



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 75 OF 2012

THAYU KAMAU MUKUGI.....PLAINTIFF

VERSUS

FRANCIS KIBARU KARANJA.....DEFENDANT

CONSOLIDATED WITH ELC NO. 49 OF 2010

FRANCIS KIBARU KARANJA.....1<sup>ST</sup> PLAINTIFF

MARTHA WAIRIMU WAITHAKA.....2<sup>ND</sup> PLAINTIFF

VERSUS

ISAAC ENTERPRISES LIMITED.....1<sup>ST</sup> DEFENDANT

JORETH LIMITED.....2<sup>ND</sup> DEFENDANT

THAYU KAMAU MUKUGI.....3<sup>RD</sup> DEFENDANT

THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT

THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT

#### JUDGEMENT

1. Francis Kibaru Karanja and Martha Wairimu Waithaka filed **ELC Case No. 49 of 2010** against Isaac Enterprises and Joreth Limited seeking a permanent injunction to restrain the two Defendants or their agents from transferring, alienating, evicting them or in any manner interfering with the parcel of land known as L.R. No. 13330/164 (“the Suit Property”). Further, they sought an order directing the Defendants to register a transfer of the Suit Property to their names and to issue the relevant documents.
2. Francis Kibaru Karanja and Martha Wairimu Waithaka averred that they bought the Suit Property from a shareholder of Thome Farmers No. 5 Limited. They pleaded that to facilitate the subdivision and issuance of titles, Joreth Limited was incorporated to act as the legal owner of L.R. No. 13330 and that it had been agreed that on payment of part of the sum of Kshs. 7 Million later demanded by its advocates, they would take vacant possession of the Suit Property.
3. The Plaintiffs in **ELC No. 49 of 2010** filed their Amended Complaint on 28/11/2012 joining Thayu Kamau Mukugi, the Chief Land Registrar and the Attorney General as the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively. They pleaded fraud against the Defendants and sought an order of cancellation of the title held by Thayu Kamau Mukugi over the Suit Property.
4. Joreth Limited filed its defence on 6/9/2013 denying the Plaintiffs’ claim while contending that there was no nexus between it and Thome Farmers No. 5 Limited. It claimed that it had caused notices to be published in the daily newspapers inviting claimants to take advantage of the consent recorded in **Nairobi HCCC No. 62 of 1992** by paying Kshs. 200,000/= within 6 months so that their titles could be processed but the Plaintiffs did not exploit this avenue. Joreth Limited denied selling the Suit Property to the Plaintiffs and in essence admitted transferring the Suit Property to Thayu Kamau Mukugi.
5. Thayu Kamau Mukugi filed **ELC Case No. 75 of 2012** on 16/2/2012 seeking a permanent injunction to restrain Francis Kibaru Karanja from trespassing onto his property known as L.R. No. 13330/164, the Suit Property, as well as damages for trespass. He claimed he was the

registered proprietor of this land and that Francis Kibaru Karanja had trespassed upon his land and erected a fence and put guards on his property. The court granted a temporary injunction on 17/2/2012 restraining Francis Kibaru Karanja from dealing with the Suit Property.

6. It is not clear whether the pleadings in **ELC Case No. 49 of 2010** were ever served on Thayu Kamau Mukugi. On 28/2/2014 the Plaintiffs filed an application seeking to consolidate **ELC No. 49 of 2010** with **ELC Case No. 75 of 2012** on the grounds that the two suits related to ownership and rights over the same Suit Property.

7. Lady Justice Gacheru gave a ruling in ELC No. 75 of 2012 on 11/11/2014 after hearing the application for consolidation stating that directions would be given after the Executive Officer availed the court file in ELC No. 49 of 2010.

8. A perusal of both court files does not show when the order for consolidation was made. Parties informed this court that the two suits were consolidated and that it was agreed that proceedings would be taken in ELC Case No. 75 of 2012.

9. The issue for determination in these two suits is, who between Francis Kibaru Karanja and Thayu Kamau Mukugi has a superior claim to the plot known as L.R. No. 13330/164?

10. Francis Kibaru Karanja gave evidence at the hearing. He resides in Massachusetts in USA. He adopted his witness statement dated 25/7/2013. He testified that he approached a director of Isaac Properties Limited in 2007, whom he understood to be the owner of this land and expressed his intention of purchasing L.R. No. 13330/164. The director informed him that Thome Farmers Limited owned L.R. No. 13330 before it was subdivided and sold to its shareholders. He told him that once he entered into a sale agreement with Joreth Limited for the purchase of the plot then the advocates for Joreth Limited would transfer the plot to him and his wife.

11. He states that a director of Isaac Enterprises caused to be shown to him a share certificate, copy of ballot paper for allocation of this plot and a copy of the identification card of Abraham Kiarri Mbaru as evidence that the plot was genuinely being offered for sale.

12. Based on this assurance he entered into a sale agreement with Isaac Enterprises Limited which was executed on 27/2/2010. He claims that Isaac Enterprises Limited caused a letter to be written by Joreth Limited confirming that the land belonged to Isaac Enterprises Limited.

13. He was informed that Thome Farmers No. 5 Limited was the beneficial owner of L.R. No. 13330 and that it had been agreed that Joreth Limited would be incorporated as the legal owner of L.R. No. 13330 for purposes of effecting transfers and issuing titles to the individual owners.

14. On signing the sale agreement, he assumed possession of the land. His lawyers forwarded payment of Kshs. 288,000/= to Kimani Kahiro Advocates who were the advocates for Joreth Limited only to learn that the payment should have been made to Njeri Kariuki Advocates. On 17/4/2009 Njeri Kariuki Advocates offered to sell the same plot to him at the cost of Kshs. 7 Million without any explanation which offer he declined since he had already purchased that plot. He was taken by surprise since he had purchased the adjoining plot no. L.R. No. 13330/163 through the same process.

15. He filed ELC No. 49 of 2010 after Joreth Limited refused to transfer the Suit Property to him. He maintains that title over the Suit Property was fraudulently issued to Thayu Kamau Mukugi and that it should be cancelled. In the alternative, he prays that Joreth Limited and Isaac Enterprises Limited ought to be ordered to compensate him for the current market value of the Suit Property.

16. He produced various documents including a copy of share certificate no. 509 for Thome Farmers Limited issued to Abraham Kiarri Mburu; the ballot paper issued to Abraham Kiarri Mburu for plot no. 021; a copy of the undated sale agreement between him and his wife as purchasers and Isaac Enterprises Limited as the vendor; the letter from Kimani Kahiro Advocates to his lawyers dated 25/1/2008 requesting payment of Kshs. 306, 576 for the processing of the title and this firm's letter of 2/9/2008 forwarding the refund of Kshs. 288,000/=; letter from Njeri Kariuki Advocate dated 2/2/2009 in relation to L.R. Numbers 13330/163 and 164 requesting patience as the process of registration was concluded; letter from Njeri Kariuki Advocate dated 16/1/2009 stating that deliberations over L.R. No. 13330/164 were yet to be completed and the letter dated 17/4/2009 offering the option for him to purchase the plots for Kshs. 7 Million; and the letter of 18/8/2009 from this advocate stating that the offer for the sale of L.R. No. 13330/164 stood withdrawn.

17. He relied on a copy of the certificate of lease for L.R. No. 13330/163 together with the transfer for this plot executed by Joreth Limited registered on 13/4/2010. The sale agreement in respect of L.R. No. 13330/163 which is dated 11/4/2008 was entered into between him and Martha Wairimu Waithaka as purchasers and Agnes Waruiru Komu as vendor. The agreement does not mention Joreth Limited.

18. Francis Kibaru Karanja avers that the issuance of title over the Suit Property to Thayu Kamau Mukugi was illegal since a suit was pending in court. He urged the court to dismiss the suit in ELC No. 75 of 2012 and enter judgement in terms of his counterclaim.

19. On his part, Thayu Kamau Mukugi gave evidence that he is the registered proprietor of L.R. No. 13330/164 having purchased it from Joreth Limited in 2010 for Kshs. 5 Million. He was issued with a certificate of title on 6/4/2010. He claims that he was surprised to find the agents of Francis Kibaru Karanja putting up a perimeter wall on his land in 2012 and filed ELC No. 75 of 2012 and obtained temporary orders against him. Previously the plot was fenced with posts which he believed was done by Joreth Limited. He stated that he charged the title over the Suit Property to Kenya Women Finance Trust in 2016.

20. He relied on copies of the title, court order issued in ELC No. 75 of 2012 together with transfer executed by Joreth Limited which was registered at the Lands office on 6/4/2010. The transfer is similar to the one Francis Kibaru Karanja relies on in support of his acquisition of L.R. No. 13330/163 which was also executed by Joreth Limited and registered on 13/4/2010. The purchase price is indicated as Kshs. 200,000/=.

21. The issue of the consideration stated in the transfer was taken up on cross examination by counsel for Francis Kibaru Karanja. The court notes that the same consideration is indicated in the transfer for L.R. No. 13330/163 in favour of Francis Kibaru Karanja.

22. On cross examination, Francis Kibaru Karanja's advocate took issue with the fact that Thayu Kamau Mukugi was 24 years old when he purportedly purchased the Suit Property. He denied being involved in any fraud in the acquisition of the Suit Property.

23. Parties filed and exchanged submissions. Francis Kibaru Karanja bases his claim to the Suit Property on the representation made by Isaac Enterprises Limited and the agreement he executed with this company. He also relies on the representations made by the advocates for Joreth Limited to his lawyers. He did not call any evidence to show the nexus between Isaac Enterprises Limited, Joreth Limited and Thome Farmers No. 5 Limited. He did not prove that Thayu Kamau Mukugi fraudulently acquired the Suit Property from Joreth Limited.

24. The court is persuaded that Francis Kibaru Karanja acquired L.R. No. L.R. No. 13330/163 in the same way that Thayu Kamau Mukugi acquired L.R. No. 13330/164.

25. Under Section 26 of the Land Registration Act, the certificate of title issued to a purchaser of land upon a transfer by the proprietor shall be taken as *prima facie* evidence that the person named is the absolute indefeasible owner and the title can only be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party.

26. The court finds that on a balance of probabilities, Francis Kibaru Karanja has failed to prove that he acquired the Suit Property and dismisses ELC No. 49 of 2010 with costs to 3<sup>rd</sup> Defendant.

27. The court also dismisses the counterclaim in ELC No. 75 of 2012 and enters judgement for Thayu Kamau Mukugi as prayed in ELC No. 75 of 2012. The court declines to grant general damages.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of March 2018.**

**K. BOR**

**JUDGE**

**In the presence of:**

Mr. Nyamweya holding brief for Mr. Maina for the Plaintiff

Ms. Githii for the 3<sup>rd</sup> Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 2<sup>nd</sup> Defendant