



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 440 OF 2013**

**DAVID NJAGI WAMBU ..... PLAINTIFF**

**VERSUS**

**GRACE MUTHONI GITUTO ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, KIRINYAGA COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By an amended plaint dated 7<sup>th</sup> March 2011 and filed in Court on 8<sup>th</sup> March 2011, the plaintiff sought judgment against the defendants jointly and severally in the following terms:

*(a) A declaration that the plaintiff is the legitimate and lawful owner of land parcel No. L.R INOI/KARIKO/2452 and the 2<sup>nd</sup> defendant be directed to draw and prepare a green card in respect of the said land to reflect the said ownership.*

*(b) In the alternative and without prejudice to prayer (a) above, if the 2<sup>nd</sup> defendant had effected any changes in ownership of L.R No. INOI/KARIKO/2452, an order do issue for rectification of the register by cancellation of the names of the 1<sup>st</sup> defendant and registration of the plaintiff as the owner of L.R No. INOI/KARIKO/2452 and a permanent/perpetual injunction do issue restraining the 1<sup>st</sup> defendant, her servants, agents and/or anybody else claiming through her from entering, cultivating, committing acts of waste or in any other way interfering with L.R No. INOI/KARIKO/2452.*

*(bb) The 1<sup>st</sup> defendant, her servants and agents be evicted from L.R No. INOI/KARIKO/2452, the plaintiff to recover possession thereof and payment of mesne profits by the 1<sup>st</sup> defendant to the plaintiff from 1<sup>st</sup> January 2005 until date of delivery of possession.*

*(c) Costs of the suit and interest.*

The basis of the plaintiff's claim is that on or about 16<sup>th</sup> March 2004, he became the registered owner of the land parcel No. INOI/KARIKO/2452 (hereinafter the suit land) having purchased it from his brother **SYMON NDEGWA WAMBU** and was issued with a title to the same. However, in 2005, the 1<sup>st</sup> defendant, her servants, agents and/or employees invaded the suit land and started picking the tea planted thereon and so the matter was reported to the Police and the 1<sup>st</sup> defendant produced a title to the suit land issued on 24<sup>th</sup> December 2004 and the dispute became an ownership dispute which the Police were unable to resolve. The plaintiff has been unable to obtain the certificate of search from the 2<sup>nd</sup> defendant and he avers that he is the lawful owner of the suit land and has never entered into any transaction or received payment for the same from the 1<sup>st</sup> defendant and that any changes effected by the 2<sup>nd</sup> defendant with regard to the ownership of the suit land must have been done unlawfully and fraudulently particulars of which have been pleaded in paragraph seven (7) of the amended plaint.

In her defence, the 1<sup>st</sup> defendant pleaded that the plaintiff fraudulently obtained registration of the suit land from his brother **SYMON NDEGWA WAMBU** and the matter was reported to the Police and upon investigation, the plaintiff's name was removed from the register and the suit land reverted back to the registered owner **SYMON NDEGWA WAMBU**. The 1<sup>st</sup> defendant denied having invaded the plaintiff's land in 2005 adding that she is the lawful and legal owner of the suit land having entered into a sale agreement with **SYMON NDEGWA WAMBU** for valuable consideration. She denied the allegations of fraud and put the plaintiff to strict proof thereof.

The 2<sup>nd</sup> defendant also filed a defence on 31<sup>st</sup> October 2007 denying in toto the plaintiff's averments of fraud and also pleaded that the suit offends the mandatory provisions of the **Government Proceedings Act** and that a Preliminary Objection would be taken at the hearing. However, that defence served no purpose because on 14<sup>th</sup> March 2007, judgment had already been entered against the 2<sup>nd</sup> defendant and an application to set it aside was dismissed on 27<sup>th</sup> April 2010 by **WANJIRU KARANJA J.** (as she then was). The 2<sup>nd</sup> defendant therefore

took no further part in these proceedings.

The plaintiff told the Court that the suit land was a sub-division of land parcel No. INOI/KARIKO/742 which originally belonged to his late father **SAMSON WAMBU NDEGWA** but was registered in the names of his brother **SYMON (SIMON) NDEGWA** who then sold it to him and it was registered in his names on 16<sup>th</sup> March 2004 and a title deed issued. He produced the sale agreement (Exhibit 1) and a copy of the title (Exhibit 2). Then in 2005, the 1<sup>st</sup> defendant invaded the land and so he reported to the Police and when she was summoned, the 1<sup>st</sup> defendant also produced a title deed and Green Card to the suit land and so the Police advised him to file this suit. He denied having sold the suit land to the 1<sup>st</sup> defendant and asked the Court to cancel the 1<sup>st</sup> defendant's title to the suit land.

The plaintiff called as his witness his brother **SIMON NDEGWA WAMBU** who testified that he sold the suit land to the plaintiff but the 1<sup>st</sup> defendant invaded it. It is his evidence that the plaintiff is the one entitled to the suit land.

The 1<sup>st</sup> defendant's evidence is that she purchased the suit land from **SIMON NDEGWA WAMBU** vide an agreement dated 1<sup>st</sup> November 2004 and the purchase price of Ksh. 800,000 was paid into **SIMON NDEGWA WAMBU**'s account at the Kirinyaga District Farmers Sacco. She produced the sale agreement (Defence Exhibit 1) and a statement from her Sacco account showing that a sum of Ksh. 800,000 was debited from her account on 1<sup>st</sup> November 2004. She also produced a deposit slip showing that Ksh. 800,000 was deposited into the account of **SIMON NDEGWA WAMBU** on 1<sup>st</sup> November 2004 at the same Kirinyaga District Farmers Sacco (Defence Exhibit 4). The 1<sup>st</sup> defendant further testified that following the sale agreement, they went to the Lands office and confirmed that there were no cautions on the suit land. The necessary consent of the Land Control Board was obtained and she was issued with the title deed to the suit land. She therefore denied having obtained the same through fraud and added that the plaintiff had been charged in **KERUGOYA COURT** Criminal Case No. 1538 of 2004 and the complainant was his brother **SIMON NDEGWA WAMBU**. Those proceedings were produced (Defence Exhibit 6). She therefore asked the Court to dismiss the plaintiff's suit with costs as she is in possession of the same.

The 1<sup>st</sup> defendant called two witnesses in support of her case being **PETER MUBARI KABUGI** (DW2) and **MUNENE NYAGA** (DW3).

**PETER MUBARI KABUGI** asked the Court to adopt as his evidence his statement filed in this Court on 21<sup>st</sup> January 2016. In that statement, he has recorded that **SIMON NDEGWA** had informed him that the plaintiff had refused with his title and so the matter was reported to the Police and the plaintiff was charged. He has also recorded that he was a witness when **SIMON NDEGWA WAMBU** sold the suit land to the 1<sup>st</sup> defendant at a consideration of Ksh. 800,000.

**MUNENE NYAGA** (DW3) previously worked with the Criminal Investigations Department (CID) in Kerugoya until February 2017. His evidence is contained in his statement filed on 22<sup>nd</sup> September 2017 which he also asked the Court to adopt. In that statement, he has stated that sometime in the months of October and November 2004, he was assigned to investigate a case where **SIMON NDEGWA WAMBU** had reported that his brother **DAVID NJAGI WAMBU** had transferred the suit land without his consent by forging his thumb impression purporting that he (**DAVID NJAGI WAMBU**) had bought the suit land from **SIMON NDEGWA WAMBU** through an agreement dated 26<sup>th</sup> November 2003 which was not correct. So DW3 recorded statement and forwarded the said agreement to the document examiner who prepared a report stating that **SIMON NDEGWA WAMBU**'s thumb print impressions were not the ones on the sale agreement and therefore it was fraudulent. DW3 therefore traced **DAVID NJAGI WAMBU** in Machakos and charged him in Court but the case was later withdrawn. The document examiner's report together with the Exhibit memo form prepared by the witness were admitted in evidence by this Court through a ruling delivered on 8<sup>th</sup> December 2017.

Submissions have been filed by **Mr. MAINA KAGIO** counsel for the plaintiff and **Mr. MUNENE MURIUKI** counsel for the 1<sup>st</sup> defendant.

I have considered the evidence by both parties and the submissions by counsel.

The following are not in dispute:

- 1. The plaintiff and SIMON NDEGWA WAMBU (PW2) are siblings.*
- 2. The plaintiff holds the title deed to the suit land dated 16<sup>th</sup> March 2004 (Plaintiff's Exhibit 1).*
- 3. The 1<sup>st</sup> defendant also holds a title deed to the suit land dated 24<sup>th</sup> May 2005 (Defence Exhibit 5).*

The key to resolving this dispute is to determine who between the plaintiff and the 1<sup>st</sup> defendant holds the lawful title to the suit land. By virtue of holding title to the suit land, both the plaintiff and the 1<sup>st</sup> defendant are entitled to the protection provided by **Sections 27 and 28 of the repealed Registered Land Act** under which both titles are issued. Those provisions provide that the registration of a person as proprietor of land shall vest in that person the absolute ownership of that land. Such registration can however be cancelled if it was obtained through fraud or mistakes as provided under **Section 143 of the repealed Act**. Similar provisions are found in the **new Land Registration Act**.

The plaintiff's claim to ownership of the suit land is predicated on his evidence that he purchased the same from his brother **SIMON NDEGWA WAMBU** (PW2) through an agreement dated 26<sup>th</sup> November 2003. It is his case therefore that the subsequent registration of the 1<sup>st</sup> defendant as owner of the suit land and the issuance of a title deed to her was done fraudulently. However, the evidence before me demonstrates that it was the plaintiff who in fact fraudulently transferred the suit land from his brother **SIMON NDEGWA WAMBU** (PW2) to himself. It is common knowledge that **SIMON NDEGWA WAMBU** (PW2) was the complainant in **KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT CRIMINAL CASE No. 1538 of 2004** in which one of the charges levelled against his brother the plaintiff was obtaining land registration by false pretences. The agreement dated 26<sup>th</sup> November 2003 (Plaintiff's Exhibit 1) by which the

plaintiff allegedly purchased the suit land from his brother **SIMON NDEGWA WAMBU** (PW2) bears a thumb print of the said **SIMON NDEGWA WAMBU** (PW2). However, as is clear from the statement filed by **SIMON NDEGWA WAMBU** (PW2) and dated 28<sup>th</sup> November 2013, he can actually write because that statement is signed by him. This Court is satisfied that **SIMON NDEGWA WAMBU** was not an honest witness and the correct version of his testimony is that the plaintiff had defrauded him of the suit land and that is why he made a complaint to the Police and criminal charges were preferred against the plaintiff. Being family, and in an attempt to renege on the subsequent agreement with the 1<sup>st</sup> defendant, he has now changed his story and now makes very startling statements in his evidence claiming that he was pressurized to file the complaint against his brother the plaintiff. This is what he said on being cross-examined by **Mr. MUNENE MURIUKI**.

*‘It is true that I filed a Criminal Case No. 1538 of 2014 against the plaintiff. I was pressurized to file that case against my brother so that I could get back the land. So I misled the Police’.*

This Court is satisfied that the truth of the matter is that the plaintiff had fraudulently transferred the suit land from his brother **SIMON NDEGWA WAMBU** (PW2) to himself by purporting that **SIMON NDEGWA WAMBU** (PW2) had affixed his thumb print to the sale agreement dated 26<sup>th</sup> November 2003. The two brothers then went to the Lands office on 16<sup>th</sup> March 2004 and had the registration in the names of the plaintiff cancelled for having been done in error hence the initial “**E.I.E**” (**ENTERED IN ERROR**). **SIMON NDEGWA WAMBU** (PW2) subsequently withdrew the charges against the plaintiff. Counsel for the plaintiff **Mr. MAINA KAGIO** has submitted that the Land Registrar had no powers to make such rectification of the register. That rectification could only have been done at the request of both the plaintiff and his brother **SIMON NDEGWA WAMBU** (PW2) and if that was not the case, nothing would have stopped the plaintiff from taking up the issue with the Land Registrar long before the suit land was transferred to 1<sup>st</sup> defendant. **Section 142 (1) (b) of the repealed Act** empowered the Land Registrar to rectify the register as he did because both the plaintiff and **SIMON NDEGWA WAMBU** (PW2) and who were by then the only interested parties consented to the same. The section reads:

*“The Registrar may rectify the register or any instrument presented for registration in the following cases:*

*(a) –*

*(b) In any case and at any time with the consent of all persons interested “. Emphasis added*

The dishonesty of **SIMON NDEGWA WAMBU** (PW2) in trying to renege on a lawful agreement between him and the 1<sup>st</sup> defendant over the suit land is also demonstrated by the fact that he tried to deny having received the consideration of Ksh. 800,000

even in the face of very clear and cogent evidence. When cross-examined by **Mr. MUNENE MURIUKI** counsel for the 1<sup>st</sup> defendant, **SIMON NDEGWA WAMBU** (PW2) had this to say about the agreement between him and the 1<sup>st</sup> defendant:

*‘I have not sold the 1<sup>st</sup> defendant any land. It is true that I have an account with the Kirinyaga District Farmers Sacco’*

He however conceded that the Ksh. 800,000 consideration was paid into his account adding however that the money did not stay in his account “**for long**”. He also makes this strange statement when cross-examined about the agreement between him and the 1<sup>st</sup> defendant in relation to the suit land:

*“I know a lawyer called **KARANI** who is now deceased. I have been to his office with the 1<sup>st</sup> defendant and **PETER**. They had some papers. I can see an agreement dated 1.11.2004. When I wrote it, I was drunk. I did not know what I was doing. The 1<sup>st</sup> defendant and **PETER** first bought me alcohol then took me to an advocate and made me sign the agreement”*

That agreement was signed by **SIMON NDEGWA WAMBU** (PW2) and the 1<sup>st</sup> defendant on 1<sup>st</sup> November 2004 and the title to the suit land issued to the 1<sup>st</sup> defendant on 24<sup>th</sup> May 2005. If **SIMON NDEGWA WAMBU** (PW2) had not voluntarily signed the said agreement, he did not have to wait until this suit was filed in 2006 to claim that he did not sign it. The truth of the matter is that he agreed to sell the suit land to the 1<sup>st</sup> defendant at a consideration of Ksh. 800,000 which was paid into his account. In attempting to impugn the 1<sup>st</sup> defendant’s title, the plaintiff has pleaded in paragraph seven (7) of his amended plaint that he never signed any transfer forms or entered into any agreement with the 1<sup>st</sup> defendant over the suit land to which he still holds the original title. The truth however is that after the Land Registrar cancelled the plaintiff’s names from the register on 16<sup>th</sup> March 2004, the suit land reverted back to **SIMON NDEGWA WAMBU** (PW2) who was therefore entitled, as he did, to sell it to the 1<sup>st</sup> defendant. The title that the plaintiff holds is therefore not a good title and this Court will shortly proceed to make appropriate orders with respect to that title. Counsel for the plaintiff has submitted that the plaintiff was not convicted in **KERUGOYA SENIOR RESIDENT MAGISTRATE’S COURT CRIMINAL CASE No. 1538 of 2004**. That alone does not prove that the plaintiff’s title is a legal one. Fraud need not be proved only through a conviction in a criminal trial. It can also be proved by other evidence and as far as this Court is concerned, the rectification of the register by the Land Registrar to cancel the plaintiff’s name as the registered proprietor of the suit land was as a result of the acknowledgement by the plaintiff and **SIMON NDEGWA WAMBU** that the plaintiff did not acquire any valid title thereto. The plaintiff is therefore not entitled to the order of a declaration that he is the legitimate and lawful owner of the suit land. On the contrary, such a declaration can only issue in favour of the 1<sup>st</sup> defendant. The plaintiff cannot therefore also be entitled to an order for mesne profits which, in any event, are special damages that require to be specifically pleaded and proved. Though the agreement between **SIMON NDEGWA WAMBU** (PW2) and the 1<sup>st</sup> defendant is wrongly titled as a ‘**LEASE AGREEMENT**’, there is no doubt that it was an agreement for the sale of the suit land at a consideration of Ksh. 800,000 because it says so in the body of the agreement as follows:

*“That on the execution of this agreement the vendor have (sic) received Ksh. 800,000 (eight hundred thousand only) being full*

*purchase price this 1<sup>st</sup> November 2004”*

The use of the term ‘**LEASE AGREEMENT**’ is therefore an error. The plaintiff cannot therefore rightly claim ownership of the suit land. The same was lawfully purchased by the 1<sup>st</sup> defendant from the then registered proprietor who is **SIMON NDEGWA WAMBU** (PW2) and who cannot now attempt to disown that transaction. In any case, nothing stopped him from filing a suit against the 1<sup>st</sup> defendant if indeed he did not enter into any such agreement. In my view, the plaintiff has no valid claim to the suit land. Any claim he may have had to the suit land was extinguished on 16<sup>th</sup> March 2004 in a process which, as this Court has already found, was with his consent and knowledge. The plaintiff cannot now plead, as he has done, that the 1<sup>st</sup> defendant’s title to the suit land is fraudulent for lack of the necessary consent when he has not himself tendered before this Court any such consent for the transaction in which he obtained title to the suit land from **SIMON NDEGWA WAMBU** on 26<sup>th</sup> November 2004. The plaintiff’s suit is clearly for dismissal.

Having said so, and as I have already stated at the commencement of this judgment, there are now two title deeds for the suit land one held by the plaintiff and the other by the 1<sup>st</sup> defendant. That can be a source of considerable mischief. The plaintiff appears not to appreciate the fact that the Land Registrar’s act of deleting his name from the register of the suit land on 16<sup>th</sup> March 2004 effectively meant that he was no longer the proprietor of the suit land and ownership had reverted back to **SIMON NDEGWA WAMBU** (PW2). Therefore, to avoid any further mischief in the use of the title in the possession of the plaintiff and pursuant to powers conferred under **Section 143 (1) of the repealed Act** (which are replicated in **Section 80 (1) of the new Land Registration Act**), it is prudent that I cancel the title deed issued to the plaintiff. In doing so, I am of course alive to the fact that the 1<sup>st</sup> defendant did not counter-claim for such cancellation. However, it was clear in the cause of this trial that the key issue is who between the plaintiff and the 1<sup>st</sup> defendant holds the legal title to the suit land and having found that the 1<sup>st</sup> defendant holds the legal title, it behoves this Court to cancel the title held by the plaintiff. That issue was brought out by the parties in their evidence and as was held in **ODD JOBS VS MUBIA 1970 E.A 476**.

*“In East Africa, the position is that a Court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact been left to the Court for decision ....”*

See also **BARBER ALIBHAI MANJI VS SULTAN HASHIM LALJI & ANOTHER C.A CIVIL APPEAL No. 296 of 2001**. This Court must therefore, for the avoidance of doubt, direct the Land Registrar Kirinyaga to recall the title deed issued to the plaintiff in respect to the suit land.

Ultimately therefore and having considered all the evidence herein, this Court makes the following orders:

**1. The plaintiff’s suit is dismissed with costs to the 1<sup>st</sup> defendant.**

**2. The Land Registrar Kirinyaga is hereby directed to recall for cancellation the title deed to land parcel No. INOI/KARIKO/2452 issued to the plaintiff on 16<sup>th</sup> March 2004.**

**B.N. OLAO**

**JUDGE**

**7<sup>TH</sup> MAY, 2018**

**Judgment dated and signed at Bungoma this 7<sup>th</sup> day of May 2018.**

**To be delivered at Kerugoya on notice.**

Ruling read and Signed on 26<sup>th</sup> June 2018

**S.N.MUKUNYA**

**JUDGE**

**26<sup>TH</sup> JUNE, 2018**