



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 72 OF 2012**

**JACOB NGIGI KANINI.....PLAINTIFF**

**VERSUS**

**JOSEPH MWANGI KAMAU (Administrator of the**

**Estate of WILSON KAMAU ITUME (DECEASED).....1<sup>ST</sup> DEFENDANT**

**THIKA LANDLESS CO-OP SOCIETY LTD.....2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR THIKA.....3<sup>RD</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. In the plaint filed on 13/2/2012, the Plaintiff seeks cancellation of the 1<sup>st</sup> Defendant's title over L.R. No. Thika Municipality/Block 24/1299 ("the Suit Property") and a declaration that the Suit Property belongs to him. He also seeks a permanent injunction to restrain the Defendants from interfering with the Suit Property together with general damages for trespass and costs of the suit.

2. The Plaintiff claims that he was registered as the owner of the Suit Property which was allocated to him by the 2<sup>nd</sup> Defendant by virtue of ballot No. 24756 in respect of plot No. 1256 dated 4/9/1994. He claims he duly paid the survey fees and the title fees following which a title deed over the Suit Property was issued in his name on 19/6/1995.

3. He was surprised in June 2011 when he visited his plot and found the 1<sup>st</sup> Defendant constructing a house on it. The Plaintiff claims the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently caused his land to be registered in the 1<sup>st</sup> Defendant's name on 20/6/1995.

4. The 1<sup>st</sup> Defendant claims in his defence that the Suit Property was allocated to his deceased father and that his father was lawfully issued a title deed over the Suit Property. He claims he has been paying rates and denies the allegations of fraud set out in the plaint. He pleads that the court lacks jurisdiction to hear and determine this suit in light of Section 76 of the Cooperatives Societies Act and urged the court to dismiss the suit with costs to him in his defence filed on 28/2/2012.

5. Both the Plaintiff and 1<sup>st</sup> Defendant testified in this case. They also produced documents. The Plaintiff withdrew the suit against the 2<sup>nd</sup> Defendant on 2/7/2012. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not participate in these proceedings.

6. The Plaintiff stated that he was member number 1177 of Thika Landless Cooperative Society Limited, which has ceased to exist. He paid Kshs. 100/= on 13/9/1994 as the membership fee for Thika Landless Cooperative Society Commission. He was allocated ballot number 24756 for plot number 1256. He also paid Kshs. 2500/= to this Cooperative on 13/9/1994 on account of survey fees for part 2. On the same date, he paid Kshs. 2500/= being title and administration fees to that cooperative society. He paid a further sum of Kshs. 500/= on 5/6/1995 for the clearance certificate of plot number 1256 part 2. All the receipts which he produced in court were issued by Thika Landless Cooperative Society. Thika Landless Cooperative Society Limited issued a plot clearance certificate to the Plaintiff dated 7/6/1995 confirming that it had no objection to him developing the plot. A title deed was issued to the Plaintiff on 19/6/1995.

7. The Plaintiff wrote to the Land Registrar on 6/6/2011 complaining that when he applied for an official search for the Suit Property it showed the name of Mr. Wilson Kamau Itume as proprietor of the Suit Property and not his own name. He urged the Land Registrar to trace his green card. He wrote a letter dated 16/6/2011 to the Permanent Secretary, Ministry of Lands seeking his assistance over the missing green card and expressing concern over the issuance of another title over the Suit Property on 20/6/1995. He further complained to the Ministry of Lands vide his letter of 30/6/2011.

8. He also produced letters from the Ministry of Lands dated 1/9/2011 and 22/12/2011 addressed to Mr. Wilson Kamau Itume which invited him to avail documents showing how he came to own the Suit Property. The Permanent Secretary, Ministry of Lands wrote to the District Land Registrar, Thika on 19/7/2011 asking him to investigate how Mr. Wilson Kamau Itume was issued a title deed before he was cleared by the company.
9. The letter dated 27/1/2012 addressed to the Chief Makongeni Location, Thika, which the Plaintiff produced in court requested the Chief to stop the person who was developing the Suit Property until the dispute was resolved.
10. The Plaintiff maintains that he has a valid title even though the green card was removed from the binder and a title deed issued to the 1<sup>st</sup> Defendant on 20/6/1995, which was a day after his own title was issued. He confirmed that Mr. Wilson Itume was summoned several times but he never appeared at the Land's office and the matter could not therefore be resolved. The Plaintiff confirmed that the Cooperative Society was wound up.
11. He never raised any complaints with the cooperative society since he already had a title over the Suit Property. He stated that he was in possession of the land from 1995 until 2000. He used to go to the plot once a month and would cut up the grass growing on it and carry it on a pickup to go and feed his cows. He claimed he had dug a septic tank on the Suit Property.
12. He conceded that the 1<sup>st</sup> Defendant was on the land and had put up a house despite there being a court order stopping both parties from developing the Suit Property. He stated that the court issued orders restraining dealings on the Suit Property on 16/10/2013.
13. The 1<sup>st</sup> Defendant is a son of Wilson Kamau Itume. He testified that his father was a *bona fide* member of Thika Landless Cooperative Society Commission which was later renamed Thika Landless Cooperative Society Limited. He stated that his father was member number 630 and that he was allocated plot number 1256 P1 after balloting. Upon his father's demise, his assets were distributed among his beneficiaries after they filed the succession cause.
14. He stated that he did a search on 11/1/2011 which confirmed that the plot belonged to his late father. He also stated that he has been paying rates. He produced a copy of the plot clearance certificate dated 27/6/1995 confirming that his father had paid Kshs. 500/= for the certificate. He also produced copies of the payment requests for property rates showing he made payment in 2012 for the Suit Property. He produced the copies of the grant of letters of administration and the certificate of confirmation of a grant together with a copy of a search dated 11/1/2011.
15. The issue the court has to determine is whether the Plaintiff has proved his claim. In his submissions, the 1<sup>st</sup> Defendant argues that his rights are protected under Section 24 (a) of the Land Registration Act. The Defendant submits that the Plaintiff failed to prove that the late Wilson Kamau Itume fraudulently acquired the title to the Suit Property.
16. The Plaintiff relies on Section 26 of the Land Registration Act which states that a certificate of title issued by a registrar is to be taken by all courts as *prima facie* evidence that the person named as proprietor of that land is the absolute and indefeasible owner of that land subject to the encumbrances, easements, restrictions and conditions endorsed on the certificate and that the title is subject to challenge only on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.
17. The Plaintiff relies on the case of **Mariah Rossetta Cadozo (suing through he appointed agent Masaai Mara Sopa Lodge Limited v Robert Kibangendi Otachi and Another** [2017] eKLR where the court referred to the case of **Christopher Mwangi Kioi v. The Chief Land Registrar and 2 others** (unreported) wherein which the court held that where there are two certificates of title issued and in existence, unless the court is shown the invalidity of the first title, the first title remains valid and the second title should be cancelled.
18. The court also referred to the case of **Munyu Maina v Hiram Gathio Maina Civil Appeal No. 239 of 2009** where the court held that when a registered proprietor's root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership since the title is challenged and the proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including interests which would not be noted in the register.
19. The Plaintiff submits that when two equities are equal, the first in time must prevail and relies on the case of **Wreck Motors Enterprises v Commissioner of Lands** C.A. No. 71/1997 where the court held that like equity keeps teaching us first in time prevails so that in an event where two titles were issued 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, the first in time must prevail. It must prevail because without cancellation of the original, it retains its sanctity.
20. Both the Plaintiff and 1<sup>st</sup> Defendant hold titles issued on 19/6/1995 and 20/6/1995 respectively. The Plaintiff's title was first in time. The Plaintiff's title shows the land measures 0.0906 hectares while the Defendant's title shows the land measures 0.0871 hectares. The plot clearance certificate produced by the 1<sup>st</sup> Defendant was issued on 27/6/1995 after the title deed had been issued on 20/6/1995. The 1<sup>st</sup> Defendant failed to show how his father acquired the Suit Property.
21. On a balance of probabilities, the court finds that the Plaintiff has proved his claim and enters judgement as prayed in the amended plaint dated 3/7/2012.

Dated and delivered at Nairobi this 7<sup>th</sup> day of May 2018.

**K. BOR**

**JUDGE**

In the presence of: -

Ms Muchui the Plaintiff

Mr. Muchoki holding brief for the 1<sup>st</sup> Defendant

Mr. V. Owuor- Court Assistant

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