



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO.243 OF 2017

GATHAITE FARMERS CO-OPERATIVESOCIETY LIMITED.....PLAINTIFF

VERSUS

NICHOLAS KIGO NDUNGU.....1ST DEFENDANT

FRANCISCA NJERI GAKUMO.....2ND DEFENDANT

GIDEON KAMAU KARANJA.....3RD DEFENDANT

DAVID NJENGA KARANJA.....4TH DEFENDANT

MARGARET NJERI NJENGA.....5TH DEFENDANT

FELISTER WANJIRU NJENGA.....6TH DEFENDANT

ROSARIA WANJIKU NDERI.....7TH DEFENDANT

FELISTA WANJIRU NDUNGU.....8TH DEFENDANT

MONICA WANGUI NJOROGE.....9TH DEFENDANT

MICHAEL NJOROGE GICHARU.....10TH DEFENDANT

HANNAH NYAMBURA NGUGI.....11TH DEFENDANT

JAMES MAINA MWANGI.....12TH DEFENDANT

AGNES WAITHERA NJUKI.....13TH DEFENDANT

JOEL KIRUKU NJENGA.....14TH DEFENDANT

MARY WAMBUI NDUNGU.....15TH DEFENDANT

SALOME WANGARI KARIUKI.....16TH DEFENDANT

DICKSON MAINA RUKU.....17TH DEFENDANT

LUCY MUGURE KAMAU.....18TH DEFENDANT

JUDGEMENT

1. On the 15/8/16 the Plaintiff filed suit against the Defendants. In the suit the Plaintiff is claiming L.R NO. MAKUYU/MAKUYU BLOCK 11/1086 measuring 6.882 Ha (suit land) from the Defendants. The Plaintiff claims that the 1st and 2nd Defendants fraudulently caused the suit land to be registered in their joint names without the knowledge and consent of the Plaintiff and later subdivided them and transferred to the

3rd-18th Defendants. The Plaintiff has *inter-alia* sought a declaration that the suit land was fraudulently acquired by the Defendants and the same be cancelled and reverted back to the Plaintiff's name.

2. It is the Plaintiffs case that the 1st and 2nd Defendants conspired and deceived the Land Registrar Muranga to fraudulently register the suit property in the joint names of the 1st and 2nd Defendants without its consent and knowledge. That the suit land was subsequently subdivided illegally into various portions and transferred to the 3rd -18th Defendants.

3. The particulars of fraud have been cited under para 4 of the plaint on the part of the Defendants.

4. The Plaintiff avers that it has never sold and or transferred its suit lands to the Defendants

5. Despite service, to the Defendants failed to enter an appearance and file a defence.

6. At the hearing the Plaintiff led evidence and called two witnesses. PW1 – Arcadius Njora Chege testified and informed the Court that he is the chairman and member of the Plaintiff Company having been elected in 1999.

7. He stated that the Plaintiff is the registered owner of the suit land. That the 1st and 2nd Defendants fraudulently transferred the suit land to themselves and caused it to be subdivided and registered in the names of the 3rd – 18th Defendant. He stated that most of the Defendants are relatives of the 1st Defendant.

8. He produced the original title and a copy of green card in evidence.

9. It was his evidence that the suit land was subdivided and Land Control Board obtained for the purpose of settling members. Before the titles were processed by the Plaintiff Company, the 1st Defendant secured new titles for the Defendants without the surrender of the original title which he claims are in his custody. He stated that the titles in the names of the Defendants are illegal.

10. That the Defendants are in possession of the titles.

11. PW2- Absolom Mwangi Nduati introduced himself as the Sub County Cooperative Officer in charge of Gatundu North. He produced a bundle of documents marked PEX No 4. He stated that Arcadius Njora Chege is the current chairman of the Plaintiff having been elected in 1999. That since 1999 the society has held no general meetings contrary to the law that provides that every company/society must have a general annual meeting annually.

12. That the society has 114 members and he produced a list of the same in the bundle marked PEX4. That the society is the registered owner of the suit land.

13. At the close of the hearing the Plaintiff elected to file written submissions which I have read and considered.

14. The key issue for determination is whether the Plaintiff has proved fraud.

15. It is the Plaintiff's case that the 1st and 2nd Defendants caused the subdivision and transfer of the suit land into several parcels and registered them in then names of the 1st – 18th Defendants.

16. Para 4 of the plaint contains particulars of the fraud which interalia includes; deceiving the Land Registrar to that the suit land had been transferred to them; presenting false documents to the said Registrar purporting to be from the Plaintiff; misrepresenting themselves to the Land Registrar as the bonafide officials of the society; obtaining new titles before cancelling the original title; subdividing the suit land without consent of the Plaintiff.

17. In the case of **R. G. Patel v. Lalji Makanji (1967 EA 314)**, 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.”

18. Fraud being a serious charge, it is trite law that it must be pleaded and strictly proved to the standard higher than the balance of probabilities but slightly lower than beyond reasonable doubt. Courts cannot infer fraud from the facts/evidence in a case. The burden of proof lies with the one who alleges fraud to do so. It is the duty of the Court therefore to determine if the Plaintiff has successfully proved fraud on the part of the Defendants.

19. In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA.** (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

20. Section 26 of the Land Registration Act provides two instances where a title can be impeached/challenged. The first is on the ground of fraud and/or misrepresentation to which the person is proved to be privy to and/or a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

21. Going by the above principles it is clear the Plaintiff has pleaded and particularized fraud but has it proved it? The Court notes that the alleged forged documents were not presented before the Court. There were no transfers forged or otherwise placed before the Court to found a claim of forgery. No handwriting expert was called to demonstrate that signatures were forged or falsely uttered; the Plaintiff did not present before the Court the official search of the Registrar of Companies to show who the registered officials of the Company are or were at the time of the alleged transactions. The officer from the cooperative department did not shed any light on who the current officials of the company are by way of an official document. All he stated was that PW1 was the chairman having been appointed in 1999 and that the company has held no meetings since 1999 contrary to the law. Therefore there is no document to show which of the officials misrepresented themselves before the Land Registrar.

22. The Plaintiff did not present to the Court the new titles claimed to be registered in the names of the Defendants. I have perused the copy of the green card adduced in evidence and it shows that the title was registered in the name of the Company on the 4/12/98 and title issued vide GN 15469 of 9/12/11. This would appear to be a gazette notice. No explanation was given why the title was issued through a Gazette Notice. On 8/10/11 the title was closed on subdivision which yielded plot Nos 1218-1239 birthing 22 plots. These titles were not presented to the Court for it to appreciate who the owners are. The Plaintiff Company has claimed land from 18 Defendants. What happened to the other plots? What titles are registered in the names of the Defendants? This detail was not disclosed so much so that the Plaintiff has not created a nexus between the Defendants title and the suit land.

23. In any event the copies of the mutation forms were not presented before the Court to show how the subdivisions were carried out and under whose authority.

24. I have perused the Land Control Board consent in respect to the suit land issued on the 25/5/2000 addressed to the Plaintiff. It refers to an application by the company made on the 15/5/2000. The said application was not presented before the Court. The consent was given for the subdivision of the suit land into 56 plots of 0.1 ha each and 2 plots of 0.4 ha each.

25. There appears to be a variance between the land control board consent and the green card in terms of the sub plots arising from the suit land. The Plaintiff did not offer any explanation at all. The Plaintiff did not call the Land Registrar to explain to the Court the circumstances under which new titles if any were registered while the original title was not surrendered.

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

“(1) 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”.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

27. The burden of proof rested on the shoulders of the Plaintiff to prove its case even where the case is undefended like in this circumstances. Sadly the Plaintiff failed to discharge the burden of proof.

28. A party wins a case on the strength of the evidence placed before the Court and not on the weakness of the evidence or lack of it of the opponent.

29. Going by the evidence and the analysis I am not persuaded that the Plaintiff has proved its case on the standard laid down in the case **Morjaria (supra)** which is higher than standard of probabilities and slightly lower than balance of probabilities.

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

31. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF DECEMBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Wainaina HB for Bwonwonga for the Plaintiff

Waithera Mwangi for the 1st-18th Defendants

Irene and Njeri, Court Assistants