



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.335 OF 2017

ECOVENTURES HOLDINGS (K) LTD.....PLAINTIFF

VERSUS

TERESIA WANJIRU NGUGI.....1ST DEFENDANT

THE LAND REGISTRAR - THIKA.....2ND DEFENDANT

JUDGEMENT

By a **Plaint**, dated **15th March 2017**, the Plaintiff herein **Ecoventures Holdings (K) Ltd** sought for Judgement against the Defendants jointly and severally for:-

- a) An Order directing the cancellation of the registration of Teresia Wanjiru Ngugi as proprietor of Juja/Komo Block 1/1413.**
- b) A revocation of the Title Deed issued to the 1st Defendant on 16th November 2010.**
- c) Costs of this suit.**

In the **Statement of Claim**, the Plaintiff averred that in its daily business caused the subdivision of the land parcel **No. Juja/Komo Block 5/472** into several plots of approximately **0.030 Hectares**. Further, it was averred that the Plaintiff's intention was to sell the sub-plots to public and therefore the office of 2nd Defendant opened new registers for the parcels in the Plaintiff's name. It further averred that unknown to it, the 2nd Defendant did cause on **12th November 2010**, title deed in the name of the 1st Defendant to be issued despite the fact that the Plaintiff as the registered owner had not executed a transfer over the parcel of land **Juja/Komo Block 1/1413**, a resultant of the mutation of **Juja/Komo Block 1/472**. Further the Plaintiff averred that the 1st Defendant is not known to it and it has never sold any parcel of land to her but the purchaser of **LR.No. Juja/Komo Block 1/1413** is one **Kenneth Mathenge Ndungu**. Therefore the registration and issuance of title deed in the name of 1st Defendant is a fraudulent act of the two Defendants herein jointly and severally. The Plaintiff further averred that the 1st Defendant though registered as the owner of the suit property has never set foot on the parcel of land which has been fenced off with a brick-fence by **Kenneth Mathenge Ndungu**. The Plaintiff therefore urged the Court to enter judgement in its favour.

Though the Defendants herein were served with Summons to Enter Appearance together with the **Plaint** as per the Affidavit of **Service of Maina Irungu**, the Process Server, they both failed to Enter Appearance nor file their defences. The matter was therefore set for **Formal Proof** on **12th February 2018**. The Plaintiff herein called one witness to support its claim and produced various exhibits.

Plaintiff's Case PW1 – Nelson Njunge Gatonye, gave evidence on behalf of the Plaintiff and stated that he is one of the Directors of the Plaintiff herein. He further testified that the business of the Plaintiff is to purchase land, subdivide the same and later sell to willing buyers. It was his testimony that they also process titles for the willing buyers. It was his further testimony that the suit property **Juja/Komu Block 1/1413**, is a subdivision of **Juja/Komo Block 1/472**, which had been subdivided into various plots. That after subdivision of the initial parcel of land, they sold the resultant subdivisions to various purchasers. He stated that the suit property was sold to **Kenneth Mathenge Ndungu**. That they were given a **subdivision plan** which they used for the transactions.

Further that the said subdivisions were in the name of the Plaintiff and they sold **Juja/Komo/Block 1/1413** to **Kenneth Mathenge Ndungu**. That after the said purchaser finalized paying for the plot and a search was carried out, the **Land Registrar –Thika**, requested for the original title. Then when a search was carried out, they noted that the suit land was registered in the name of **Teresia Wanjiru Ngugi**, who was not a purchaser from the Plaintiff. There was also a **caution** in favour of one **Joseph Wakori Ndirangu**. It was his testimony that he did not know any of the above named persons and therefore **Teresia Wanjiru** was a stranger to the Plaintiff. He confirmed that the suit property was sold to **Kenneth Mathenge** and the Court should cancel the Certificate of title in favour of **Teresia Wanjiru** and revert it to **Kenneth Mathenge**

Ndungu the *bonafide* purchaser.

After the close of the Plaintiff's case, *written submissions* were filed on **5th April 2018**. The Plaintiff urged the Court to allow its claims as the registration in favour of the 1st Defendant was obtained fraudulently. The Plaintiff relied on **Section 80(1)** of the ***Land Registration Act*** which provides:-

80(1) 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.

This Court has now carefully considered the available evidence and the exhibits produced in court. The Court has also considered the written submissions and the relevant provisions of law and finds as follows:-

Though the matter herein came for ***Formal Proof***, the Plaintiff needed to call evidence and prove its case on the required standard of balance of probabilities. See the case of ***Koinange & 13 Others... Vs...Koinange (1986) KLR 23***, where the Court held that:-

“The standard of proof of such an allegation of fraud ought to be higher than that of a balance of probabilities”.

The Plaintiff has alleged that it owned the initial suit property ***Juja/Komo Block 1/472***, which was later subdivided into various portions of land and sold to various purchasers. That such subdivision was ***Juja/Komo Block 1/1413***, and the same was sold to one ***Kenneth Mathenge Ndungu***. Indeed the Court has seen the subdivision scheme and parcel ***No. Juja/Komo Block 1/1413*** is a subdivision of ***Juja/Komo Block 1/472***.

It was the Plaintiff's evidence that even after the said ***Kenneth Mathenge Ndungu*** finalized payment of the purchase price, he was not issued with the title deed immediately. However, when he tried to carry an official search in ***February 2017***, the ***Land Registrar-Thika*** asked for the copy of the original title deed. The Court has indeed seen the said receipt with the writing ***“Bring current T/D”*** for ***Juja/Komo Block 1/1413***. The Plaintiff further testified that when an official search was eventually carried out, it showed that one ***Teresia Wanjiru Ngugi***, the 1st Defendant herein was the registered proprietor of suit property as from ***12th November 2010***, and a ***caution*** was placed in favour of ***Joseph Wakori Ndirangu*** on ***18th April 2012***.

However, Plaintiff further testified that the said ***Teresia Wanjiru Ngugi*** was a stranger to the Plaintiff as she never purchased any parcel of land from the Plaintiff herein. Further the Plaintiff also testified that ***Joseph Wakori Ndirangu*** was not known to it and cannot claim beneficial interest on the suit property. Indeed the certificate of official search produced in court shows that the registered proprietor of ***Juja/Komo Block 1/1413*** is ***Teresia Wanjiru Ngugi***. The Plaintiff has alleged that the said registration was obtained fraudulently. Though the Plaintiff made allegations on the part of the Defendants and served them with Summons to enter Appearance, the Defendants herein did not enter appearance nor file defence. Therefore the Plaintiff's allegations remain unchallenged.

As a registered proprietor, the 1st Defendant, ***Teresia Wanjiru Ngugi*** is deemed to be the ***absolute*** and ***indefeasible*** owner of the suit property ***Juja/Komo Block 1/1413***, as provided by ***Section 26(1)*** of the ***Land Registration Act***, which provides:-

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, easement, restrictions and conditions 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.

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

However, under the exceptions in ***1(a)&(b)*** of the above provision of law, the said registration can be challenged if the said certificate of title was acquired through ***fraud, misrepresentation, unlawful*** or through ***corrupt scheme***.

The Plaintiff has made allegations of fraud against the Defendants. If 1st Defendant did not purchase the suit property from the Plaintiff who confirmed that it only sold the same to one ***Kenneth Mathenge Ndungu***, how did she obtain the said registration? That could only be answered if

Defendants had filed their defences and challenged the Plaintiff's evidence.

For now, the Court finds that the Plaintiff's evidence is uncontroverted and therefore the Court will find no reasons to doubt the Plaintiff's evidence. The Court therefore finds that the 1st Defendant's title can be challenged and impugned. See the case of ***Elijah Makeri Nyangwara... Vs...Stephen Mungai Njuguna & Another (2013) eKLR***, where the Court held that:-

“...the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

Having found that the 1st Defendant's title is alleged to have been acquired fraudulently and given that this parcel of land was alleged purchased by one ***Kenneth Mathenge Ndungu***, the Court finds that this is a proper case where ***Section 80(1)*** of the ***Land Registration Act*** is

applicable, which Section provides for rectification of a register and cancellation or amendment of any registration if the same was obtained by fraud or mistake.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved its case on a balance of probabilities and consequently, the Court enters Judgement for the Plaintiff against the Defendants jointly and severally in the following terms:-

a) An Order directing the cancellation of the registration of Teresia Wanjiru Ngugi as proprietor of Juja/Komo Block 1/1413.

b) A revocation of the Title Deed issued to the 1st Defendant on 16th November 2010, and Plaintiff to bear its own costs.

Further the Plaintiff is entitled to costs of this suit.

Orders accordingly.

Dated, Signed and Delivered at Thika this 29th day of June 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Irungu for the Plaintiff

No appearance for the Defendant

Court clerk – Lucy

Court – Judgement read in open court in the presence of Mr. Irungu for Plaintiff and no appearance for the Defendant.

L. GACHERU

JUDGE

29/6/2018