



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 474 OF 2017

(FORMERLY NAIROBI ELC 921 OF 2012)

SAMUEL NJEHIA GITAU.....PLAINTIFF

VERSUS

JOYCE WANJIKU.....DEFENDANT

JUDGMENT

By a **Plaint** dated 27th **November 2012**, the Plaintiff herein brought this suit against the Defendant for the following orders;

a) A permanent injunction to restrain the Defendant by herself, her servants or agents or otherwise from entering or occupying the Plaintiff's property known as Ruiru/Mugutha/

Block 1/T.2517.

b) Costs.

In his statement of claim, the Plaintiff averred that he is the registered owner of the suit property having purchased it from one **Mary Njeri Chege** vide sale agreement dated 4th **March 1997**. That in **September 2012**, the Defendant illegally entered onto the suit property and planted several tree seedlings and unless restrained by the Court, she will continue trespassing on the suit land.

The suit is contested and the Defendant filed a Defence and Counter claim and sought for the following orders:-

a) An order cancelling title number Ruiru/Mugutha/Block 1/T.2517, and dated 27th November 1998, in the name of Samuel Njehia Gitau.

b) General Damages.

c) Costs of the suit.

d) Interest on (b) and (c) above at Court's rates.

She averred that she is the beneficial owner of the suit property having purchased the suit land from one **Alice Wambui Mburu** vide a sale agreement dated 8th **January 2003** facilitated through **Nyakinyua Investment Company Limited**. That she was then issued with a membership certificate number **7867**, allocated under ballot number **2517**. However in the year **2010**, she discovered that the plaintiff was also claiming ownership and the claims were discredited by Nyakinyua Investment Limited.

She further averred that the Plaintiff has unlawfully registered the suit property in her name and particularized fraud and illegality under paragraph 8. It was her contention that she has been in continuous use since the year **2003**, when she purchased the suit property.

The Plaintiff filed a Reply to Defence and Defence to Counter claim in which he denied all the allegations made in the defence and reiterated the contents of the **Plaint** and averred that the purchase from one **Alice** was a purchase from a person with no interest on the suit property. Further that the District Land Registrar was categorical that the Defendant bought the suit land after it had already been sold to the Plaintiff and a title deed issued.

The matter proceeded for *viva voce* evidence wherein the Plaintiff herein

testified and closed his case while the Defendant called two witnesses and closed her case

PLAINTIFF'S CASE

PW1, Samuel Njehia Gitau, adopted his witness statement dated **27th November 2014**, and testified that the suit land is registered in his name having bought it from one **Mary Njeri Chege** in **1997**, after following all the proper procedures. He produced the title deed as exhibit 1, sale agreement as exhibit 2, a copy of the search as exhibit 3 and a copy of the green card exhibit 4. It was his testimony that from the green card one **Alice Ndungu** was never an owner of the suit land. Further that as per his sale agreement the land was allocated at Nyakinyua Company Investment Limited. That he entered into the land in the year 2004 or **2005** and that his neighbor takes care of the land and that one **Joyce** has never been the owner of the suit land.

DEFENCE CASE

DW1 Joyce Wanjiku Kihoti, adopted her witness statement and produced her list of documents as exhibit 1 and marked item 6 as MF1 2. She testified that she bought the suit land on **8th January 2003**, from **Nyakinyua Company Investment Limited** but **Alice Wambui Mburu**, was the shareholder bearing share certificate **no. 7553** signed on **23rd January 2003**, and thereafter she obtained her share certificate **no.7867** signed on **20th February 2004**. It was her testimony that she did not conduct a search as there was no title deed and that she has lived on the suit land since **2003**. Further that when she went to Nyakinyua Investment, the Company stated that they did not recognize the Plaintiff as they did not have his documents. She told the Court that the Land Registrar confirmed that **Mary Njeri Chege**, was the registered owner after the Government of Kenya and that according to the green card the said **Alice** was not an owner. Further that though the Chief Land Registrar asked the Plaintiff to produce his registration documents, he failed to do so. She urged the Court to cancel the Plaintiff's title and allow her Counter Claim.

DW2 Alice Wambui adopted her witness statement dated **8th December 2016**, and testified that she sold the land to the Defendant on the **8th of January 2003**, having bought the land from Nyakinyua Investment before the year **2000**. It was her evidence that the agreements refer to ballot no. **2517**. Further that though she was the owner of the suit property in the year **2000**, her name is not on the Green Card. However, she released the ballot and the share certificate to the Defendant after she sold the suit property to her.

DW3 Lucia Mburu testified that she is a Director of **Nyakinyua Investment** and produced MFI 6 as exhibit. It was her testimony that the Company had a meeting on the **10th of November 2010**, and after deliberations, they noted that the land belonged to **Joyce Wanjiku**. Further that the entry in the Green Card shows that **Mary Njeri** was registered as an owner on the **15th of November 1994** though she was not aware of how the Green Card was prepared.

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

Having considered the available evidence and the submissions, the Court finds the issues for determination are;

- 1. Who between the Plaintiff and the Defendant has a good title?***
- 2. Whether the Plaintiff is entitled to the orders sought.***
- 3. Whether the Defendant is entitled to the orders sought***

1. Who between the Plaintiff and the Defendant has a good title?

It is not in doubt that the suit land has been registered in the name of the Plaintiff. Further that the Defendant also claimed to be the owner of the suit property and averred that she bought the suit property from one **Alice Wambui Mburu**. When a proprietor's title is in question, it is not enough to dangle the certificate of title. The proprietor must go ahead and prove how he acquired the said title. 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”

In this instant the Plaintiff has laid claim to ownership of the suit property and the Defendant has also claimed ownership of the suit property. It is the duty of the court to establish which of the two parties proved that she/he acquired the title property and therefore holds a good title.

The Plaintiff has claimed that he bought the suit property from one

Mary Njeri Chege. In this regard he has produced a sale agreement to confirm that indeed **Mary Njeri Chege** and himself entered into a sale agreement. Further the Plaintiff has produced a title deed that proves that he is the registered owner. He has also produced a Green Card that shows that the suit land was registered in the name of the said **Mary Njeri Chege** before it was transferred in his name in 1997.

The Court has further seen the letter by the Land Registrar dated **16th June 2011**, stating that the ownership of **Mary Njeri Chege** has not been disputed. In her submissions the Defendant has castigated the Land Registrar for coming into conclusions without having any

documents or clearances. However it is the Court's holding that the Land Registrar though did not appear in Court to give evidence, he must have been guided by the letter written by the Defendant who acknowledged that the said **Mary Njeri Chege** was the initial owner of the suit property and that she sold the suit land to Alice who then sold it to her. This Court is guided by the letter dated **25th March 2011**, written by the Defendant herein that was addressed to the Chief Land Registrar. It is this Court's further holding that for the Defendant to pen down that the suit land belonged to the said **Mary Njeri Chege**, that must have been the information she either got from the vendor or the Company. The Land Registrar in his letter which has been produced in evidence by the Defendant confirms that indeed the title deed was issued to **Mary Njeri Chege**, before the same was transferred to the Plaintiff.

While the Defendant claims that no clearance certificate has been produced to show how the Plaintiff got the title deed, it is this Court's findings that once the title deed was issued, the transfer from the said **Mary Njeri Chege** to the Plaintiff did not need a Clearance Certificate. Further the Land Registrar confirmed that the reason as to why their office was unable to get the documents needed for the transfer is because the records had not been filed in the Land Registry for a while. This Court has noted that there is an alleged discrepancy with the date in which the alleged transfer was done. However it has been confirmed by the Green Card produced before the Court that the transfer took place on the **15th of November 1994**.

On the other hand the Defendant having laid a claim to the land, she produced share certificate from Nyakinyua Company Limited that relate to ballot **No. 2517**;- One which was issued to one **Alice Wambui** and another

one that was issued to her. Further this Court has also seen the sale agreement that states that DW2 was selling her plot of land and that the ballot was **2517**. This Court further acknowledges that **Nyakinyua Investment Company Limited** which is the Company that was originally allotted the suit land indeed wrote a letter dated **10th November 2010** and confirmed that the parcel of land belonged to **Joyce Wanjiku Kihuto**. This was confirmed by DW3 in her evidence.

However as already noted above, the party needs to prove how it acquired ownership of the suit property. At the back of this Court's mind is the acknowledgement by the Defendant that indeed one **Mary Njeri Chege** was the initial owner of the suit property and that is how she must have gotten the title deed of the suit property. This fact was never disputed by **Nyakinyua Investment Company**. Therefore DW2 needed to actually prove how she acquired ownership of the suit property from **Mary Njeri Chege** to be able to sell the same to the Defendant. Having established that the said **Mary Njeri Chege** was the initial owner and further that there is no evidence that the suit property was ever transferred from **Mary Chege** to **Alice Wambui**, it is this Court's holding that there is no way that the said **Alice Wambui** could transfer ownership of the property to the Defendant as she did not have any proprietary interest. Further the suit land had already been transferred to the plaintiff and since his title was the first one, then it should prevail. No other title could be given to another party as the

suit was not available for allocation. See the case of **Gitwany Investment Ltd & 3 Others..Vs..Commissioner of Lands, HCCC No.1114 of 2002**, where the Court held that:-

“The first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail”.

It then follows that the Plaintiff has proved that he bought the suit property from the initial owner **Mary Njeri Chege** who had been issued with a valid title deed. In the absence of any evidence to the contrary, the court finds that the Plaintiff holds a good title. On the other hand, the Defendant has failed to prove that she acquired a good title to the suit property as the person who sold the land to her could not transfer title that she did not have and which was in possession of the Plaintiff and thus not available for transfer to another person.

Therefore the Court holds and finds that the Plaintiff is the party that bears a good title and his registration as proprietor is therefore valid and is upheld.

2. Whether the Plaintiff is entitled to orders sought.

The Plaintiff has sought for an order of permanent injunction. This Court has already held and found that he is the duly registered owner of the property. As registration of a person guarantees them all the rights and interest that appertains to the suit land, the Plaintiff's prayers as sought are therefore merited as the Plaintiff holds the title as an absolute owner with all rights and privileges appurtenant thereto. See **Section 27(a) of Cap 300 (repealed)** which states:-

(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.

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

The Defendant has sought for an order of cancellation of the Plaintiff's title to the suit property. The suit land is registered under the Registered Land Act Regime (now repealed). Under **Section 143(1)** of the above Act (now repealed), the register of a parcel of land could only be rectified if the entry was entered through mistake or fraud. See **Section 143(1)** of the **Cap 300 (repealed)** which provides:-

143. (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.

There is no evidence adduced by the Defendant that the Plaintiff acquired the title herein by mistake or fraud. The chain of entries that culminated in the Plaintiff's ownership of the suit property are well documented. This Court cannot fault the Plaintiff's registration.

Consequently, the Court finds that the Defendant has failed to prove his case and show that the Plaintiff's title was acquired either through fraud or that it was acquired unlawfully and therefore she is not entitled to the orders sought.

Having now carefully considered the available evidence and the exhibits thereto, the Court finds that the Plaintiff has discharged his duty of proof of his case on the required standard of balance of probabilities. For the above reasons the Court enters Judgment for the Plaintiff against the Defendant in terms of prayers sought in the Plaint entirely.

However, the Court finds the Defendant's Counter Claim is not merited and it is dismissed entirely with costs to the Plaintiff.

It is so ordered.

Dated, Signed and Delivered at Thika this 6th day of December 2019.

L. GACHERU

JUDGE

6/12/2019

In the presence of

No appearance for Plaintiff

Mr. Juma holding brief for Mr. Simiyu for Defendant

Jackline - Court Assistant.

L. GACHERU

JUDGE

6/12/2019