



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 120 OF 2014

WILLIS GITAU NJOROGE.....PLAINTIFF

VERSUS

MONICA WANJIRU GACHIE.....1ST DEFENDANT

COUNTY LANDS OFFICER - NAKURU.....2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit through plaint filed on 8th May 2014. He averred that he is the registered proprietor of the parcel of land known as Kiambogo/Kiambogo Block 2/8273 (Mwariki) having acquired it from Nyandarua Teachers Housing Co-operative Society Ltd. He added that the said property was fraudulently transferred to the 1st defendant by the 2nd defendant and that the 1st defendant proceeded to erect a perimeter fence around the property without his consent. He therefore seeks judgment against the defendants jointly and severally as follows:

- a) *A declaration that the Plaintiff is the lawful owner of Title No. KIAMBOGO/KIAMBOGO BLOCK 2/8273(MWARIKI) (the suit land).*
- b) *A Mandatory Order directing the 2nd defendant to cancel the registration of the 1st Defendant as a proprietor of Title No. KIAMBOGO/KIAMBOGO BLOCK 2/8273(MWARIKI) and thereafter revoke the title issued to the 1st defendant on the 8th of August 2013 and validate that issued to the plaintiff on 7th May 1999.*
- c) *Vacant possession of Title No. KIAMBOGO/KIAMBOGO BLOCK 2/8273(MWARIKI) in favour of the Plaintiff in default an eviction order as against the 1st defendant in respect of all that parcel of land known as KIAMBOGO/KIAMBOGO BLOCK 2/8273(MWARIKI).*
- d) *A permanent injunction to restrain the 1st Defendant either by herself, her agents servants , assigns and/or any other person whatsoever acting at her behest from trespassing at, remaining on, alienating, disposing or in any other way dealing with the parcel of land known as Title No. KIAMBOGO/KIAMBOGO BLOCK 2/8273(MWARIKI), in any manner whatsoever prejudicial to the Plaintiff's quiet enjoyment.*
- e) *An order restraining the 2nd defendant from registering any interest adverse to the plaintiff to the suit land.*
- f) *Costs and interest of the suit.*
- g) *Any other relief this Honourable Court deems fit and just to grant.*

2. The 1st defendant reacted to the plaint by filing a defence and counterclaim. She denied the plaintiff's averments and added that she is the registered proprietor of the suit property. She urged the court to dismiss the plaintiff's case and to enter judgment in her favour for:

- a. *A declaration that the 1st Defendant (now Plaintiff) is the rightful, legal and registered owner of all that parcel of land known as KIAMBOGO/KIAMBOGO BLOCK 2/8273 (MWARIKI).*
- b. *An order of permanent injunction restraining the Plaintiff (now Defendant) either by himself, servants, agents, relatives and/or employees from trespassing, encroaching, alienating, disposing, claiming interest over way whatsoever from interfering, dealing With the suit parcel of land;*

c. Costs of the suit

3. Although the Attorney General filed Notice of Appointment of Advocates on behalf of the 2nd defendant, I have not seen on record any defence filed by the 2nd defendant.

4. At the hearing, the plaintiff testified as PW1 and told the court that he is a farmer and a resident of Nyandarua County. That he was previously a teacher and as such he joined Nyandarua Teachers Co-operative in 1993 by paying registration fee of KShs 1,000 and I was issued with a receipt dated 9th August 1993. The co-operative came up with a housing project which he joined by making various payments including KShs 22,000 on 16th December 1993. On 30th March 1995 the co-operative advised him through a letter of that date to pay for survey. He paid KShs 4,550 on 15th May 1995 and was later allocated plot number 8273 which was a subdivision of Kiambogo/Kiambogo Block 2/69. Ultimately, he was issued with title deed on 7th May 1999 for the plot which became known as Kiambogo/Kiambogo Block 2/8273 (Mwariki). He produced the original of the title deed as an exhibit. He later went to conduct a search at the land registry and was issued with Certificate of Search dated 11th February 2014 which showed that the plot was now owned by Monica Wanjiru Gachie, the 1st defendant herein. He also produced the Certificate of Search. He then instructed an advocate who wrote a letter dated 28th February 2014 to the District Land Registrar. The registrar responded and enclosed a copy of the green card for the property. The green card shows that there are four entries of proprietors of the plot after the plaintiff's name and that the last owner of the plot is the 1st defendant. He also produced the letter and the green card as exhibits. The green card shows that after the plaintiff, one Denis Moseti Obino became registered proprietor. The plaintiff stated that he does not know Denis Moseti Obino and that he never sold the plot to him. He added that he does not know any of the other people listed in the entries in the green card and that upon being allocated the plot, he did not develop it since he did not have funds. He also did not have a caretaker for the plot.

5. Under cross examination, the plaintiff stated that between 1999 and 2013 he was living in Nyandarua and that he discovered that someone was on the suit property in 2013. He only got to know about the people listed in the green card when he conducted a search in 2013. He added that although the property has been developed by the 1st defendant, she is not the owner.

6. PW2 was John Mweri Kinyua. He adopted his witness statement dated 8th May 2014 as his evidence in chief. He stated as follows in the said statement:

I am a male adult aged 42 years and a resident of Nakuru County, Kiti Estate, of PO. BOX 654 and clearly recall the events that led to this suit. I work with Mimwa Commercial agencies, a registered commercial agency within Nakuru Town. On 4th February 2014, I was approached by Mr John Kimani, who is the grandson of Mr Willis Gitau Njoroge to help him locate plot no Kiambogo/Kiambogo Block 2/8273 (Mwariki) which is owned by his grandfather.

We agreed to meet the following day and I requested for all relevant documents that showed ownership, after scrutinizing the papers, we bought the map sheet from the lands office so that we could easily know the physical location of the plot. There was only one parcel of land, that was owned by Nyandarua Teachers Sacco and was situated at pipeline, we proceeded to pipeline to the physical address of the parcel of land and discovered that the plot had already been occupied and there was a house being constructed on the said plot.

We then proceeded to the lands office and did an official search, which showed that the property belonged to one Monica Wanjiru Gachie. Upon making the said discovery, we went to the registrar who instructed us to go to the site through the area chief (Mr Chege) whom we briefed because we had all the original documents. At the site we met a Mr Kariuki who introduced himself as the husband of Monica Wanjiru Gachie and we arranged that the following day we should meet at the registrar's office at Ardhi House with each party carrying their ownership documents (i.e. title deed).

The following day, we met with Monica Wanjiru Gachie with her husband at Ardhi house, but as we were waiting for our turn to enter, they excused themselves that they had other business to do and refused to enter and left. I entered the registrar office and briefed her of the event; she advised me that the only alternative was to report to the CID, Nakuru, because there were four entries in the green card and also pursue the whole matter through court process (civil suit).

We were issued with the copies of the green card on 28th February 2014 and together with the other copies surrendered to our Advocate for further action.

That is all I can state.

7. Under cross examination, PW2 stated that they reported the matter to police and that the police recorded his statement. Despite going back to the police several times, there was no positive outcome.

8. The plaintiff's case was thereby closed.

9. The first witness for the defence was Caleb Wanjala Sunguti, the District Land Registrar, Nakuru. He stated that Kiambogo/Kiambogo Block 2/8273 originated from Kiambogo/Kiambogo Block 2/69. It was subdivided and resulted in parcels 8252 to 8324. The parcel for 8273 was first opened on 19th April 1999 in the names of Nyandarua Teachers Housing Co-operative Society Ltd. It was transferred to the plaintiff on 7th May 1999. Subsequently, it was transferred from the plaintiff to Dennis Moseti Obino on 12th March 2003 and later to Josephat Mwangi Waweru on 14th April 2006; then to Abraham Birundu Nyangoto on 8th November 2006, then to the 1st defendant herein on 8th August 2013. The 1st defendant remains the current owner and was issued with a title deed on 8th August 2013. DW1 produced a copy of the green card for Kiambogo/Kiambogo Block 2/8273 which has 12 entries and another green card for the same property which has 4 entries. The green card with 12 entries shows that the mother parcel is No. 69 while the one with 4 entries shows the mother parcel as No.

11. According to DW1, there was duplicity in the green cards. DW1 also produced two mutations forms for the parcels 69 and 11. Parcel 69 resulted in parcel 8252 to 8314 while parcel 11 resulted in parcel numbers 8263 to 8323. Physically parcels 69 and 11 were on different locations.

10. Under cross examination DW1 stated that the land registry normally keeps copies of all documents used in effecting transfer but in this case he had not found any consent signed by plaintiff to transfer the parcel to Dennis Mosei or any other documents supporting all the transfers of the parcel. On being shown the original of the plaintiff's title deed, DW1 stated that it looked to him as a genuine title. He added that normally when transferring, the original title deed is surrendered to the registry before a new title is issued and that it is not possible that the plaintiff transferred the land to Dennis Mosei without surrendering the original title. He further stated that when transferring a freehold title, there has to be a consent of the land control board, there has to be a properly executed transfer documents together with KRA PIN certificate and copies of ID before registration. The transfer document has to be valued for stamp duty, stamp duty has to be paid. There then follows registration. A new title then has to be issued but before then the original title has to be surrendered. When a transacting party is a corporate entity like Nyandarua Teachers Sacco then a copy of certificate of incorporation has to be provided. He added that a registrar cannot do a valid transfer or make entries without proper documentation and that in this case, it is not clear whether all the procedures were followed. DW1 further stated that the entries in the green card are evidence of activities on the register and that often when records are missing it could be due to misfiling or fraud.

11. Next on the stand was the 1st defendant who testified as DW2. She adopted her witness statement dated 19th August 2014 as part of her evidence in chief. She had stated as follows in the said statement:

That sometimes in August, 2013 my husband Kariuki and I identified a parcel of land that we wished to build our matrimonial home. We proceeded to conduct an official search from the lands office and established that the registered owner was one ABRAHAM BIRUNDU NYANGOTO.

That on 6th August, 2013 I entered into a sale agreement with the said Abraham Birundu Nyangoto and my husband and I agreed that I be registered as the registered owner of the subject parcel.

That sometimes in May, 2014 my husband was accosted by a stranger who introduced himself as a CID officer by the name Mr. Njeru. The said CID officer requested for consultation since some people were laying claim on the suit land. My husband and I visited the CID offices where we tendered documents to prove ownership of the land.

That on 22nd July, 2014 I was served with summons to enter appearance and an application slated for hearing on 23rd July, 2014 and that is when I came to learn of the instant suit and the Plaintiff herein Willis Njoroge Gitau. The Plaintiff herein is a stranger to me and the allegations of fraud, illegality or misrepresentation as alleged in the Plaintiff's plaint are baseless.

That I pray that the Plaintiff's suit be dismissed and that the court grants my prayers in the counter claim.

That is all I can state.

12. She added that she found a "For sale" sign advertising land for sale and called the number in the sign. The person who answered was called Ibrahim Birundu Nyangoto. The "For sale" sign had been there for a while. They agreed to meet with Ibrahim at the plot the following day. They accordingly met. She was present with Kariuki Mwangi, her husband. Ibrahim showed them the beacons and his documents of ownership which showed that he was the registered owner. DW2 carried out a search at Lands Registry the next day which confirmed that he was the owner. The following day, DW2 and her husband returned to the plot to confirm if Ibrahim was owner. An elderly neighbour at the plot confirmed to them that Ibrahim was the owner. DW2 and the seller signed an agreement which was drawn by Munene & Associates. They agreed on purchase price of KShs 600,000 which DW2 paid. Ibrahim came with original title deed, a copy of his national ID, his passport photographs and a copy of his KRA PIN. They also signed transfer and an application for Land Control Board consent. Title was processed in DW2's name. The process of following up the title was entrusted to Munene & Associates. DW2 added that she only got to know Abraham when she called him on phone and met him prior to buying the plot.

13. DW2 added that from the time she bought the plot to when the plaintiff started claiming it, there was a gap of 6 (six) months. She completed construction and moved into the house. She added that she was summoned to CID offices and that some people came to the land and told her husband that they were the sons of the owner of the plot. They came back about two months later in the company of a person who said he was the area chief. DW2 and her husband met at the Lands registry with the persons who were claiming the lands. The CID officer did their investigations and told DW2 that since her name was in the green card there was no case against me.

14. Under cross-examination DW2 stated that she did not inform Abraham that she was summoned by CID about the plot. She added that she surrendered the original title which was in the name of Abraham to the Lands Registry and that the plaintiff should explain how he has his title.

15. Finally, the defence called its last witness, Kariuki Mwangi who testified as DW3. He adopted his witness statement dated 26th August 2014 as his evidence in chief. He had stated therein thus:

That sometimes in August, 2013 my wife and I were in need of a plot to build our matrimonial home. That we identified a plot that was being advertised for sale and called the cell phone indicated. I called the said mobile phone number and talked to a gentleman who informed me that he was the owner and after negotiating on the purchase price, he agreed to sell the parcel at KShs. 600,000/=.

That I proceeded to conduct an official search from the lands office and established that the registered owner was one Abraham Birundu Nyangoto. We proceeded to the firm of Munene & Associates Advocates in the company of the said Abraham Birundu

Nyangoto and executed a sale agreement. The said Abraham executed the transfer instrument and surrendered all the facilitating documents to my wife and I. I decided to have the said parcel registered in my wife's favour the 1st defendant herein which was registered on 6th August, 2013. We immediately commenced developing the subject parcel and have erected our matrimonial home thereon.

We lived peacefully on the suit land until May, 2014 when I was accosted by one Mr. Njeru who informed me that he was a CID officer and asked my wife and I to record statements with the CID to confirm ownership of the suit land which we did.

That on 22nd July, 2014 my wife was served with summons to enter appearance and an application requiring her to attend court on 23rd July, 2014.

That is all I can state.

16. Under cross examination, DW3 stated that they did not invite Abraham to testify in this case since they have all the documents for the plot. Defence case was then closed.

17. Parties then filed and exchanged written submissions. Relying on the provisions of **section 26** of the **Land Registration Act**, the plaintiff argued that he is the registered proprietor of the suit property and therefore entitled to all the rights and privileges in respect of it. The plaintiff further cited the fact that he is still holding the original of his title document as proof that he never transferred the plot to anybody else. He also relied on the provisions of **section 80** of the **Land Registration Act** and urged the court to grant him the relief sought in the plaint.

18. On her part, the 1st defendant argued that she is a bona fide purchaser for value and that therefore her title cannot be impeached on the basis of fraud. She added that there has been no proof of fraud or that she was party to such fraud. She cited the provisions of **sections 26 and 80** of the **Land Registration Act**.

19. In his submissions the Attorney General left it to the court to determine which of the two title documents should prevail. He further argued that the plaintiff had failed to prove any fraud against the 2nd defendant to the required standard.

20. I have carefully considered the parties' respective pleadings, evidence and submissions. The issues that arise for determination are firstly, who as between the plaintiff and the 1st defendant holds a valid title document and secondly, whether the parties are entitled to the reliefs sought.

21. Both the plaintiff and the 1st defendant hold a title document in respect of the suit property and therefore claim entitlement to it. The District Land Registrar confirmed in his testimony that both have titles for the suit property. Unfortunately, the registrar's testimony has not assisted the court to determine who between the two has a valid title. Nevertheless, it is trite that in cases of double titles, parties must go beyond flashing the very title that is under challenge. In **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** the Court of Appeal held thus:

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 is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.

22. From the material on record, the plaintiff has demonstrated that he was member number 760 of Nyandarua Teachers Housing Co-operative Society Limited as far back as 9th August 1993 and that he made various payments to the said society upon which he was allocated and shown the suit property. Ultimately, a title deed was issued to him on 7th May 1999. He produced the title deed in evidence and maintained that he had not sold or transferred the suit property to any other person. That notwithstanding, he was shocked to obtain a green card from the land registry which showed that the suit property was transferred to one Dennis Mosei Obino on 12th March 2003, then to Josephat Mwangi Waweru on 14th April 2006, then to Abraham Birundu Nyangoto on 8th November 2006 and ultimately to the 1st defendant on 8th August 2013. The District Land Registrar perused the plaintiff's title in court and stated that it looked genuine. He further stated that the normal procedure where there is a transfer is that the original title is retained by the registry and marked accordingly. One is therefore baffled as to how transfer could have been registered in favour of Dennis Mosei Obino on 12th March 2003 without the plaintiff parting with his title.

23. On the other hand, the 1st defendant's position is that she purchased the suit property from Abraham Birundu Nyangoto through sale agreement dated 6th August 2013. She did not call Abraham Birundu Nyangoto to testify and there was no evidence tendered on how he acquired the plot. Even the District Land Registrar could not produce any documents supporting the transfer in his favour or any of the alleged transfers from the plaintiff to the other persons listed in the green card.

24. There is no dispute that the plaintiff was the registered proprietor of the suit property as at 7th May 1999, long before the 1st defendant arrived on the scene. Neither the 1st defendant nor the District Land Registrar have demonstrated how the plaintiff lost proprietorship.

25. The 1st defendant argued that she is a bona fide purchaser for value and that therefore her title cannot be impeached. To qualify to be a bona fide purchaser, the 1st defendant would need to satisfy the test in the Ugandan case of **Katende vs. Haridar & Company Limited [2008] 2 E.A.173** cited with approval by our Court of Appeal in **C O Okere v Esther Nduta Kiiyukia & 2 others [2019] eKLR**:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a) he holds a certificate of title;**
- b) he purchased the property in good faith;**
- c) he had no knowledge of the fraud;**
- d) he purchased for valuable consideration;**
- e) the vendors had apparent valid title;**
- f) he purchased without notice of any fraud;**
- g) he was not party to any fraud.”**

26. I found it rather strange that according to the 1st defendant, her first contact with Abraham Birundu Nyangoto was when she saw his contact on a “for sale” notice. She went ahead and called him on phone and ultimately signed a sale agreement dated 6th August 2013 with him. The agreement had provided for payment of the purchase price of KShs 600,000 through bank transfer but this was crossed by hand and replaced with “cash” in handwritten form. Having paid the full purchase price in cash on 6th August 2013, the 1st defendant became registered proprietor with lightning speed on 8th August 2013 and title deed issued to her that very day! Clearly, the 1st defendant either had knowledge of Abraham Birundu Nyangoto’s questionable title or was least bothered by it. Fraud was written all over the transaction.

27. There is a good reason why standard conveyancing provides for a completion period to allow a purchaser to investigate the vendor’s title. A bona fide purchaser would ordinarily only pay a deposit then take advantage of the time between execution of the agreement and completion date to investigate the vendor’s title. To act otherwise would only bring a purchaser within the description offered by the Court of Appeal in **Chemey Investment Limited v Attorney General & 2 others** [2018] eKLR thus:

... As this Court stated in *Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others* (supra), only a foolhardy, and we may add, a careless or fraudulent investor would purchase land such as the suit property “with the alacrity of a potato dealer in Wakulima market.” And further in *Flemish Investments Ltd v. Town Council of Mariakani*, CA No. 30 of 2015, in an appeal where the appellant, who had fraudulently obtained registration of public property in his name, but claimed to be an innocent purchaser for value without notice, this Court stated:

“A bona fide purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, persons, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellant honestly believed that Plot No. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells.”

28. I further note that the 1st defendant acknowledged in her testimony that she became aware of the plaintiff’s claim to the suit property after purchasing it. Despite that knowledge, she went ahead with construction to completion. The haste with which the 1st defendant acted is quite telling. Even after the dispute became subject of police investigations, the 1st defendant did not inform her seller Abraham Birundu Nyangoto or get him to assist with investigations.

29. In view of the foregoing, I am not persuaded that the 1st defendant purchased the property in good faith or that she had no knowledge of the fact that Abraham Birundu Nyangoto’s title is not supported by any transfer or further that she was not party to the fraud that led to Abraham Birundu Nyangoto obtaining title. The 1st defendant is thus not a bona fide purchaser.

30. Although the court is duty bound under **Section 26** of the **Land Registration Act** to accept certificates of title as proof of ownership, such titles can be nullified if they are acquired illegally, unprocedurally or through a corrupt scheme. The section provides:

26. Certificate of title to be held as conclusive evidence of proprietorship

(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.

31. Where a certificate of title is not supported by relevant documents such as transfer then there is prima facie evidence of illegality, procedural impropriety or even corruption. That is because under **Section 9(2)** of the **Land Registration Act** the registrar is specifically required to maintain a register with details supporting all the entries in it. Owing to absence of supporting documents, I find that the 1st defendant's title is clouded by illegality and procedural impropriety and is thus invalid. The 2nd defendant is clearly at fault for introducing into the register and maintaining on the register entries which are not supported by any documentation such as transfers or even consent of the land control board. It follows therefore that the 1st defendant's counterclaim is unsustainable and is therefore dismissed.

32. In the end, I enter judgment for the plaintiff against the defendants jointly and severally as follows:

a) A declaration is hereby issued that the Plaintiff is the lawful owner of Title No. KIAMBOGO/KIAMBOGO BLOCK 2/8273(MWARIKI).

b) The 2nd defendant is hereby ordered to cancel the registration of the 1st defendant as a proprietor of Title No. KIAMBOGO/KIAMBOGO BLOCK 2/8273(MWARIKI) and to register the plaintiff as the proprietor of the said property.

c) The 1st defendant to vacate and grant vacant possession of Title No. KIAMBOGO/KIAMBOGO BLOCK 2/8273(MWARIKI) to the plaintiff within 30 (thirty) days from the date of delivery of this judgment. In default, the plaintiff to evict the 1st defendant from the said property.

d) A permanent injunction is granted restraining the 1st defendant either by herself, her agents servants, assigns and/or any other person whatsoever acting at her behest from trespassing, remaining on, alienating, disposing or in any other way dealing with the parcel of land known as Title No. KIAMBOGO/KIAMBOGO BLOCK 2/8273(MWARIKI), in any manner whatsoever prejudicial to the plaintiff's quiet enjoyment.

e) Costs of the suit and interest thereon are awarded to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 20th day of November 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd defendant

Court Assistants: Beatrice & Lotkomoi