



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.303 2012

PETER MBUGUA NJOROGI (Suing As The Administrator

And Legal Representative Of The Estate Of GEOFFREY

NJOROGI MUTHEE.....PLAINTIFF

VERSUS

CYRUS WAWERU KAGUNYI.....DEFENDANT

AND

BENJAMIN CHEPKWONY RONO.....3RD PARTY

JUDGMENT

(Suit by the plaintiff seeking cancellation of title of defendant; plaintiff claiming that the suit land was supposed to be registered in name of deceased's estate which he represents; title having emanated from a land buying company; title issued to the Third Party and not the deceased; Third Party selling the land to the defendant through an exchange agreement with land that defendant owned; defendant now registered proprietor of suit land and filing a Third Party notice to revoke the exchange agreement in the event that the plaintiff succeeds; from the evidence, title was supposed to be issued to the deceased and not to the Third Party; Third Party having acquired the title irregularly; defendant not protected by Section 143 of the Registered Land Act; title of defendant cancelled and order issued that deceased's estate be registered as proprietor; defendant entitled to have his land back from the Third Party)

PART A : INTRODUCTION AND PLEADINGS

1. This case was commenced through a plaint filed on 11 November 2008. The plaintiff has brought this suit on behalf of the estate of Geoffrey Njoroge Muthee (deceased). It is his claim that the deceased was the lawful proprietor of the land parcel Nakuru Block 29/618 (Ronda) having purchased it from one James Kanegeni. It is averred in the plaint, that upon purchase, the deceased settled his family on the land including the plaintiff who is his son, and lived on it. It is pleaded that upon his death, his family continued living on the land. It is pleaded that about the year 2000, the defendant obtained title to the suit land, which title the plaintiff only came to know of when the defendant filed a case before the Land Disputes Tribunal in the year 2005 where he was sued. It is the plaintiff's case that the title of the defendant was acquired fraudulently and/or illegally. It is pleaded that on 10 November 2008, the defendant entered the suit land and attempted to remove the plaintiff and other children of the deceased which action prompted this suit. In the case, the plaintiff seeks the following orders :-

- (a) A declaration that the title deed in respect of Nakuru Municipality Block 29/618 (Roda) issued to the defendant was issued illegally and should be cancelled.
- (b) A declaration that the title deed issued to the defendant for the land parcel Nakuru Municipality Block 29/618 (Ronda) is subject to the interest of the estate of the late Geoffrey Njoroge Muthee and the occupation by his children on the suit land.
- (c) A perpetual injunction restraining the defendant by himself and/or his servants, agents, workmen, assigns, or children from entering, occupying, claiming or otherwise howsoever interfering with the plaintiff's (or any of the children of the deceased's) occupation, enjoyment and possession of the parcel of land known as Nakuru Municipality Block 29/618 (Ronda).
- (d) Costs, interest and any further relief.

2. The defendant filed a statement of defence vide which he denied having fraudulently acquired title to the suit land. He pleaded that the plaintiff and the children of the deceased were evicted vide an eviction order issued in the suit Nakuru CMCC No. 927 of 2008. The defendant later enjoined Benjamin Chepkwony Rono as a third party to this suit. In his Third Party Notice, he pleaded that in the event that the plaintiff's suit against him is successful, the Third Party should transfer back to the defendant, the land parcel Nakuru Municipality Block 3/664 (Barut) which he averred that he gave in exchange, in return for the suit land.

3. The Third Party filed a defence through which he contested the plaintiff's case and the Third Party Notice. He pleaded that he was allocated the suit land by virtue of being a member of Kalenjin Enterprises Limited which he later exchanged with the land parcel Nakuru Municipality Block 3/664 previously owned by the defendant.

PART B : EVIDENCE OF THE PARTIES

(i) The plaintiff's Case

4. In his evidence, the plaintiff testified inter alia that his father, Geoffrey Njoroge Muthee died in the year 1996. He stated that the deceased purchased this land on 5 June 1978 from one James Kanegeni and he produced their written agreement and transfer. The transfer identifies the suit land as Plot No. 529. He explained that at the time, the properties were under Kalenjin Enterprises, a land buying company. The original owner of the share was one John Yator, who sold the land to Mr. Kanegeni, who in turn sold the land to the deceased. He stated that upon the purchase, the deceased took possession of the land and built a home and lived here with his family. He stated that in the early 2000s, when survey was being done and titles being issued, the Third Party came to their home and claimed that this was his land. After about two weeks, the Third Party came with police officers and arrested the plaintiff's brother and sister and they were charged with the offence of Forcible Detainer. He stated that they were acquitted. In the year 2005, the defendant sued the plaintiff and his mother before the Land Disputes Tribunal claiming ownership over the suit land. The Tribunal did not decide in favour of the defendant but its decision was quashed by the High Court for want of jurisdiction. His own investigations revealed that there was a fraudulent issuance of titles by some officials of Kalenjin Enterprises. He asserted that it is his father who was entitled to ownership of the suit land as he was recognized by Kalenjin Enterprises and his name entered in their register. He was aware of another parallel register, which he claimed is false, which recognizes the Third Party. He stated that the Third Party was issued with a title deed on 19 June 2000 and the defendant became registered proprietor of it on 29 November 2004, while they were in possession of the land. He stated that the Third Party never attempted to take possession of the land but it is the defendant who attempted to evict them before they filed this suit. In cross-examination, he testified inter alia that he was 23 years old when the family started occupying this property in the year 1978. He testified that his mother died in the year 2005. He was aware that his late mother had complained to the offices of Kalenjin Enterprises, but was not aware that the company resolved the matter in favour of the Third Party. He mentioned that it was a Mr. Yator who balloted for the land.

5. PW-2 was Elijah Kiplagat Kipkemei Chelaite. He is a director and the Chairman of Kalenjin Enterprises. He gave history of the company and averred that it was started in the year 1969 with 4413 members. He himself is an original member. One paid Kshs. 500/= to be a member, but such member could sell his/her shares, in which event, the company would now recognize the purchaser as their member. He testified that the company purchased 3 farms in Nakuru, 2 in Subukia, and 2 in Molo. In Nakuru, the company purchased land in Rhonda (now Block 29); Dundori/Mugwathi Block 2 (Koelel); and the 3rd in Barut (Miti Mingi Mbaruk). The land in Rhonda was shared out in estimated 1/2 acre plots, subject to survey, but persons balloted on the basis of the old plot allocation in the years 1972/1973 and the allottees took possession. The formal survey was done in the year 1997 but there was no change in the ground position. He explained that not all members balloted, for one needed to pay Kshs. 25/=, to be allowed to ballot. However, all those who balloted took possession of their allocations. If the person sold his share, the new owner could continue occupying the land balloted.

6. He gave a history of the suit land. He stated that it was identified as Plot No. 529 and the person who balloted for it is John Kangogo Yator who was an army officer. As an army officer, he was privileged to be allowed to take two ballots and he balloted for Plot No. 529 and No.168. Mr. Yator wished to develop the Plot No. 168, and so as to raise funds, he sold the Plot No. 529 to John Kanegeni, who later sold it to the deceased. The deceased then took possession of the suit land in the year 1978. He stated that these transactions passed through the company offices.

7. He testified that he was chosen to be a Director in the year 2001, and when he took office, he discovered that the land of the deceased had been mistakenly given to the Third Party. He expounded that the Third Party was a member, but did not ballot for any plot in Rhonda, where the suit land is situated. He explained that the shares of the Third Party are in Barut farm and that the allocation for this farm was done in the years 1987/1988. The allocation for Rhonda had already been completed in the year 1972.

8. He testified that upon survey, the Plot No. 529 was given the number 618. In their records, no name is indicated against this plot number, but he stated that the deceased was occupying the plot. He testified that the name of the Third Party was inserted in the year 2000, instead of the name of the deceased, and the Third Party was subsequently issued with title. The directors later discovered this anomaly, and so as to compensate the Third Party, and also probably because he was a serving Chief, they gave him the Plot No. 1533 (Rhonda) and asked him to return the suit land. The Third Party also got his rightful allocation for the land in Barut. He stated that the dispute reached the company offices in the year 2001 and he wrote a letter dated 19 September 2001 to clarify the position. He testified that according to their company register, the Plot No. 618 is of the deceased. He produced the said register as an exhibit. The same register (a typed register) shows that the Third Party is owner of the Plot No. 1533. He refuted the parallel register (handwritten), claimed as genuine by the defendant and Third Party. He was examined on the claim of the Third Party that he purchased shares from one Kipkoske Ngeno, and the documents relied upon by the Third Party. He refuted the documents, which to him, showed shares worth Kshs. 6,000/= and stated that any person who held shares of more than Kshs. 5,000/= was moved to Ngata area to get 20 acres of land.

9. In cross-examination, he more or less asserted his above evidence. He further stated that the name of the deceased was put in the typed register as owner of the Plot No. 618 sometimes in the year 2001. Therefore, there was a blank against this plot number. On the handwritten register relied upon by the defendant and Third Party, he faulted it for being certified by the Chief, and he explained that the Chief has nothing to do with the company and its records. He stated that at some point, the company was run by officials who messed it up and that is how the Third Party got the suit land. He stated that to get title, one needed a clearance certificate from their offices, but he did not know who may have signed the clearance certificate for the Third Party to get title, as he was not in office at the time. He was not aware of

any sale of the suit land by Kipkoske Ngeno to the Third Party. He stated that the Third Party is not an original member but purchased shares from other members. He stated that he was allocated 3.6 acres in Miti Mingi Mbaruk comprised of two plots of land of 1.8 acres each. He stated that when allocation was being done in the other farms, if one had balloted for land in Rhonda, this was deducted, and since the Third Party never balloted for land in Rhonda, he was never deducted any when he was allocated land in Mbaruk. He denied that the Third Party got the suit land from a Task Force set up to oversee allocations of land for the company in the late 1980s. He was categorical that there was no name inserted against the Plot No. 618 in the register, until the year 2000, when the name of the Third Party was inserted.

10. With the above evidence, the plaintiff closed his case.

(ii) The Defence Case

11. The defendant testified and asserted ownership over the suit land. He stated that he exchanged with the Third Party, his land parcel Barut Block 3/2664, for this land. Prior to the purchase, he verified ownership from Kalenjin Enterprises and he was given the handwritten register which was certified by the Chief. The exchange agreement was entered into on 6 March 2001. They got consent of the Land Control Board on 4 November 2004 and the land was transferred to him on 29 November 2004. He stated that when he was first shown the land by the Third Party, there were no beacons. He engaged a surveyor who pointed to him the boundaries within which there was a house which was occupied. He took action against the occupants by going to the Land Disputes Tribunal, and later filing the case No. 927 of 2008, before the Magistrate's court in Nakuru. He stated that he got eviction orders which were executed. He denied having committed any fraud as he simply purchased the land from the Third Party. He stated that in the event that he fails, he wishes to have back his land and Kshs. 80,000/=, which they did not include in their agreement, as his plot had a higher value of this amount.

12. In cross-examination, he mentioned that he knew the Third Party for a long time as he had earlier in the year 1992 exchanged with the Third Party a plot that he owned in Kericho for another plot of the Third Party in Rhonda. He stated that he went to see the suit land about 3 months after their written agreement with the Third Party when they found out that there were no beacons. He therefore did not know the specific location of the suit land. It is about 8 months later that he engaged a surveyor and he stated that he already had title at the time. It is then that he discovered that the house was within the land he had obtained. He then went to the Tribunal in the year 2005 about 1 1/2 years after. He denied that when transfer was done to him, he was already aware of the plaintiff's occupation of the land. Pressed on why he did not effect a transfer from the year 2001, when he claims to have exchanged his land for the suit land, he stated that he did not have money. He conceded that in the year 2002, he was aware of the location of the land and its boundaries and agreed that at the time, the Third Party had title but no suit for eviction was filed. He filed his case for eviction in the year 2008 vide which he sued Geoffrey Muthee (the deceased) although he was aware of his death in the year 2005. He denied colluding with the Third Party to get the suit land.

(iii) Case of the Third Party

13. The Third Party on his part testified that he purchased shares of Kalenjin Enterprises from one Kipkoske Ngeno (also known as Ngeno Mochu) in the year 1987. He purchased two shares from him and 10 shares from his son, one Samuel Kipkemoi Koske. Mr. Ngeno died in the year 1989 and he went to see his family and did an agreement with Mr. Ngeno's wife, whereby Mrs. Ngeno, acknowledged the sale of 12 shares to him. He stated that he brought Ngeno's family to the company to verify the sale after which he paid survey fees of Kshs. 1,000/=. The receipt he produced is dated 28 April 1987. He stated that he was allocated 3.6 acres in Barut and 0.6 acres in Rhonda, which is parcel No. 618, the land in dispute. He stated that he was also given a second parcel of land in Barut, but 0.6 acres of it was taken away for the reason that he had been given 0.6 acres in Rhonda. He did not get a surveyor to point out to him the land in Rhonda, but all the same he processed the title in the year 2000. He was then showed the land by a surveyor but he found an old lady residing in it. He stated that he reported the matter to the company offices and to the police, but no charges were preferred. He testified that he owed the defendant Kshs. 80,000/= for a car that he had purchased from him and to settle this debt they exchanged plots. He mentioned to the defendant that the land was occupied but they verified from the company that he was the one noted in the register (the hand written register). He denied selling the land because he knew that it had an issue. He denied owing the defendant any money as they had settled their debt with the exchange of the land. He refuted having obtained the land illegally and asserted that he got the land in the year 1990.

14. In cross-examination, he stated that when he bought the shares from Mr. Ngeno and his son, the land had not yet been distributed to members and that distribution started in the year 1987. He said that he bought 300 shares with each share being Kshs. 500/= and Mr. Ngeno surrendered to him a "green card" issued by the company. The shares were worth Kshs. 6,000/= and the share certificates were surrendered to him. He did not ballot for a plot and did not know if balloting was ever done. When he bought the land, there were already shareholders on the land but he did not know how they came to occupy the land. He was aware that some occupied 1/2 acre or 1 acre but he did not know when the demarcation was done. He stated that he was allotted the suit land in the year 1990 after an investigation committee had verified his status. He thought that he was given the land because it was vacant and stated that he was put in the register after being allocated the land. He said he paid Kshs. 1,000/= for survey although the receipt showed Kshs. 100/=, and that what was noted on the reverse, a transfer to him, was endorsed by the company. He contended that he only owns one plot in Rhonda, which is the suit land. Pressed, he acknowledged also owning the Plot No. 1533, which he says measures 1/4 acre and situated in Rhonda, which plot he stated that he took occupation of in the year 1992 as a member. He stated that he was given title to this plot because he was in occupation. He got title to it in the year 2005. He denied going to the land with the defendant and denied showing the defendant the land. He stated that he only gave the defendant the title and informed him that there was an old lady in occupation.

15. The Third Party called one Kipkirui Rono as his witness. He testified that he became a member of Kalenjin Enterprises in the year 1969 and a director in the year 2009. He also acted as Secretary from the year 2009 to 2012 and had access to company records. He testified that the Third Party purchased 12,000 shares from Kipkoske and he was given land in Rhonda and Barut. He stated that he was given 5.4 acres in Barut, and 0.6 acres removed, as he had gotten a similar acreage in Rhonda. He stated that in Rhonda, a few members balloted for land but majority were allocated the land that they occupied. He was not aware how the Third Party got allocated the land. He stated that titles were issued according to the handwritten register (the one impugned by the plaintiff) although he stated that he did not know its source. He denied that the plot belongs to the plaintiff and stated that it was legally given to the Third Party. According to him, to demonstrate membership, one exhibited the Share Certificate and paid up receipt for survey and the "green card" meant nothing.

16. Cross-examined by counsel for the plaintiff, he stated inter alia that he has 3 shares, each share being of Kshs. 500/=. He stated that land

was first distributed in the year 1978 and the first farm distributed was that in Bahati although he did acknowledge that people in Rhonda were allocated land in the years 1971/72. One stood in the land he wished to occupy, and was allocated the land, and the plot number written by the surveyor in the receipt. One paid Kshs. 50/= for each share. He stated that the Third Party held 12000 shares. He acknowledged that no member was entitled to two plots in Rhonda, and if you had a lot of shares, you would be allocated land elsewhere, less the acreage of any plot given at Rhonda. You could only have two plots through purchase. Re-examined, he averred that if the Third Party held 6,000 shares, he would be entitled to 21 acres of land in Barut.

17. With the above evidence the Third Party closed his case.

PART C : SUBMISSIONS OF COUNSEL

18. All counsel filed their written submissions which I have considered in full.

19. In his submissions, counsel for the plaintiff inter alia submitted that the evidence of the plaintiff is well supported by that of his witness. He submitted that the interest of the deceased was recognized by the company. He further submitted that the deceased having been in possession, he had overriding rights under the Registered Land Act. He relied on the case of *Mwangi & Another vs Mwangi (1986) KLR 328*, and *Public Trustee vs Wanduru (1984) KLR 314*. He submitted that the 3rd party never balloted for land and there was no basis for him being registered as owner of the suit land. He submitted that the defendant cannot be protected as the process leading to his registration is suspect. He relied on Section 26 of the Land Registration Act, 2012 and the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another (2013) eKLR*. He submitted that the protection given to title does not extend to property that has been unlawfully acquired and relied on the case of *Isaac Gathungu Wanjohi & Another vs Attorney General & 6 Others, Petition No. 154 of 2011 (2012) eKLR*.

20. On the part of the defendant, counsel submitted that the defendant is an innocent purchaser for value and that he was not aware that a third party had settled on the land at the time of purchase. He submitted that no fraud has been proved against the defendant and that the defendant's title is protected by Section 26 of the Land Registration Act, 2012. He relied on the case of *George Ted Osewe Odero & 3 Others –vs- Pauline Adhiambo Raget & 5 Others (2016) eKLR* and *Samuel Kamere vs Land Registrar Kajiado (2015) eKLR*. He submitted that the defendant did a search of the title and followed it up with a visit to the company offices to verify ownership and that he paid valuable consideration for it when he exchanged his parcel of land for the suit land. He relied on the case of *Shimoni Resort vs Registrar of Titles & Another (2016) eKLR*.

21. On the part of the 3rd Party, it was submitted inter alia that the Third Party purchased two shares from Kipkoskei Ngeno which enabled him to be allocated the suit land. It was submitted that this was corroborated by PW-2. It was further submitted that PW-2 contradicted himself when he stated that the name of the 3rd Party was inserted in place of the name of the deceased. It was submitted that when his name was inserted, PW-2 was only an ordinary member. It was submitted that there is no evidence that the 3rd Party acquired his title by way of fraud and that Section 26 of the Land Registration Act, 2012, does not apply. It was also submitted that there was no evidence that John Yator ever held shares in Kalenjin Enterprises. Counsel submitted that the title issued to the 3rd party and transferred to the defendant was properly obtained and that the plaintiff's suit should be dismissed.

PART D : ANALYSIS AND DECISION

22. The dispute herein is tripartite. The plaintiff has sued the defendant who is the current proprietor of the suit land so that his title may be cancelled, and in place thereof, the estate of the deceased person, which the plaintiff represents, be registered as proprietor. The defendant acquired the suit land from the Third Party, through an exchange of land arrangement, vide which the defendant surrendered title to a land that he owned to the Third Party, and in return, the Third Party transferred to the defendant, title to the disputed land. It is the case of the plaintiff that the defendant ought not to have been registered as proprietor of the said land, and it is their position that the said land was wrongfully allocated to the Third Party and no good title passed to the defendant. The Third Party has asserted that he got good title to the land whereas the defendant on his part has argued that he is an innocent purchaser for value and his title ought not to be revoked.

23. The way I see it, two questions stand out, being :-

(i) Who was entitled to have the land from Kalenjin Enterprises in the first instance?

(ii) If it is the deceased who was entitled to have the land what should happen to the title of the defendant ?

Issue 1 : Who was entitled to have the land from Kalenjin Enterprises ?

24. The main question of fact in this case is who was entitled to have the land from Kalenjin Enterprises in the first instance. The plaintiff has contended that it is the deceased who was entitled to be allotted the land whereas the Third Party has insisted that it was him who was supposed to be allotted the land and that he therefore properly obtained title to the said land.

25. I have gone through the evidence. The plaintiff called Mr. Chelaite, the current Chairman of Kalenjin Enterprises, to give a history of the suit land and to state who was supposed to be issued with title to the same. In his evidence, Mr. Chelaite did state that the suit land, then identified as Plot No. 529, was distributed through a balloting process, and the person who balloted for it was John Kangogo Yator. If that was the case, it follows that if title to the land was to be issued, then the same ought to have been issued to the said Mr. Yator, and subsequent transfers would follow this stream. On his part, the Third Party stated that he got the suit land after purchasing it from one Kipkoske Ngeno. The Third party called Mr. Kipkirui Rono, also a director at Kalenjin Enterprises to support his evidence.

26. I have conflicting evidence from two persons, both of whom are directors of Kalenjin Enterprises, on who was to get the suit land, and which of the two registers presented, is authentic. Ideally, this should not happen, as a company must have consensus on what is its authentic record. This is a matter that Kalenjin Enterprises must sort out, or else there will be confusion within the company itself, on who is supposed

to get land and who is not supposed to get land. It is not a state of affairs that should be allowed to prevail, as land is sensitive and emotive, and matters touching on distribution of land within the land buying company need to be resolved with finality. I indeed take judicial notice of several cases filed in this court concerning the allocation of land within Kalenjini Enterprises and I think the company itself needs to come up with one common position after consideration of all factors.

27. In the circumstances of this case, I have heard the witnesses, seen their demeanour and what documents they use to back their respective positions. On my part, I am more persuaded by the evidence of PW-2. He is also the Chairman of the company, and I believe that his stand on company matters must be given more weight than the stand of the Third Party's witness. PW-2 was categorical that the suit land was balloted by Mr. Yator who later sold it to Mr. Kanegeni and who then sold it to the deceased. The company was aware of this transaction but he said that there was no entry made against the plot allocated, and it remained that way, until the name of the Third Party was entered. He stated that this entry was an error, since the name that was to be entered is that of the deceased. They corrected the anomaly by entering the name of the deceased in the typed register, and so as to compensate the Third Party, they gave him the Plot No. 1553. This evidence, to me is credible evidence.

28. The Third Party's witness, Mr. Rono, in his evidence in Chief, stated that he did not know how the Third Party got allocated the land. What he knew, is that he purchased shares from Mr. Kipkoske Ngeno and his name was entered against the suit land in the handwritten register. He of course backs the entries in the handwritten register. He did not deny that some members balloted for land and some were allocated land that they were in occupation of. He also stated that no member was to get to be allocated two plots in Rhonda.

29. If this indeed was the position, and there appears to be consensus that no person was to be allocated more than one plot in Rhonda, then the Third Party cannot justify having two plots, that is the suit land and Plot No. 1533. During cross-examination, he stated that he got the plot No. 1533 because he was in occupation. He was never an original member and he became member because he purchased the shares of Kipkoske Ngeno. It follows then, that if he was in occupation, he could only claim to occupy what was meant to be for Kipkoske Ngeno and nobody else. Since no allocation of two plots was allowed, Kipkoske Ngeno could only have been entitled to occupation of one plot and could get no more than this one plot. The Third Party cannot now claim to be entitled to any more than what Kipkoske Ngeno would have been entitled to. Thus, if he occupied plot No. 1553, because he purchased shares from Kipkoske Ngeno, he could get no other plot apart from this one, unless of course he purchased another plot from another person, which is not the case here. If he was in occupation of the land parcel No. 1553, I do not see how he can claim to have been rightfully allocated the suit land.

30. Moreover, he was never in occupation of the suit land; in fact, he has never occupied it. He stated in his evidence that the suit land was allocated to him in the year 1990. I wonder why he never took immediate possession of it if indeed he was comfortable with this allocation. He indeed never took any step to take possession of the suit land or remove the persons who were in occupation. There is no question that the persons who were in occupation were the deceased and his family, and they had been in occupation for a long time, having taken possession of the share that was balloted by Mr. Yator.

31. I am more inclined to believe the version of PW-2, that the Third Party was allocated the suit land wrongfully, but so as to compensate him, he was allocated the Plot No. 1533. This to me, is the more plausible explanation when you look at all the facts at hand.

32. Thus, upon an assessment of the evidence, I am persuaded on a balance of probabilities, that the person who was meant to be allocated the suit land is George Muthee, the deceased. Owing to an error, or irregularity, deliberate or otherwise, his name was not entered against the plot number of the suit land, but later, the name of the Third Party was inserted. This was later corrected through the typed register. My overall finding following my above reasoning, is that the first title was meant to be issued to the deceased and not to the Third Party.

Issue 2 : Is the title of the defendant liable to be cancelled ?

33. In their submissions, counsel for the plaintiff, defendant and Third Party, argued on behalf of their respective clients. One common thread in their submissions was the interpretation to be given to Section 26 of the Land Registration Act, 2012. However, in my view, the said statute is not applicable to the circumstances of this case as the dispute arose before the Land Registration Act came into being. The case itself was filed in the year 2008 before the Land Registration Act was enacted. It follows that this case is governed by the provisions of the Registered Land Act (repealed by the Land Registration Act, 2012) and the case law flowing from it, as this is the statute under which the title was issued and which was the statute in force when the suit was filed. All cases referred to me by counsel for the defendant and Third party, save for the case of ***Samwel Kamere vs Land Registrar, Kajiado*** (supra) are therefore not relevant to this case.

34. I have already held that in the first instance, title was not supposed to have been issued to the defendant but to the deceased. In my own assessment, the Third Party could not have obtained title without some sort of misrepresentation or outright fraud on his part. He had already been compensated with the land parcel No. 1533, a fact that was certainly within his knowledge, and he ought to have surrendered the title to the suit land, which he did not. His acquisition and/or continued holding of the title to the suit land was therefore an act of fraud on his part. He knew that he was taking away and/or keeping land which he was not supposed to have in the first place.

35. The applicable law in my view is Section 143 of the Registered Land Act, which provides as follows :-

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.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

36. It will be seen from Section 143 (1) that the court, subject to the provisions of subsection 2, can inter alia order a cancellation of an entry in the register if it is satisfied that any such registration (other than a first registration) has been procured through fraud or mistake. Under

subsection 2, the register ought not to be rectified so as to affect the title of a proprietor who is in possession and who acquired the title through valuable consideration, unless the proprietor was aware of the factors that may vitiate the title, or caused, or contributed to them.

37. Now, what we have is not a case of a first registration that may be protected, since the Third Party did not acquire his title through a land adjudication process. Indeed, the first registered proprietor is the Government of Kenya, and not the Third Party. It follows that the proviso to Section 143 (1) which precludes the rectification of the register to affect a first registration does not apply. This is therefore a title that is subject to rectification pursuant to Section 143(1) of the Registered Land Act. There is however the caveat in Subsection 2, which as we have seen, inter alia provides that the title of a proprietor, who is in possession, and who has acquired title through valuable consideration, ought not to be affected unless the person was party to the vitiating factors.

38. In my view, Subsection 2 does not protect the defendant. For protection in subsection 2 to apply, three factors must exist, being :-

- (i) The title holder must be in possession;
- (ii) The title holder must have acquired title through valuable consideration; and
- (iii) *The title holder must not be privy to any fraud or mistake, or contributed to it through his act, neglect or default.*

40. In my view, the defendant does not tick the above three boxes. He certainly is not in possession and has never been. There was an attempt to state that the plaintiff was evicted through an order issued in Nakuru CMCC No. 927 of 2008, and a letter from M/s Nasioki Auctioneers which states that an order of eviction has been executed was displayed. I am however convinced that there was never any eviction that was ever executed. The evidence that I have is overwhelming that the plaintiff and the family of the deceased have never parted with possession of the suit land. Since the defendant is not a title holder in possession, then his title can be affected.

41. There is evidence that the plaintiff did pay valuable consideration for the land, but I doubt if he was completely innocent of the fraud perpetrated by the defendant. First, he was aware of the presence of the family of the deceased on the land. The fact that he hesitated before taking action against them, to me, smacks of a collusion with the Third Party. But it really doesn't matter, and I need not make a concrete finding on this, because he is not in possession and thus his title is subject to be affected if I am convinced that the title was never a good title in the first place, of which I certainly am. The Third Party never had a good title that he could pass to the defendant and the defendant is not protected by Section 143 of the Registered Land Act.

42. In the circumstances of this case, title needs to be restored to the person who ought to have been issued with it in the first instance, and that is to the estate of the deceased. The register must be rectified to reflect that the right proprietor of the suit property is the estate of the deceased. The plaintiff's suit against the defendant must therefore succeed with costs.

43. The defendant has a contingent claim against the Third Party whereby he has asked for return of the title to the land parcel Miti Mingi/Mbaruk Block 3/2664 (Barut) which he gave to the Third Party in exchange for the suit land. Since the plaintiff's claim against the defendant has succeeded, I have no reason not to allow the suit by the defendant against the Third Party, as the consideration given by the Third Party has totally failed, and the defendant needs to be taken back to the position that he was in before their transaction over the suit land. There was mention in his evidence of an additional Kshs. 80,000/= but I am unable to take this into consideration, since in his Third Party notice, the defendant only asked for return of the title to the land parcel Miti Mingi/Mbaruk Block 3/2664 (Barut). He can only get what he pleaded, for the Third Party will not have had a chance to contest any further award beyond what he was notified in the Third Party notice. The defendant is also entitled to be indemnified by the Third Party, of the costs that he will pay to the plaintiff.

44. I believe that I have dealt with all issues in this case and now make the following final orders :-

- (i) That a declaration is hereby issued that as between the plaintiff, defendant and the Third Party, it is the estate of Geoffrey Njoroge Muthee which is the rightful proprietor of the land parcel Nakuru Municipality/Block 29/ 618 (Ronda).**
- (ii) That the title of the defendant to the land parcel Nakuru Municipality/Block 29/618 (Ronda) is hereby cancelled.**
- (iii) That an order is hereby issued that the register of the land parcel Nakuru Municipality/Block 29/618 (Ronda) be rectified so as to reflect that the proprietor of the said land is the Estate of Geoffrey Njoroge Muthee.**
- (iv) That the defendant and Third Party are hereby permanently restrained from entering, being upon, taking possession, or entering into any dealings over the land parcel Nakuru Municipality/Block 29/618 (Ronda).**
- (v) That the title of the Third Party, Benjamin Chepkwony Rono to the land parcel Miti Mingi /Mbaruk/ Block 3/ 2664 (Barut) is hereby cancelled and an order is hereby issued to the District Land Registrar, Nakuru, to have the defendant, Cyrus Waweru Kagunyi, restored as the registered proprietor of the said land.**
- (vi) That the plaintiff shall have costs of the suit against the defendant and the defendant shall have the costs of the Third Party proceedings as against the Third Party.**
- (vii) That upon making good the costs of the plaintiff, the defendant can seek indemnity of the said costs from the Third Party.**

45. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 14th day of February 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In the presence :-

Ms. Kinuthia holding for Mr. Kibet, instructed by M/s Mirugi Kariuki & Co. Advocates , for the plaintiff.

Mr. Wairegi holding brief for Mr. Ngure, instructed by M/s Rubua Ngure & Co. Advocates, for the defendant.

Ms Cheruto holding brief for Mrs. Ndeda, instructed by M/s Ndeda & Associates, for the Third party.

Court Assistant :Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU