



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.101 OF 2017

(Formerly ELC CASE NO.278 OF 2016 – Nyeri)

JULIUS KARIUKI MUIRURI.....PLAINTIFF

-VERSUS-

SMART TOP MEDIA LIMITED.....1ST DEFENDANT

ATLANTA VILLAGE, THIKA.....2ND DEFENDANT

JUDGEMENT

The Plaintiff herein **Julius Kariuki Muiruri** brought this suit against the Defendants vide a **Plaint** dated **7th December 2016**, and sought for the following orders:-

- a) A declaration that the registration of the 1st Defendant and thereafter the 2nd Defendant as proprietors to plot No.Thika Municipality Block 13/427 is null and void, the same be cancelled forthwith, and the Land Registrar Thika do revert the said registration of the said plot into the names of the Plaintiff.**
- b) General damages for fraud.**
- c) Costs of the suit and interest on (b) at court rates till payment in full.**
- d) Any other or further relief that this court may deem fit to grant.**

In his claim, the Plaintiff averred that he is a bonafide purchaser for value for plot **No.Thika Municipality Block 13/427**, which was duly registered in his name on **6th November 2001**. He alleged that on unknown dates, the 1st Defendant using fraudulent and irregular means had itself registered as the proprietor of the suit plot and it did not have any right whatsoever on the said plot and any registration thereof was undertaken **fraudulently**. He particularized the said fraud on **Paragraph 6** of the **Plaint** among them having registered itself as the proprietor of the suit property while knowing very well that the same was registered in the name of the Plaintiff.

He further claimed that on unknown dates, the 1st Defendant purportedly sold the said plot to the 2nd Defendant and the same was transferred to it. Therefore the 2nd Defendant cannot have any lawful ownership of the plot as the 1st Defendant did not have **lawful title, proprietary right** and/or **ownership** that he could sell and/or transfer to the 2nd Defendant. The Plaintiff therefore prayed for an order cancelling the registration of the subject plot to the 1st and 2nd Defendants' names and the said registration do revert into the name of the Plaintiff herein. It was further averred that despite demand and intention to sue, the Defendants have not made good this claim and thus the suit herein.

The Defendants were served with **Summons** through **Substituted Service** as is evident from the **Affidavit of Service** filed on **22nd May 2017** by **Jessee Kariuki Advocates**. Despite the said service, the Defendants failed to enter appearance nor file defence. The Plaintiff sought for **interlocutory Judgement** on **23rd May 2017** and the matter

was set for **formal proof** on **24th October 2017**.

The Plaintiff's Evidence.

PW1 – Julius Kariuki Muiruri gave evidence on **24th October 2017** and adopted his witness statement wholly as his evidence in court. He testified that he is the owner of the suit property **Thika Municipality Block 13/427**, wherein he has a **Certificate of Lease** which he produced as **exhibits 1 & II**. He also testified that some other persons have now claimed the parcel of land and that they even placed a **caution** via **Johathan Ngumo Mbogo Advocates**. The Plaintiff produced documents in support of ownership of the suit property. It was his testimony that the persons who later claimed the suit property are **Smart Top Media Ltd**, the 1st Defendant who were registered after his registration and who later sold the suit property to the 2nd Defendant. He also alleged that there was an attempt to change his name from the suit property and replace it with **Smart Top Media Ltd** as per the **exhibit No.8**. It was his further testimony that he had bought the suit property from one **Loice Odeny**, who had acquired the same in the **year 2001**. However, the 1st Defendant appeared in the **year 2011** even if the Plaintiff had been paying land rates and rent in his name and that he would even carry some activities on the suit property. He testified that at one time, he had attempted to subdivide the land but it was not possible since the Green Card was missing. He therefore urged the Court to cancel the registration of the suit property to the 1st Defendant and later 2nd Defendant. He further testified that due to this case, he has suffered both financially and psychologically and he urged the Court to award him general damages for the said suffering. Further that they have put a slab of perimeter wall all-round the plot and that the Court should allow his prayers.

After the close of the Plaintiff's case, the Court directed that he files written submissions which was done on **5th December 2017**.

The Plaintiff submitted that the suit property is owned by him and that the Court should declare so. He relied on various provisions of law such as **Article 40(1)** of the **Constitution of Kenya, 2010** which provides:-

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

He also submitted that he is the rightful owner of the suit property and has his **rights** and **interests** protected as provided by **Section 24(a)** of the **Land Registration Act, 2012** which provides:-

Subject to this Act—

(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;

He also submitted that his registration can only be challenged and defeated as provided by **Section 80(1)** of the said **Land Registration Act** which provides:-

Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

The Plaintiff submitted that he has never sold, transferred nor undertaken any transaction in respect of the suit property which would defeat his ownership of the same. It was his further submissions that any purported transfer, sale or conveyance of the suit property to the Defendants herein or third parties was done **irregularly, fraudulently** and it is therefore **null** and **void** and the Court should declare it so. He urged the Court to cancel the said purported acquisition and registration of the suit property to the Defendants herein as the same is illegal as the parcel of land is still registered in the name of the Plaintiff herein.

The Plaintiff further relied on various decided cases among them the case of **Bornes C. Koskei...Vs...Geoffrey K. Korir, Nakuru HCCC No.7 of 2004**, where the Court held that:-

“...I find that the Plaintiff having proved by documentary evidence that she is the lawful owner of the parcel of land known as Nakuru/Olenguruone/Kiptagichi/610, the Defendant having neither challenged her claim in an way nor attending court to explain what interest if any, he has over the same hereby allow the suit and enter Judgement for the Plaintiff as prayed in the Plaint with costs of the suit and interest thereon at court rates”.

Further, he relied on the case of **Nairobi Permanent Markets Society & 11 Others...Vs...Salima Enterprises & 2 Others (1997) eKLR**, where the Court of Appeal held that:-

“The Company as the registered proprietor of the suit land therefore is the absolute and indefeasible owner thereof. There is no allegation that the Company was party to any fraud or misrepresentation perpetrated upon the appellants in the acquisition of the suit land. There is no averment in the Plaint that the Company's rights of ownership cannot be interfered with by the Appellants. The Company paid Kshs.1 Million Shillings Stand Premium and is liable to pay to the parties to observe status quo was clearly an interference with the Company's rights of ownership and the Learned Judge was justified in vacating that Order”.

Therefore the Plaintiff submitted that the Court should uphold the proprietary rights of the Plaintiff to his parcel of land by allowing his claim against the Defendants with costs and interest.

This Court has now carefully considered the pleadings and the annexures attached thereto. The Court has also considered the adduced evidence and the exhibits produced in court. Further the Court has carefully read and considered the written submissions, the cited authorities and the relevant provisions of law and the Court renders itself as follows:-

There is no doubt that **Julius Kariuki Muiruri**, the Plaintiff herein is registered as the leaseholder of **Thika/Municipality Block 13/427**, the suit property. The Certificate of Lease was issued on **6th November 2001**, and the said registration was done under the **Registered Land Act, Cap 300 Laws of Kenya, (now repealed)**.

In the above repealed Act, on **Section 27(b)** provides that:-

“The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease”.

The above position has been replicated in **Section 24(b)** of the **Land Registration Act**, which provides:-

Subject to this Act—

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Therefore as a registered holder of a certificate of lease, the Plaintiff has **rights** and **privileges** appurtenant thereto, and these rights shall not be defeated except as provided by the law. See **Section 28** of the **Registered Land Act, Cap 300** (now repealed) and **Section 25** of the **Land Registration Act 2012**, capture the above position. The said Sections provide as follows:-

Section 28 Registered Land Act, Cap 300(now repealed).

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register”

Section 25, Land Registration Act 2012

25.(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

It is evident that the Plaintiff's Certificate of Lease was issued on **6th November 2001** for a term of **99 years** from **1st January 1999**. Therefore as a registered leaseholder, the Plaintiff had his **rights protected** by the law. Such right included right to **quiet enjoyment** of the said parcel of land, **occupation** and **disposal** of the same at his will. However, the Plaintiff has alleged that the **1st Defendant** also obtained a **Certificate of Registration** in the **year 2011** and later sold the parcel of land to the **2nd Defendant**. Though the Defendant's never appeared in Court nor produced their Certificates of registration, it is evident from the caution lodged by **Jonathan Ngumo Mbogo Advocate** and his accompanying **Statutory Declaration** that the **1st Defendant** had obtained registration of the suit property in its name and it sold the same to the **2nd Defendant** who was issued with Certificate of lease on **1st September 2011**.

The 1st Defendant's Certificate of lease was not produced in court to

confirm when it was issued. However, the Plaintiff alleged that it was issued in the **year 2011**. The Plaintiff's Certificate of lease was issued in the **year 2001** specifically **6th November 2001**. Given that the Plaintiff's Certificate of lease was issued on **2001** which is earlier than the 1st Defendant's Certificate of lease, then the Court will rely on the maxim of equity which states that :- "**When two equities are equal, the first in time prevails**". 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".

Therefore, the Plaintiff's registration is the first in time and it is the one that will prevail.

Having found that the Plaintiff's registration over the suit property is the one that prevails, then the subsequent registration while the Plaintiff was holding a valid Certificate of Lease is **null and void**. The said registration could have been obtained by either **fraud, mistake or omission**. As provided by **Section 80(1)** of the **Land Registration Act**, the said subsequent registration is liable to cancellation and thus rectification of the Register. The said Section provides:-

Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

Having now carefully considered the available evidence, the Court finds that there is **sufficient evidence** to warrant this Court to **grant an Order of Rectification** of the register herein wherein the **Certificate of Lease issued to the 1st Defendant and later to 2nd Defendant should be cancelled forthwith and the suit property herein should remain registered in the name of the Plaintiff as per his Certificate of Lease issued on 6th November 2001**.

The Plaintiff has also suffered loss and damages due to the inconveniences caused by the subsequent registration of the suit property into the names of the Defendants herein. The Court awards **general damages to the Plaintiff** in the tune of **Kshs.500,000/= payable by the Defendants herein**.

The **Plaintiff** is the **successful litigant** and is **therefore entitled to be paid costs of the suit plus interest thereon**.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved his case on the balance of probabilities. Consequently, the **Court enters Judgement for the Plaintiff against the Defendants jointly and severally in terms of prayer No.(a), (b) and is awarded general damages of Kshs.500,000/= plus costs and interest at court's rates as prayed in prayer No.(c)**.

It is so ordered.

Dated, Signed and Delivered at Thika this 9th day of April 2018.

L. GACHERU

JUDGE

In the presence of

M/S Cheserek holding brief for Mr. Jesse Kariuki for Plaintiff

No appearance for 1st Defendant

No appearance for 2nd Defendant

Esther - Court clerk.

Court – Judgement read in open court in the presence of the above advocate.

L. GACHERU

JUDGE

9/4/2018