



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT ELDORET**

**CIVIL CASE NO. 362 OF 2014**

**MARGARET ABIYA .....PLAINTIFF**

**VERSUS**

**THOMAS KIMELI KERING**

**T/A BETALAND ENTERPRISES.....1<sup>ST</sup> DEFENDANT**

**JOHN KIPSAINA MUKUNG.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Plaintiffs Case**

Margaret Abiya (*hereinafter referred to as the plaintiff*) has come to court against Thomas Kimeli Kering trading as Betaland Enterprises and John Kipsaina Mukung (*hereinafter referred to as the defendants*) claiming that at all material times to this suit, she is the registered owner of all that parcel of land known as Plot Number 5A measuring 1/8 Acre comprised in all that parcel of land known as PIONEER/NGERIA BLOCK 1(EATEC)/1437.

It is the plaintiff's case that she legally obtained ownership of the aforesaid parcel of land vide the sale agreement dated 20<sup>th</sup> December, 2011 between herself and the 1<sup>st</sup> defendant having duly paid the consideration thereof in full. The plaintiff further avers that subsequent to the said sale, she obtained the requisite title document as prove of ownership through the 1<sup>st</sup> Defendant, who undertook all the conveyancing procedures as agreed by the parties under clause 4 of the sale agreement dated 20<sup>th</sup> December, 2011.

The plaintiff avers that the 1<sup>st</sup> Defendant has without any colour of right and / or any legal justification authorized the 2<sup>nd</sup> Defendant who is unknown to the plaintiff/Applicant to enter into the plaintiff's said parcel of land and the said 2<sup>nd</sup> Defendant started erecting illegal structures thereof without her consent which act the plaintiff avers is inconsistent with her right as the registered owner.

The plaintiff's claim as against the Defendants jointly and severally is for vacant possession and / or peaceful use of the suit property as the bonafide purchaser for value and / or legal registered owner of the same. The plaintiff further avers that she has demonstrated a prima facie case with a high probability of success and that damages shall not be an adequate remedy in the circumstances.

Despite Demand and Notice of intention to sue having been issued to the Defendants, the defendants have with impunity continued with their illegal actions to the detriment of the plaintiff thus necessitating the filing of this suit.

The plaintiff avers that there is no other suit pending and there have been no previous proceedings in any Court between the parties herein over the same cause of action.

The plaintiff prays for judgment against the defendant for a declaration that Plot Number 5A measuring 1/8 Acre comprised in all that parcel of land known as PIONEER/NGERIA BLOCK 1(EATEC)/1437 belongs to the plaintiff and that the defendant should be ordered to give her vacant possession.

Further she prays for a permanent injunction restraining the defendants, their servants, agents and/or assigns from in any way dealing and/or interfering with the plaintiff's quiet possession, use and/or enjoyment and to stop unlawfully threatening to alienate, constructing, dealing, selling and / or illegally transferring Plot Number 5A measuring 1/8 Acre comprised in all that parcel of land known as Pioneer/Ngeria Block 1(Eatec)/1437.

**Defence Case**

The 1<sup>st</sup> Defendant did not file defence and did not give any evidence.

The 2<sup>nd</sup> Defendant filed Defence and counterclaim stating that he is a stranger to the entire contents of paragraph 4 of the plaint more specifically that the plaintiff is the registered owner of all that parcel of land known as Plot Number 5A PIONEER/NGERIA BLOCK 1(EATEC) 1437 the subject of these proceedings contrary to disputed title deed issued to her in respect to the 2<sup>nd</sup> defendants parcel of land known as PIONEER/NGERIA BLOCK 1(EATEC) 11731.

The 2<sup>nd</sup> Defendant categorically denies the allegations that the plaintiff obtained ownership of the suit land vide sale agreement dated 20<sup>th</sup> December, 2011 and particularly that the plaintiff obtained the title to the suit land legally but through the 1<sup>st</sup> Defendant and not through the legal owner one James Kiprono Sang.

The 2<sup>nd</sup> Defendant denies that he entered the suit land and started erecting illegal structures but avers that he is in lawful possession and use of all that parcel of land known as PIONEER/NGERIA BLOCK 1(EATEC) 11731.

The 2<sup>nd</sup> Defendant avers that on 23<sup>rd</sup> March, 2012, he purchased all that parcel of land known as PIONEER/NGERIA BLOCK 1(EATEC) 1440 PROVISIONAL NO.C (11731) measuring 1/8 of an acre from Betaland Enterprise as per mutation form dated 7<sup>th</sup> March 2012 and immediately took possession and started developments therein.

The 2<sup>nd</sup> Defendant further avers that the 1<sup>st</sup> Defendant intimated to him that the title deed in respect of PIONEER/NGERIA BLOCK1 (EATEC) 11731 had been erroneously issued to the plaintiff and he had asked her to return the same to be issued to the 2<sup>nd</sup> Defendant who is the rightful owner but the plaintiff set conditioning for the release. The plaintiff's is the rightful owner of that parcel of land is Plot No.5a Pioneer/Ngeria Block 1 (EATEC)/1437 as per her sale agreement dated 20<sup>th</sup> December, 2011 and the 2<sup>nd</sup> Defendant is the legal owner parcel of land known as PIONEER/NGERIA BLOCK 1(EATEC) 1440 PLOT NO.C (11731) as per his sale agreement dated 23<sup>rd</sup> March, 2012.

The 2<sup>nd</sup> Defendant contends that due process was not followed in transferring the 2<sup>nd</sup> Defendant parcel of land Title Number PIONEER BLOCK 1 (EATEC) 11731 in favour of the plaintiff and therefore the whole process is illegal, null and void as more particularly set out herein below;

- i. The transfer was done without the consent of the registered owner.*
- ii. Some of the documents used in effecting the transfer does not belong to registered owner.*
- iii. The land belonging to the 2<sup>nd</sup> Defendant was illegally transferred to the plaintiff without his consent.*

The 2<sup>nd</sup> Defendant contends that the said transfer is therefore vitiated by irregularities which the Honourable Court cannot overlook and that the plaintiff has no reasonable cause of action against him and the suit is otherwise bad in law. The 2<sup>nd</sup> Defendant denies receiving any demand or notice of intention to sue The defendant filed counter-claim claiming that sometimes on 23<sup>rd</sup> March 2012 the 2<sup>nd</sup> Defendant purchased PIONEER/NGERIA BLOCK1(EATEC)/1440 PROVISIONAL NUMBER (11731) and since then has exclusive possession thereto to date. The 2<sup>nd</sup> Defendant avers that on 27<sup>th</sup> May 2014 the plaintiff illegally transferred the 2<sup>nd</sup> Defendant's parcel of land into her name the same being Pioneer/Ngeria Block 1(EATEC)/11731 and title deed issued. On 11<sup>th</sup> August 2014, the plaintiff was advised by the 1<sup>st</sup> Defendant to return the title deed which was issued to her so that the same can be transferred to the 2<sup>nd</sup> Defendant but she set conditions for the release of the title deed.

The 2<sup>nd</sup> Defendant immediately after purchase took possession and has done extensive development therein. He has constructed permanent house. The 2<sup>nd</sup> Defendant further avers that he is the legal owner of PIONEER/NGERIA BLOCK 1(EATEC) 11731. The 2<sup>nd</sup> Defendant seeks an order to compel the plaintiff to dully execute transfer documents over PIONEER/NGERIA BLOCK 1 (EATEC) 11731 in favour of the 2<sup>nd</sup> Defendant and in default the Deputy Registrar to sign the said transfer.

The 2<sup>nd</sup> Defendant avers that there is no other suit pending in any court between the 2<sup>nd</sup> Defendant and the plaintiff in respect to the counter claim and there have been no previous proceedings in any court between the 2<sup>nd</sup> Defendant and the plaintiff over the counter claim. This Honourable Court has jurisdiction to hear and determine this suit as the cause of action arose in Eldoret Town. The defendant prays for Judgment in terms of

- a) A declaration that the 2<sup>nd</sup> Defendant is the lawful and rightful owner of PIONEER/NGERIA BLOCK 1(EATEC) 11731.*
- b) An order compelling the plaintiff to execute transfer of title document over PIONEER/NGERIA BLOCK 1(EATEC) 11731 to the 2<sup>nd</sup> Defendant and in default the Deputy Registrar of this court to execute the transfer and all such documents that shall be required to documents that shall be required to effect the aforesaid transfer.*

In the reply to the defence and defence to counter claim, the plaintiff states that PIONEER/NGERIA BLOCK 1(EATEC) 1437 was mother title and that plot No. 3 was only based in identifying the petitioner part of the main title that she had purchased. The plot was later identified as Pioneer/Ngeria/Block 1 (EATEC) 11731. That plot No 5/Pioneer/Ngeria Block 1(EATEC) 1437 and Pioneer/Ngeria 1437 and Pioneer/Ngeria Block 1(EATEC) 11731 refer to one and the same property.

#### **Plaintiff's Evidence**

The plaintiff in her evidence states that the suit parcel of land known as PIONEER/NGERIA BLOCK 1(EATEC) 11731 was sold to her by the 1<sup>st</sup> Defendant vide the sale agreement dated 20<sup>th</sup> December, 2011 at an agreed consideration of Kshs.250,000/= [***read Two Hundred and Fifty Thousand Shillings Only***] which sale amount she duly paid for in full.

She visited the suit property with the 1<sup>st</sup> Defendant herein before she disbursed the purchase price to the vendor. She paid the entire agreed purchase price of consideration to the 1<sup>st</sup> Defendant herein by depositing the same in the Defendant's Account Number [...] at Co-operative Bank and was subsequently issued with a receipt to the effect acknowledging receipt of the said money.

The defendant being a land dealer undertook the relevant legal procedures and had the title issued to the plaintiff which title she later collected from him. She had been having peaceful ownership of the suit land until she received a letter from the Defendant dated 11<sup>th</sup> August, 2014 purporting that the title deed which he himself had issued to the plaintiff for the suit property had been erroneously issued.

She responded to the above letter seeking a refund of the consideration at the current market price as the above letter had caused her untold mental and psychological anguish. No explanation was advanced for the error as the 1<sup>st</sup> defendant had duly furnished her with the title document as well as the map for the subject parcel of land.

Instead of giving her a viable explanation or a proposal, the 1<sup>st</sup> Defendant started threatening and nagging her to surrender the title to the suit property which order she declined to honor as she had completed the transaction by paying the agreed purchase price in full and was subsequently legally issued with the title to the said property.

The second Defendant has started interfering with her interest of ownership and without any colour of right claims an interest over the said parcel of land and has even put up illegal structures thereon which act is inconsistent to her proprietary rights as the legal registered owner.

After she declined to honor the order by the 1<sup>st</sup> Defendant to surrender the title document, the Land Registrar started calling her and imploring her to surrender the title to the land registry yet no explanation to that effect was also advanced hence prompting her to seek legal advice after which her counsel on record wrote a demand letter to the said Land Registrar which letter has never elicited any response.

The 1<sup>st</sup> Defendant/Respondent had without any colour of right and/or any legal justification authorized the 2<sup>nd</sup> Defendant/Respondent who was unknown to her to enter into the subject parcel of land and started erecting illegal structures thereon without her consent which act was inconsistent with her right as the legal registered owner.

She states that she obtained the title to the suit property legally and after following the due process of the law. Her counsel had shown her the purported sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and confirmed that the alleged transaction was entered into on 23<sup>rd</sup> March 2012 long after the 1<sup>st</sup> Defendant had sold the same parcel to her.

Further to the above, the 1<sup>st</sup> defendant personally handed over the document to her plus the map thereof in 2014 two years after he allegedly sold the same property to the 2<sup>nd</sup> defendant. She believed the legal title to the suit property had already passed to her upon completion of the purchase price hence the reason the title deed was given to her by the 1<sup>st</sup> Defendant, the legal owner of the suit property hence with legal right to enjoy peaceful and quiet possession thereof.

### **2<sup>nd</sup> Defendant's Evidence**

**John Kipsaina Mukung, DW1** testified that he is a teacher by profession at Kaptuyia. He has never met the plaintiff and therefore does not know her at all. On 23<sup>rd</sup> March 2012, he purchased land parcel number PIONEER/NGERIA BLOCK 1(EATEC)1440 PROVISIONAL NO. C (11731) from John Kipketer Cheruiyot T/a Betaland Enterprises and executed a sale of land agreement. The agreed purchase consideration was Kshs. 280,000, and was paid in full and was acknowledged by Betaland and his parcel of land indicated as 11731. That Betaland had pointed to the 2<sup>nd</sup> defendant the parcel of land and had in fact shown him the map. The title had not been transferred to Betaland but was still in the names of the owner Mr. James Kiprono Sang. After execution, he entered the land and started developing the same. The parcel of land PIONEER/NGERIA BLOCK 1(EATEC)1440 was subdivided and land parcel number was carved out PIONEER/NGERIA BLOCK 1(EATEC)11731 and the registered owner signed the transfer documents in his favour but he was surprised that the same was registered in the names of the plaintiff. However, upon inquiry, he was informed that the same was registered in error. Betaland offered to correct the error but the plaintiff was not willing to listen.

**DW2 James Kiprono Sang** of ID/No.0735135 of P. O. Box 314, Sotik in the Republic of Kenya states that he was the Registered Owner of parcels of land known as PIONEER/NGERIA BLOCK 1(EATEC) 1440 and PIONEER/NGERIA BLOCK 1 (EATEC) 1437. He sold a piece of land measuring one acre from his parcel of land No. PIONEER/NGERIA BLOCK 1(EATEC) 1440 to BETALAND ENTERPRISES LIMITED which company subdivided into provisions Nos PIONEER/NGERIA BLOCK 1(EATEC)11731, PIONEER/NGERIA BLOCK 1(EATEC)11729, PIONEER/NGERIA BLOCK 1(EATEC)11730, PIONEER/NGERIA BLOCK 1(EATEC)11733 and PIONEER/NGERIA BLOCK 1(EATEC)11734.

The land parcel No. PIONEER/NGERIA BLOCK 1(EATEC)1437 was his land but had sold it to third parties but didn't sell the same to Betaland Enterprises at all. That after subdivision of No. PIONEER/NGERIA BLOCK 1(EATEC) 1440 and sale, his remainder portion was PIONEER/NGERIA BLOCK 1(EATEC) 11734 and he was the registered owner.

He did not sign any transfer documents in favour of Betaland Enterprises Limited in respect to PIONEER/NGERIA BLOCK 1(EATEC) 11731 and how the land was transferred to the plaintiff was fraudulent according to him for reasons that the signature in the transfer forms is not his and that the photographs were not his. He did not attend the land control board and the signatures in the consent forms were not his.

The rightful owner of the land is John Kipsaina Mukung and that he signed transfer form in favour of him.

***DW 3 Dorothy Letting***, the County Land Registrar, Uasin Gishu testified that she knew Land Parcel No. PIONEER/NGERIA/BLOCK1 EATEC/1440. It has been subdivided into numbers Pioneer/Ngeria/(EATEC) 11729 – 11734. On the other hand, parcel number Pioneer/Ngeria EATEC 1437 was subdivided into Pioneer/Ngeria Block 1(EATEC) 11804 and 11803.

The gist of the evidence by the land registrar is that the title deed in the name of the plaintiff was procured erroneously. Pioneer/Ngeria EATEC Block 1 11731 emanated from Pioneer/Ngeria Block 1 EATEC 1440 but not Pioneer Ngeria/Block 1/EATEC 1437. If the plaintiff procured Pioneer/Ngeria Block 1(EATEC) 1437 then upon subdivision she should have been given the title Pioneer/Ngeria/Block1 EATEC 11804 or 11803.

I have considered the plaintiff's evidence on record and submissions and do find that the plaintiff entered into agreement with Thomas Kimeli Kering of ID No.21436080 T/A Betaland Enterprises. In the Agreement, Thomas Kimeli Kering is described as the vendor and owner of all the parcel of land known as Pioneer/Ngeria Block 1 (EATEC)1437. The purchase price was Kshs. 255,000/=. The plaintiff confirmed to have inspected the parcel of land and was satisfied on its location and topography. The 1<sup>st</sup> Defendant processed title and the plaintiff was issued with title in respect of parcel number Pioneer/Ngeria Block (EATEC/11731. It is not clear how the plaintiff ended up being registered as proprietor of the parcel number Pioneer/Ngeria Block 1 (EATEC) 11731 and yet it was a subdivision Pioneer/Ngeria Block 1 (EATEC)1440. The plaintiff purchased a portion of 1 Pioneer/Ngeria Block 1 (EATEC)1437 and not Pioneer/Ngeria Block 1 (EATEC)1440.

It is clear that the parcel number Pioneer/Ngeria Block 1(EATEC) 11731 was created on 15/06/2012 from parcel number 1440 which was initially owned by John Kipketer Cheruiyot of ID.No.6872467 T/A Betaland Enterprises. John Kipketer Cheruiyot sold a portion of the said land to John Kipsaina Mukung vide agreement made on 23.3.2012. The application for consent of the land control board was made on the 4.3.2014 more than six months after the agreement contrary to section 6 of the Land Control Act Cap 302, Laws of Kenya.

There is no evidence that the said application was presented to the Land Control Board. Moreover, there is no consent of the Land Control Board.

The transfer of the land in respect of the 2<sup>nd</sup> Defendant is not certified and not registered. This court finds there is likely to have been a mix-up in the office of Betaland Enterprises in respect of the parcels of land that they were given to sell. There are two agents of Betaland Enterprises Limited thus Thomas Kimeli Kering who was the vendor in respect of the title number Pioneer/Ngeria Block 1(EATEC) 1437 and John Kipketer Cheruiyot who was vendor in respect of Pioneer/Ngeria Block 1(EATEC)1440.

This court finds that the plaintiff was purchasing a portion of Pioneer/Ngeria Block 1(EATEC) 1437 that gave forth to parcel numbers Pioneer/Ngeria Block 1(EATEC) 11804 to Pioneer/Ngeria Block 1(EATEC) 11805. On the other hand, the 2<sup>nd</sup> defendant was purchasing a portion of Pioneer/Ngeria Block 1 (EATEC) 1440 that upon subdivision gave forth to Pioneer/Ngeria Block 1(EATEC) 11729 to Pioneer/Ngeria Block 1(EATEC) 11734. This court finds that the title by the plaintiff in respect to the suitland was obtained un-procedurally as the parcel of land registered in her name was not a resultant of the parcel of land she purchased.

The case of ***Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009***, is relevant where the Appeal Court held that:-

***“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered 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 any and all interests which would not be noted in the register.”***

Being the registered owner of the suit property, the Plaintiff is deemed to be the ***absolute*** and ***indefeasible*** owner of this suit property. However, the said certificate can be challenged if the same was acquired through ***fraud*** or in which he is found to have been aware and involved ***misrepresentation*** or ***un-procedurally***. **Section 23(1) of the Registration of Titles Act (now repealed)** and repeated in **Section 26(1)(a) &(b) of the Land Registration Act 2012**, are relevant which provides: -

***“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.***

From the foregoing, the plaintiff's whole process of acquiring title was based on mistake and procedural impropriety caused by the 1<sup>st</sup> Defendant. The Plaintiff title to the property referred to as 11731 is hereby cancelled, the plaintiff having been registered un-procedurally due to mistake. The 1<sup>st</sup> defendant is hereby ordered, within a period of 60 days, to allocate and transfer to the plaintiff alternative land within the same locality or refund the plaintiff Kshs. 255,000/= plus interest from the date of filing suit.

On the counter claim this court finds that the 2<sup>nd</sup> defendant has established that he entered into agreement with Betaland over the sale of a portion of Pioneer/Ngeria Block 1 (EATEC)1440 and that the same was subdivided to create Pioneer/Ngeria/Block1 EATEC 11729 to Pioneer/Ngeria/Block1 EATEC 11734 which was to be transferred to the 2<sup>nd</sup> Defendant. I do order that Pioneer/Ngeria/Block1 EATEC

11731 be registered in the names of the 2<sup>nd</sup> defendant. Costs of the suit plus interest to be paid by the 1<sup>st</sup> defendant.

**Dated and delivered at Eldoret this 28<sup>th</sup> day of June, 2018.**

**A. OMBWAYO**

**JUDGE**