, 2/7660.2/7661,2/7664,2/7665,2/7666,2/7667,2/7668 and Ruiru /Kiu Block 2/7669 in Ruiru area.***
- 4. General Damages***
- 5. Costs of this suit and interest at Court rates.***
- 6. Any other or further relief that this Honourable Court may deem fit and just to grant.***

In her statement of Claim, the Plaintiff averred that she bought the ten suit plots that were curved from the original **2/2627**, from one **Lucy Wanjiru**, and **Catherine Wanjiru Kanja** and **Margaret Mathew Ndungu**. She averred that she conducted due diligence and applied for transfer consents and subsequently the titles were issued and registered in her name. She then disposed off **eight** plots and remained with **two** plots. However on the **25<sup>th</sup> of October 2014**, the Defendant trespassed on the suit premises and removed the beacons erected on the subsequent subdivisions and unless restrained, the Defendant will continue inciting and preventing any suitable development to be undertaken in respect to the suit premises.

The suit is contested and the Defendant filed a Defence and Counter claim dated **17<sup>th</sup> February 2015**, and sought for the following orders:-

- 1. A declaration that the title No. Ruiru Block 2/2627 was illegally obtained and the subsequent subdivisions resulting from Title No.Ruiru/Kiu Block 2/2627 cancelled being 2/7658, 2/7659, 2/7660, 2/7661, 2/7664, 2/7665, 2/7666, 2/7667, 2/7668 and Ruiru/Kiu Block 2/7669 were illegally registered and thus invalid***
- 2. The Costs and interests of this suit.***
- 3. Any other relief that this Court may deem fit to grant.***

In her statement of defence, the Defendant denied the allegations made in the Plaintiff and averred that she is the bonafide and registered owner of the suit property having bought it from one **Elijah Wanaina Ngure** on **31<sup>st</sup> January 2016**. Further that she is registered with **Githunguri**

**Constituency Ranching Company Limited** under certificate **No.1101**. That the Plaintiff acquired the documents fraudulently and has continued to trespass on the suit land.

After various Applications, the matter proceeded for hearing via *viva voce* evidence, wherein the Plaintiff gave evidence for herself and called one more witness. The Defendant also gave evidence for herself and called three other witnesses.

#### **PLAINTIFF'S CASE**

**PW1 Grace Wairimu Njihia** adopted her witness statement dated **20<sup>th</sup> November 2014**, and produced the list of documents filed on **20<sup>th</sup> November 2014**, and the other dated **14<sup>th</sup> April 2015**, as exhibits. She testified that she bought seven plots from **Lucy Wanjiru Nganga** and **Catherine Wanjiru Kanja** who had bought the said plots from **Elijah Wanaina Ngure**, the initial allottee and that the Mutation is in their names. Further that she bought three plots from one **Margaret Ndungu**, who had bought the said plots from **Lucy** and **Catherine**. It was her testimony that she conducted a search, applied for **Consent** from the **Land Control Board** after which the suit properties were registered in her name. Thereafter she sold 8 plots and remained with only 2 plots registered in her name. That the Defendant trespassed on the said plots, and put up structure thereon and thus this suit.

Further that she was not shown the titles in the names of the persons who sold her the suit properties though the land was transferred to them. Further that the mutation was approved by the lands office and the title deeds were signed by the Land Registrar.

**PW2 Lucy Wanjiru Ngugi**, adopted her witness statement and testified that she buys and sells land. That she bought the suit property from **Elijah Wanaina Ngure** on **16<sup>th</sup> November 2005**, and that he had the original title. That the sale agreement was prepared by an Advocate which agreement was signed by the Vendor and Purchaser. Later in the year **2011**, they subdivided the land into 12 plots and reference numbers were given after approval by the District Land Surveyor and they later sold 7 plots to the Plaintiff .

She further testified that the title produced in court does not show that the said title deed was issued. She however stated that the title was issued in **1992** and the one she compared with was issued in **2011**. That the land was transferred to them by Elijah but they were never issued with the title deed. That there was an entry in the green cards where it indicated the subdivisions.

#### **DEFENCE CASE**

**DW1 Jonaina Wairimu Mburu**, adopted her witness statement dated **13<sup>th</sup> February 2015**, and stated that one **Elijah Wanaina** sold to her the suit land through a share certificate from **Githunguri Constituency Ranching Company Limited** in the year **2006**. She produced her bundle of documents as exhibit 1. It was her testimony that she entered into an agreement for the purchase of the suit land at **Kshs.95,000/=** after confirmation from the Chairman of the **Githunguri Ranching Company Limited** that the Vendor, **Elijah Wainaina Ngure**, had not sold the suit land to anyone else. Further that the said Elijah thumb printed the agreement and that she was never informed that a title deed existed as she possesses documents of ownership and she has put up a structure in the suit property. It was her testimony that she held a ballot **no.2280** and title **no. 2627** and urged the court to cancel the Plaintiff's title deeds.

**DW2 John Maina Mburu**, testified that he is the Chairman of **Githunguri Ranching Company Limited** and adopted his witness statement. He further testified that from their record, it was clear that on **31<sup>st</sup> January 2006**, the suit land was sold by the original owner **Elijah Wanaina Ngure**, to the Defendant and their offices recorded the transfer. That a clearance certificate and original sale agreement were also surrendered. The transfer was effected and the Defendant was issued with a share certificate. That the ballot number was also issued which translated to title **No.2627**. He further testified that though **Elijah Wainaina Ngure**, applied for a title deed, there is no evidence that he ever received it .However he could not know the exact position as to whether the said **Elijah Wainaina Ngure**, was issued with the said title deed. However the title deed was issued on **22<sup>nd</sup> June 1992**, while the clearance certificate was issued on **6<sup>th</sup> July 1992**, and the Green Card shows that it was signed on the **17<sup>th</sup> February 1992** in the name of the Government of Kenya and on **22<sup>nd</sup> June 1992** in the name of **Elijah Wainaina Ngure**.

It was his testimony that when they visited the offices of the Advocate who is alleged to have prepare the sale agreement, the Advocates denied preparing it and the sale agreement is not genuine as the said **James Kamau Njoroge** who witnessed it was blind at that time.

He further testified that the agreement dated **31<sup>st</sup> January 2006**, refers to a ballot number for title **no.2627**, but the same is handwritten in the agreement despite the fact that the agreement had been type. He further testified that the documents from their offices were not signed and that the Certificate was not signed as the Chairman could not sign without the same being witnessed by the Director of the Company.

**DW3 Robert Mugendi Mbuba**, the Land Registrar testified that he could not find the green card for the suit land. That the only documents that he found from the binder were a letter from the DCI Ruiru, the response to the letter in which they confirmed that they did not have the transfer documents from **Elijah Wainaina Ngure** to **Catherine Wanjiru Kanja** and **Lucy Ngugi** and they could therefore not confirm the authenticity of **Ngure's** title as the original title was not presented for verification. He testified that the absence of the green card means that the title is not registered yet and the confirmation of ownership could only be done by the allocating Company **Githunguri Constituency Ranching Company**.

He further testified that the lands registry is the custodian of the green card and if it is not found, the culpable person is the Registry. He informed the Court that he was unable to confirm whether the land was sub divided as he did not have the history of the land. Further that once subdivision is done, the mother title is closed and new titles are shown and the same is indicated in the subdivisions. That the date the

title deed was issued must be shown.

**DW4 John Wakahau Mbugua**, an Advocate of the High Court of Kenya practising in the name and style **Wakahau Mbugua & Company Advocates**, stated that on the **31<sup>st</sup> January 2006**, one **Elijah Waninana Ngure** in the company of the Defendant instructed him to prepare a sale agreement and that the vendor had share certificate **B3018** and ballot **No. 2280** from **Githunguri Ranching Company Limited** which he gave to the Defendant after payment of the purchase price. That they were accompanied by one **Wanaina Ngure** and **Nyagahu Mwaura**. That he signed the agreement but he did not see any title deed. He further testified that the agreement by the Plaintiffs was earlier than the one he drew and that the number of the title deed was indicated in ink after he had drawn the agreement.

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

After consideration of the pleadings, the available evidence and the written submissions, the Court finds the issues for determination are as follows:-

- 1. Whether the Plaintiff acquired a good title**
- 2. Whether the Plaintiff is entitled to the orders sought**
- 3. Whether the Defendant is entitled to the orders sought**
- 4. Who should bear the costs of this suit?**

**1. Whether the Plaintiff acquired a good title .**

To be able to determine whether or not the Plaintiff has a good title, the root of the title which was acquired by the Plaintiff must be carefully interrogated. It is the Plaintiff's testimony that she bought the suit land from one **Lucy Wanjiru Ngugi** and **Catherine Wanjiru**. For the Court to establish whether the Plaintiff has a good title, it must first establish that the said vendors held a good title which they were capable of transferring to the Plaintiff. See the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR**, where the Court held that:

*'We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register*

It was the evidence of PW2 who is one of the vendors that they bought the suit property from one **Elijah Wainaina Ngure**, who was the owner of the suit property and in that respect they entered into a sale agreement. The sale agreement was produced in court as an exhibit. Further the Court has considered the said sale agreement and finds that it meets the threshold that is required under the provisions of **Section 3(3) of the Law of Contract Act**. The said sale agreement bears the name of the parties, the consideration and the description of the property and therefore it is enforceable.

Further PW2 has alleged that there was a transfer form which was used to transfer the suit property to them and the transfer form has been produced as an exhibit in Court. It is important to note that DW3 **Robert Mbuba** who was the Land Registrar testified that he was unable to find any documents that relates to the issuance of the title deed and the transfer of the suit property to anyone and therefore he was unable to confirm whether indeed any of the said documents were ever issued as he did not have any history of the land to confirm from. The Land Registrar led evidence to the effect that if any of the documents that are meant to be in the custody of the land Registry get lost or the officers are unable to find them, then the officials at the Land Registry would most definitely bear the blame. This Court definitely agrees with these assertions. However it must then be proved that these documents actually existed.

The Court has noted that the Plaintiff has alleged that she conducted **due diligence** and went ahead to conduct an official search at the lands registry. There is no evidence that the official search was ever conducted as the Plaintiff has failed to produce an official search that would confirm that the said **Elijah Wainaina Ngure** was ever issued with the title deed and that he was the registered proprietor of the suit land. Further the transfer form that has been produced before this Court seems to be very contradictory. While the title deed was issued on the **22<sup>nd</sup> of June 1992**, the transfer indicates that it was certified on the **11<sup>th</sup> of July 1992**. It then becomes impossible for this Court to fathom how a certification would have come after a title deed was issued. What would be the essence of the certification and further certified after registration.

The Mutation forms clearly indicates that the instructions to subdivide the suit land were from the registered proprietor of the suit land . **Lucy Wanjiru** and **Catherine Wanjiru** have been listed as interested parties in the Mutation forms. It is not in doubt that the two ladies have acknowledged that they were never registered as proprietors of the suit land and as such there is no way that they would have given instructions to the surveyor to subdivide the land while they were not the registered owners. It is then clear that though the sad **Elijah Wainaina Ngure** was a beneficial owner, the evidence produced before this Court on how he later became a registered owner is not satisfactory as that evidence seems to have so many gaps, thus breaking the chain of tracing the root of the said registration.

It is this Court's findings that the said **Lucy Wanjiru aNgugi** and **Catherine Wanjiru Kanja** never had any interests in the suit land and therefore, they could not pass any good title to the Plaintiff. See the case of **Esther Ndegi Njiru & another...Vs... Leonard Gatei [2014] eKLR** where the Court held that;

*"It would thus in my view follow that if the 2<sup>nd</sup> Defendant did not have a good title in the property he could not pass a good title*

*to anybody else. Were the title still in the name of the 2<sup>nd</sup> Defendant, the Defendant/Plaintiff in the counterclaim would be entitled to challenge the title under section 26(1)(a) of the Land Registration Act on the ground of fraud to which the 2<sup>nd</sup> Defendant was a party. On the first issue I would therefore hold and find that the 2<sup>nd</sup> Defendant to counterclaim did not hold a valid title to the suit property which he could sell and transfer to the plaintiffs."*

## **2. Whether the plaintiff is entitled to the orders sought**

The Court has held and found that the persons who sold the suit land to the Plaintiff did not have a good title and therefore they could not pass a good title to the Plaintiff. In this regard, the Court finds that the Plaintiff is not entitled to the orders sought in the Plaintiff's claim and the Plaintiff's claim is consequently dismissed.

## **3. Whether the Defendant is entitled to the orders sought**

The Defendant has testified that she is the owner of the suit property having bought the same through a sale agreement date **31<sup>st</sup> January 2006**, from the original owner. To this effect DW4 who is the Advocate that prepared the sale agreement confirmed that indeed he prepared the same between the Defendant and **Elijah Wanaina Nguni** who held ballot No. **2280**. This Court having looked at the sale agreement confirms that it meets the requirements of **Section 3(3) of the Law of Contract Act**.

It was the evidence of **DW3** that as the land registry did not have the history of the suit land as no documents existed, then the allocating Company which is **Githunguri Ranching Company Limited** was best placed to give directions on the issue. DW2 who is the current chairman of the Company testified that as per their records, the Defendant is the owner of the suit property after she bought the same from the original owner **Elijah Wanaina Nguni**. His evidence has been corroborated by the letter dated **26<sup>th</sup> January 2015**, from the Company confirming that the Defendant is the registered owner of the suit property. Further DW3 also testified that the ballot that was initially given to the original owner of the suit property is the one that resulted into the suit property. Since the said ballot is the one that was transferred to the Defendant, it would be safe to conclude that the Defendant is the bonafide owner of the suit property.

Consequently, the Court finds and holds that the Defendant is the rightful purchaser of the suit property.

The Defendant has sought for a declaration that the subdivisions carried over the original suit property being **Ruiru/Kiu Block 2/2627** were illegally obtained and thus invalid. Though the Plaintiff has submitted that the certificate of registration is conclusive evidence of ownership, it is also trite that there are instances wherein such titles can be impeached. This Court has already held that the process through which the plaintiff obtained title to the suit land cannot be explained and therefore the title was issued unlawfully. This Court therefore finds that the titles are impeachable and therefore invalid. See the case of **Elijah Makeri Nyang'wara ...Vs... Stephen Mungai Njuguna & Another, (2013)eklr where the Court held that**

*"...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 that 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 or 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 their titles by subsequent transactions."*

Having carefully considered and analyzed the available evidence, the Court finds that the Defendant has proved that the Plaintiff's titles were acquired illegally and she is therefore entitled to the orders sought in her Counter Claim.

## **4. Who should bear the Costs of the suit?**

Though costs are usually awarded at the discretion of the Court, it is evident that costs usually follow the events and this instant the Defendant being the successful party is entitled to the costs of the suit and interest thereon.

The upshot of the above foregoing is that the Plaintiff has failed to prove her case on the required standard of balance of probabilities and consequently the Court finds that her claim is not merited and the same is dismissed entirely. However the Defendant has proved her claim on the required standard of balance of probabilities and the Court finds that her Counter claim is merited and the same is allowed entirely with costs and interest thereon.

It is so ordered.

**Dated, Signed and Delivered at Thika this 29<sup>th</sup> day of November 2019.**

**L. GACHERU**

**JUDGE**

**29/11/2019**

In the presence of

Mr. Kibathi for Plaintiff

Mr. Wanyama holding brief for Mr. Kanyi for Defendant

Lucy - Court Assistant.

**L. GACHERU**

**JUDGE**

**29/11/2019**