



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.144 OF 2012**

**JEREMIAH NJOROGE NJUGUNA .....PLAINTIFF**

**VERSUS**

**CLEMENT NDICHU KIMANI .....1<sup>ST</sup> DEFENDANT**

**SUSAN NJERI NDUATI.....2<sup>ND</sup> DEFENDANT**

**SHADRACK MUREITHI.....3<sup>RD</sup> DEFENDANT**

**JEDIDAH WANJIRU MURINGU.....4<sup>TH</sup> DEFENDANT**

**JOHN MUNIU KAMAU .....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

***(Suit by plaintiff claiming that his land was fraudulently subdivided and transferred to the defendants; defendants having purchased their portions from an agent of the defendant; plaintiff acknowledging that he gave his agent authority to subdivide and sell; no proof of fraudulent subdivision and transfer; cancellation of titles can only be done on clear and cogent evidence; problem of the plaintiff appearing to be a difference over accounts with his agent for which the defendants should not be affected; plaintiff's suit dismissed with costs)***

1. This suit was commenced by way of a plaint which was filed on 27 October 2011. In the plaint, the plaintiff has pleaded inter alia that he was the registered owner of the land parcel Miti Mingi/Mbaruk Block 1/3 (Ndege) measuring approximately 0.73 Ha. He pleaded that in the year 1997, he caused the said land to be subdivided into the land parcels Miti Mingi/Mbaruk Block 1/185, 186, 187, 188, 190, 191, 192, 193, 194, 195, 196, 197, and 198. He has averred that between the years 1997 and 2007, the defendants, without his knowledge or consent, entered into the said parcels of land, took possession and constructed houses. It is his view that this amounts to trespass. He has claimed that the defendants obtained the title deeds to the said parcels of land by way of fraud namely (slightly paraphrased for brevity):

*(a) They knew or ought to have known that the said parcels of land belong to the plaintiff.*

*(b) They fraudulently presented themselves to the Land Control Board to obtain consent to transfer without the knowledge and consent of the plaintiff.*

*(c) They ignored or neglected all efforts by the plaintiff to have them vacate the land or compensate him the value.*

2. In the suit, the plaintiff has asked for the following orders :

*(i) A declaration that the title deeds issued to the defendants were tinged with and obtained by fraud and they be cancelled.*

*(ii) An order for eviction of the defendants from the parcels Nos. 185,186, 187, 188, 193 and 196.*

*(iii) General Damages for trespass from 1997 to the date of judgment.*

*(iv) Costs of this suit.*

3. The defendants entered appearance and filed a joint statement of defence. They pleaded inter alia that they bought the land and settled therein with the full knowledge of the plaintiff and they asked that the case of the plaintiff be dismissed.

4. The plaintiff testified that he was the owner of the land parcel Miti Mingi/Mbaruk Block 1/3 (Ndege) and that he engaged a land broker, one Francis Kabugi Njuguna, to subdivide it into 14 plots and sell them at Kshs. 50,000/= save for 5 plots which he wanted to keep for himself. He stated that his instructions to Mr. Njuguna, were for him to bring transfer forms to him once he got a buyer. He stated that he was surprised to see developments coming up and the defendants in possession. He testified that Mr. Njuguna used to give him money in bits. He filed a case at the Land Disputes Tribunal which ordered the defendants to give him Kshs. 35,000/= for each plot which they never did. He stated that he has no agreement with the defendants, never signed any transfer form to them, and that they never went to the Land Control Board. He was only aware of a sale of three plots which he sold. He asserted that the defendants should each pay him Kshs. 100,000/= for their plots.

5. Cross-examined, he agreed that he had given Mr. Njuguna the task of subdividing and selling the plots. He explained that he had wanted Kshs. 50,000/= per plot, after the broker had deducted his commission, but claimed that he was never paid. He however conceded to having received a sum of Kshs. 350,000/= but complained that it came in bits. He claimed that he was not aware where this Kshs. 350,000/= came from as he did not know that it was the defendants who purchased the plots. He testified that the broker never gave him the identity of the purchasers but only gave him money. He agreed that he had permitted the broker to collect the money but could not tell whether the money that he received from the broker came from the defendants. He also agreed giving the broker his ID card and I noted that he hesitated and did not give a clear answer when it was put to him that he also signed the transfer forms. He complained that Mr. Njuguna never told him that so and so is a purchaser and has paid so much, and therefore he did not recognize the defendants. That is why he went to the plots in issue and asked the defendants to pay him Kshs. 40,000/= as he could not tell who among them had fully paid the purchase price of Kshs. 50,000, but they refused. He conceded to accepting Kshs. 35,000/= from them; some paid him the additional money and he has not sued them, but the defendants refused.

6. The 1st, 2nd, 3rd and 4th defendants testified but the 5th defendant did not. The 1st defendant testified that he purchased the land parcel No. 196 from one Susan Muthoni Mbugua, who had in turn purchased the plot from Bassco Housing Company Limited, the firm of Mr. Njuguna, who was the plaintiff's appointed broker. He stated that he is therefore not aware of the plaintiff's claim against him and he was not aware of any debt owed to him. The 2nd defendant on her part, purchased two plots being Plots No. 187 and 188 from Bassco Housing Company Limited. She paid Kshs. 100,000/= for the plots and her title deed was processed on 11 June 1998. She built a house in one of the plots and later sold them to a 3rd party. As they were arranging for transfer, the 3rd party informed her that the plaintiff had come claiming that he was owed. This resulted in the case before the Land Disputes Tribunal which ordered the purchasers to add Kshs. 35,000/= to the plaintiff but this award was quashed by the High Court. In cross-examination, she testified that she did not do a search prior to the purchase and did not attend any Land Control Board meeting. The broker did everything for her, her role only being to pay the purchase price

which she did. The 3rd defendant on his part also testified that he purchased his plot for Kshs. 50,000/= from Bassco, which he paid in full, was issued with a receipt and later a title deed to the plot No. 185. He moved into the land in the year 1997. In the year 2003, the plaintiff came demanding how he has settled into the land and he showed him his receipt for Kshs. 50,000/=. He was later sued before the Tribunal. The 4th defendant similarly testified that she purchased her plot No. 186 from Bassco Housing Limited. She paid Kshs. 50,000/= and was issued with a receipt. She got her title on 6 August 1997, took possession and built a house. She testified that the plaintiff also has a development on the same original plot and he never stopped her from developing her plot. She stated that the broker never informed them that he was selling on behalf of another person and they only came to know that he was agent when the plaintiff emerged demanding money from them.

7. Both Ms. Omwenyo for the plaintiff and Ms. Njoroge for the defendants, filed written submissions which I have considered. In her submissions, Ms. Omwenyo, inter alia submitted that Francis Kabugi Njuguna, the proprietor of Bassco Housing Company Limited never held title to the original parcel of land. She faulted the fact that he introduced himself as the owner of the land and issued them with a receipt bearing his company's name. She faulted the defendants for not carrying out a search and never entering into any written agreements with the agent. She submitted that the plaintiff testified that he never executed any agreements for sale or transfer to the defendants. She wondered how the defendants could have obtained title. She further referred me to the provisions of the Land Control Act which requires consent of the Land Control Board. She submitted that the agent could only have done what he did, if he held a power of attorney, which he did not. She referred me to the cases of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609B of 2012* and *Esther Ndegi Njiru vs Jane Mugo Wanjiru, Nairobi ELC No. 128 of 2011*. She was of the view that the plaintiff is entitled to the prayers sought.

8. On her part, Ms. Njoroge submitted inter alia that the plaintiff admitted to having instructed his agent to sell the plots and admitted to receiving Kshs. 350,000/= from him. She submitted that the plaintiff at the Tribunal only sought to have more money from the defendants. She pointed out that the plaintiff did not produce the transfer forms or Land Control Board forms to prove that he never signed the same. She wondered why the plaintiff never reported any case of fraud to the police if this was the position. She was of the opinion that no fraud has been proved. She submitted that the plaintiff must have signed the transfer forms and left them with the broker whose work was only to find buyers and have the land transferred to them.

9. I have considered the pleadings, the evidence, the submissions of counsel and all aspects of this case.

10. From the evidence presented before me, it is not denied by the plaintiff that he indeed instructed Mr. Francis Kabugi Njuguna (hereinafter referred to as "the agent") to subdivide his land parcel Miti Mingi/Mbaruk Block 1/3 (Ndege) and sell the resultant subdivisions at Kshs. 50,000/=. If the plaintiff admits to have given the agent the go ahead to subdivide, then it means that the plaintiff must have signed all required documents to have the land subdivided. Upto the point of subdivision, the plaintiff cannot really have any quarrel with anyone. In his evidence, he complained that the agent never informed him who has purchased the subdivisions, who has paid, and how much such person had paid. He actually at that time, never complained that the agent has wrongfully sold the subdivisions without him having signed any consent or transfer forms. Indeed at no time did he ever report to the police or other authorities that his signature has been forged so that the defendants receive title to the portions of land in dispute. Although the Land Disputes Tribunal proceedings were never produced as evidence, it does appear that he only sought an award of additional money, which was given, although the Tribunal did not have jurisdiction and the award was later quashed. Even when he confronted the defendants in the plots in issue, he never complained that he has not signed any transfer forms but only complained that he has not been paid.

11. I find it unusual for the plaintiff to now turn around and allege that he never signed any documents of transfer of his land. I have already mentioned earlier that when asked whether or not he gave out his ID card and signed transfer forms, the plaintiff hesitated and did not give a clear answer.

12. The defendants already have titles in their names and following the provisions of Section 26 of the Land Registration Act, the law presumes that the said titles are genuine. The said law is drafted as follows :-

*26. (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.*

13. It will be seen from a reading of Section 26 (1) that the law presumes that the holder of a certificate of title holds good title to the land. That is why evidence of such title is to be taken by the courts as prima facie evidence that the person named therein is the absolute and indefeasible owner. It follows that the burden of demonstrating that the said title is not a good title, and ought to be cancelled on the grounds mentioned in Sections 26(1) (a) and (b), is placed upon the person alleging that the title held is not a good title. In other words, if I hold a certificate of title, and you don't, I do not need to prove that I hold a good title, it is for you, to prove that I hold a bad title. Proof can only come by way of evidence, and given the emotional attachment that people hold to land, such proof must be concrete and precise.

14. Impugning a title is serious business, for title to land is considered to be sacrosanct. It is not enough for a former title holder to say that he/she did not sign a transfer document, or he/she did not sign a consent document, without the said document being presented in court and proof being tendered that the signatures therein are not authentic, or if the documents are completely non-existent, without calling a Lands officer or other appropriate official, to give evidence that transfer was effected without the necessary documentation being presented. It is not enough for the person alleging that the title holder holds a bad title to merely claim by way of mouth, without anything more, that the title is bad and hope that the title holder will go to lengths to demonstrate why he should be regarded as holding a good title, yet the very person alleging, does not have any title in his name. As I have said, the burden of proof is on the person claiming that the title is bad and that burden must be properly discharged. If that were not to be the case, then anybody can emerge from the blues and simply say that so and so has a bad title, and he will not need to give any other evidence, other than the said statement, for the court to impose a burden for the title holder to prove that he has a good title.

15. In our case, the plaintiff never presented any document to demonstrate that the signatures therein are not his signatures. Neither did he call any land official or other officer to give evidence that the land was transferred to the defendants without there being the requisite documents. Without such proof, I am afraid that I cannot say that the plaintiff has demonstrated to this court that the defendants obtained title irregularly without following the laid down procedures. Ms. Omwenyo cited the case of ***Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another*** to support her submissions. In that case, the plaintiff, held title to certain land and later learnt that the same had been transferred to other parties. He asked for their titles to be cancelled. The person who transferred the property held a purported power of attorney from the plaintiff. In his evidence, the plaintiff did demonstrate, through cogent evidence, that the alleged power of attorney was never signed by him, that the passport used to transfer the land is not his passport, and did demonstrate that he never executed the transfer forms used to transfer the land. That is not the position here. The plaintiff in our case has not tabled the alleged documents that he claims never to have signed and has not given any evidence that no such documents exist. I am afraid that the plaintiff has hopelessly failed to discharge his burden.

16. I get the impression that the plaintiff executed all requisite documents required to transfer land and left everything for his agent to do, his only demand being that he be paid the purchase price. It appears to me that the agent may not have given the plaintiff a good account of what he received, and the plaintiff decided to vent it out on the defendants, which to me was improper. He ought to have sued his agent for accounts and not affect the defendants. Although the due diligence of the defendants was rather poor, there is no evidence that they did anything wrong for them to get title. In their innocence, they believed that the agent was the title holder, but no fault arises out of that ignorance. It seems that the agent was acting for an undisclosed principal but this does not mean that the principal, herein the plaintiff, is not bound by the acts of such agent. The plaintiff has not tabled anything to show that the agent departed from what they had agreed and acted contrary to instructions. A written authority outlining the scope of the agency needed to be produced in this instance and none was produced. But most importantly, and I hope to be forgiven for repeating this, no evidence of any forged documents or absence of documents was ever produced. I am therefore unable to come to the conclusion that the titles of the defendants are not good titles.

17. It is for the above reasons that the plaintiff's case must fail.

18. It is hereby dismissed with costs to the defendants.

19. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 8th day of February 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Ms Elizabeth Omwenyo for the plaintiff.

Mr. Okeke holding brief for Ms. Nancy Njoroge for the defendants.

Court Assistant: Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**