



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANGA**

**ELC NO 370 OF 2017**

**PETER NYOIKE GITHUKA (suing in his capacity as the Legal representative**

**of the estate of NJUGUNA CHEGE, deceased) - PLAINTIFF**

**VS**

**GITHINJI WAWERU - 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, MURANGA - 2<sup>ND</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL - 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Vide a plaint filed on the 15/5/17 the Plaintiff sued the Defendants for orders;

a. A declaration that the registration of land parcel LOC4/GATITU/222 (suit land) by the Land Registrar Muranga in the name of Githinji Waweru was fraudulent illegal unlawful and void ab initio.

b. An order directing the Land Registrar Muranga to forthwith cancel the title in respect of LOC4/GATITU/222 issued in the name of Githinji Waweru.

c. A further order directing the 1<sup>st</sup> Defendant that the land LOC4/GATITU/222 be registered in the name of the lawfully appointed administrator (s) of the estate of the late NJUGUNA CHEGE.

d. An order directing the 1<sup>st</sup> Defendant to surrender the certificate of title in respect to the suit land and improperly issued to him to the Land Registrar Muranga for cancellation.

e. Costs of the suit and interests thereon.

2. It is the Plaintiff's case that the suit land was registered in the name of NJUGUNA Chege, his father, now deceased in 1966 after demarcation of lands in the area. Upon registration he settled on the land with his family until his death in 2009.

2. That in 2009 the deceased desired to subdivide the suit land and carried out a search and discovered that the suit land was registered in the name of the 1<sup>st</sup> Defendant, a person unknown to him.

4. He claims that the transfer of the suit land to the 1<sup>st</sup> Defendant was fraudulent illegal and unlawful. He has pleaded particulars of fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.

5. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their defence filed on the 3/7/17 denied the Plaintiff's claim and sought to put him on the strictest proof.

6. By leave of the Court that 1<sup>st</sup> Defendant was served through substituted service. This prompted one Rose Githinji to file an application dated the 11/9/2017 seeking leave of the Court to be enjoined as the administrator of the estate of the 1<sup>st</sup> Defendant.

7. It would appear that this application was not prosecuted.

8. At the hearing the Plaintiff testified and called one witness. He relied on his witness statement filed on the 15/5/17. He stated that the suit land was registered in the name of his father in 1966. He settled on the land with his family till his demise in 2009. Shortly before he met his death he carried out a search on the title for purposes of the intended subdivision and discovered that his suit land was registered in the name of the 1<sup>st</sup> Defendant in 1966, 10 years after he became so registered as owner.
9. Alarmed with the findings he stated that his father lodged a complaint at the chief's office, who in turn wrote a letter to the Land Registrar requesting the title be rectified and reverted to the said Njuguna Chege.
10. After the demise of his father he obtained letters of grant of administration in 2016 and filed suit for the recovery of the suit land. He stated that prior to filing the suit he wrote to the Land Registrar seeking to know how the suit land was transferred to the 1<sup>st</sup> Defendant but the letter did not elicit any response.
11. He informed the Court that he and his family live on the land and the 1<sup>st</sup> Defendant has never set foot on the suit land. That he does not know him.
12. He produced a list of documents dated the 15/5/17 marked PEX No 1-12
13. PW2- Monica Nduta Ndungu testified and informed the Court that she is married to the younger brother of the Plaintiff having gotten married into the family in 1958. That she was present during the demarcation of the suit land in which Njuguna Chege was registered as owner in 1966. That she does not know the 1<sup>st</sup> Defendant, lives on the suit land and that the 1<sup>st</sup> Defendant has never claimed the suit land.
14. All the Defendants did not adduce any evidence at the trial. They were absent although served.
15. I have read and considered the submissions filed by both the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants
16. The key issues are;
  - a. Who are is the registered owner of the suit land?
  - b. Has the Plaintiff proven fraud on the part of the Defendants?
17. Section 26 of the Land Registration Act mandate Courts to take a certificate of title as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the limitations and conditions set by law.
18. The green card on record in respect to the suit land showed that the land was registered in the name of Njuguna Chege in 1966. It was transferred to the 1<sup>st</sup> Defendant in 1977. The register does not disclose the nature of transfer whether by sale or gift.
19. Going by the record the title of the 1<sup>st</sup> Defendant is prima facie evidence of ownership.
20. Section 26 provides grounds upon which a title may be impeached either on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally procedurally or through a corrupt scheme.
21. The Plaintiff has pleaded fraud on the part of the Defendants. the particulars of fraud against the 1<sup>st</sup> Defendant are;
  - a. Causing himself to be registered as the proprietor of the suitland without the knowledge, consent, participation, permission and or authority of the deceased.
  - b. Causing himself to be the registered proprietor of the suitland without obtaining requisite Land Control Board consent.
  - c. Presenting himself to the second Defendant as the genuine owner of the suitland and causing the name of the deceased to be deleted from the relevant Register.
  - d. Failing to cause the reversion of the name of the deceased in the requisite Register when well knowing he had no proprietary or equitable interest in the suitland.
22. Those against the 2<sup>nd</sup> Defendant are;
  - a. Colluding with the first Defendant to register the first Defendant as the owner of the suitland in total disregard of the interest of the Plaintiff's deceased father therein.
  - b. Issuing of the respective title deed to the first Defendant without proper procedure and especially by not first establishing that the requisite Land Control Board Consent had been obtained.
  - c. Transferring the interest in the suitland of the Plaintiff's father without establishing first that the Plaintiff's father had been involved, participated in and or authorized the first Defendant to do so thereby perpetuating an illegality.

d. Deleting, removing and or cancelling the name of the Plaintiff's father from the register or records of the suitland upon relying wholly on false information from the first Defendant.

23. The Plaintiff placed reliance on a letter written by the area chief requesting the Land Registrar to cancel the entries made in favour of the 1st Defendant. The ground for cancellation is that the 1st Defendant was not known to the area chief. There is no law that permits the Chief to order for the cancellation of titles. Further the Plaintiff also relied on a letter dated 31/3/09 that his late father had written to the Attorney General seeking rectification. In the view of the Court the letter is a demand letter to the office in answer the Plaintiff's claim for the suit land and carries no weight in proving the Plaintiff's claim.

24. The Court has to consider whether this is sufficient to prove of fraud, mistake or corrupt scheme as contemplated in Section 26 and Section 80 of the Act. The law is also that the title issued under Section 27 of the repealed Act could only be cancelled as per the provisions of the Registered Land Act.

25. In the case of **R. G. Patel v. Lalji Makanji (supra)**, the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

26. In the case of **Ndolo –Vs- Ndolo (2008) 1 KLR (G&F) 742** the Court of Appeal stated that:

“.....Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

27. The Plaintiff's invite to revoke title must be backed with solid proof of fraud given the right to property is protected under Article 40 and Section 26 of the Land Registration Act. I have analyzed the evidence of the Plaintiffs witnesses and there is no iota of evidence presented before the Court to prove the particulars of fraud stated above.

28. Section 107 of the Evidence Act states as follows;

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

29. It is on record that Njuguna Chege sold the suit land to the 1<sup>st</sup> Defendant on the 4/3/1977. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed the following documents; application for Land Control Board consent dated the 22/10/1976, Land Control Board consent issued to Njuguna Chege on the 2/11/1976 for the transfer of the suit land to Githinji Waweru; The transfer of the suit land from Njuguna Chege to Githinji Waweru dated the 15/2/1977 which was registered on the 4/3/1977. This agrees with the date the title was issued in accordance with the green card adduced by the Plaintiff.

30. The Court agrees with the Plaintiffs Advocate that these documents were not adduced in evidence by the Defendants. The suit proceeded ex parte but they have alluded to the documents in their written submissions. I have always held the view that written submissions cannot take the place of evidence and therefore however cogent the documents may appear they cannot be considered in evidence in this case.

31. That said, it is the finding of the Court that the Plaintiff has not discharged the burden of proof expected of him.

32. In the end the suit fails. It is dismissed with no orders as to costs.

**33. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28<sup>TH</sup> DAY OF NOVEMBER 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of;**

Ms Munyua HB Njoroge Kugwa for the Plaintiff

1<sup>st</sup> – 3<sup>rd</sup> Defendants: Absent

Irene and Kuyiki, Court Assistants