



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 267 OF 2017**

**CECILIA NJOKI NJENGA .....PLAINTIFF**

**VERSUS**

**MICHAEL NGOTHO GITHIA .....1<sup>ST</sup> DEFENDANT**

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

**JUDGEMENT**

1. Before me for determination is a matter wherein the Plaintiff filed her plaint on the 11<sup>th</sup> October 2016 and sought for an order of injunction restraining the defendants from selling, entering and or transferring L.R No. Nyandarua /Milangine 3666. The Plaintiff also sought for orders for the cancellation of title for LR. Nyandarua /Milangine 3666 issued to the 1<sup>st</sup> Defendant and a re-issue of the title document in the Plaintiff's name.

2. Lastly, the Plaintiff sought for orders that the Land Registrar, the 2<sup>nd</sup> Defendant herewith do amend the Register to reflect her as the sole proprietor of LR Nyandarua /Milangine 3666. The plaintiff sought for costs of this suit.

3. Alongside the said plaint, the Plaintiff had also filed an application dated the 7<sup>th</sup> September 2016, seeking interim orders to preserve the subject suit as well as to effect service upon the Defendants through substituted service.

4. That on the 11<sup>th</sup> October 2016, the interim orders of injunction were granted, however the court was not satisfied that efforts had been made to serve the Defendants and directed for a second service to issue. On the 3<sup>rd</sup> May 2017, the court was informed that although the 2<sup>nd</sup> Defendant had been personally served, yet the 1<sup>st</sup> Defendant could not be served as efforts to trace him had been fruitless since his whereabouts was unknown. The Plaintiff thus sought leave of court to serve the Defendant through substituted service.

5. The court directed that an affidavit be sworn to show the efforts that the Plaintiff had made to ensure service upon the Defendant.

6. An affidavit was subsequently sworn on the 10<sup>th</sup> May 2017 and filed on the 19<sup>th</sup> May 2017 stating the efforts that the Plaintiff had made to try and serve the 1<sup>st</sup> Defendant in vain. The application was heard on the 22<sup>nd</sup> June 2017 and the court, being satisfied with the explanation, granted the plaintiff leave to serve the 1<sup>st</sup> Defendant through substituted service. This was done vide the daily Nation dated the 10<sup>th</sup> July 2017. A copy was also affixed on the court's notice board thereto.

7. That upon service to both Defendants herein and there being no appearance nor response, judgment was entered against them on the 9<sup>th</sup> October 2017 and the matter fixed for formal proof on the 11<sup>th</sup> December 2017 on which day the Plaintiff withdrew the case against the 2<sup>nd</sup> Defendant opting to call them as her witness.

8. The matter then proceeded for formal proof wherein the Plaintiff testified in kikuyu language to the effect that she was 70 years old, illiterate and a widow to the late Njenga Njora, whom we shall refer to as the deceased for the purpose of this case.

9. That the deceased who had passed away on a date she could not remember, was the proprietor of the suit land and upon his demise, she had petitioned for letters of administration vide the Nakuru High Court Succession Cause No. 309 of 1997.

10. That vide a letter of grant, which she had produced as exhibit 1, she was granted 23 acres of the deceased's estate to which she had subdivided amongst her 8 children leaving the suit land herein which measured 1 1/2 acres to herself.

11. That later when she had wanted to sell 1/2 acre of her inheritance, she gave the title deed to a Surveyor to have the land subdivided. The surveyor, whom she could only remember was called Mr. Kariuki, however was unable to carry out her instructions because as he had

informed her, the land had already been sold to someone else.

12. That upon receiving the said information, she decided to go to the Lands office to find out the status of the land. She was surprised to find out that the suit land had been registered in her name as well as the names of her step sons and that the same had now been sold to and registered in the name of the Defendant herein, a person she did not know.

13. She confirmed that she knew both Peter Ngungu Njenga and Joram Njenga whom she stated were her step children, but denied to having registered the suit land in their names.

14. She testified that she had sued the 1<sup>st</sup> Defendant whom she had never seen and further that she lived upon the suit land.

15. She testified that neither she nor her step children (now deceased) had ever had the suit land registered in their names and neither had she been called to the land Control board to transfer the land. She testified that all she wanted was for the cancellation of the title held by the 1<sup>st</sup> Defendant.

16. The Plaintiff's next witness was the one Mr. Christopher Maina Gichuki, the land Registrar of Nyandarua and Samburu Counties who testified that the original number of the other land herein was L.R No. Nyandarua/Milangine 1322 as per the Nakuru High Court Succession Cause No. 309 of 1997. That upon subdivision, the same gave rise to the present suit land which was subsequently registered in the names of the 1<sup>st</sup> Defendant herein.

17. The witness further testified that as per the green card, the land had been transferred to the 1<sup>st</sup> Defendant by three persons namely Peter Ndungu Njenga, Joram Njenga and Cecilia Njoki Njenga, who were administrators of the deceased's estate, after the Succession Cause. That there were no supporting documents anywhere in their records and that as he testified, he still could not understand how the 1<sup>st</sup> Defendant got title to the suit land. He produced the Green card as Plaintiff exhibit 2 and further testified that this was a not a normal transfer and might had been done in error and the entry made for another piece of land.

18. The Plaintiff thus closed her case wherein her Counsel filed their submissions on the 26<sup>th</sup> March 2018 to which he reiterated the evidence that had been adduced in court and further relied on Section 26 (1) of the Land Registration Act to buttress the fact that the instant Title issued to the 1<sup>st</sup> Defendant ought to be revoked on the ground elicited under sub Section (a) and (b) of the Act.

19. I have considered the uncontroverted evidence adduced in court, the documents produced as exhibits and the fact that the 1<sup>st</sup> Defendant having neither entered his appearance nor filed his defence herein, as well as the Plaintiff's contention that the registration of the suit property in the names of the 1<sup>st</sup> Defendant was illegal and fraudulent.

20. I find the issue for determination being whether the plaintiff is entitled to the orders so sought in her plaint and who is to pay costs for the suit.

21. From the facts of the matter before me and the evidence adduced in court, what comes out clearly is that after the Plaintiff herein had petitioned for letter of administration to her late husband's estate, which comprised amongst others, land parcel No L.R No Nyandarua /Milangine 1322, she had contracted a land surveyor to subdivide the land as per the confirmation of Grant issued on the 9<sup>th</sup> November 2010 in the Nakuru High Court Succession Cause No. 309 of 1997 so as to enable her distribute the same amongst her children.

22. That surveyor did as was told but did not submit to her the title for 1 ½ acres of land registered as L.R No Nyandarua /Milangine 3666 which was to be registered in her name as her share in the inheritance.

23. Later when she wanted to sell her portion of land she was shocked to learn that the same had been registered in the name of the 1<sup>st</sup> Defendant herein without her knowledge and consent from the Land Control Board.

24. It was also clear from the evidence adduced by the Land Registrar that there was no documentary evidence in their office showing how the suit land came to be registered in the 1<sup>st</sup> Defendant's name. He concluded his testimony by stating that the same must have been transferred erroneously.

25. I have considered the Judgment annexed as one of the Plaintiff's list of documents herein and delivered on the 28<sup>th</sup> September 2001 in the Nakuru High Court Succession Cause No. 309 of 1997 wherein the Plaintiff herein was appointed as one of the Administrators to her late husband's Estate. That subsequently, the Plaintiff, vide an order made on the 21<sup>st</sup> January 2010, was appointed as a guardian and manager of Joseph Njora Njenga who was placed under her custody.

26. I have also considered the certificate of grant issued on the 8<sup>th</sup> November 2010, in respect of the Estate of Geoffrey Njenga Njora wherein the Plaintiff herein inherited the following pieces of land;

- i. L.R No Nyandarua /Milangine 1322 measuring 1 ½ acres
- ii. L.R No Nyandarua /Milangine 1322 measuring 1½ acres to be held in trust for Joseph Njora Njenga
- iii. L.R No Nyandarua /Milangine 1324 as well as Bank accounts held at the KCB bank at Nyahuru

27. Indeed the law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

“the Certificate of Title issued by the Registrar upon registration, 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 the 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 un-procedurally or through a corrupt scheme**

28. As may be observed, the law is extremely protective of title and provides only two instances for the 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 illegally, un-procedurally or through a corrupt scheme.

29. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

30. The Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR**, held as follows:

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property.

31. There having been no evidence adduced in court to prove the legality of how the 1<sup>st</sup> Defendant acquired title to the suit land herein, now that the same was challenged by the Plaintiff herein, I am persuaded on the evidence before the court that the Plaintiff is the lawful owner of the suit property having brought forth evidence on how she acquired the suit property in her evidence which was strong and uncontroverted.

32. In the absence of documents backing the 1<sup>st</sup> Defendant's title such as a sale agreement or even a consent of transfer from the Land Control Board nor any documents in the office of the Land Registrar as indicated by the Plaintiff and her witness, the only inference which can be drawn is that the 1<sup>st</sup> Defendant's title was issued un-procedurally and or fraudulently.

33. Such a title is thus liable to impeachment under section 26(1) (b) of the Land Registration Act, 2012 herein above stated.

34. From the evidence adduced as a whole and the further the finding of this court, I am satisfied that the plaintiff has proved her case on a balance of probabilities as against the 1<sup>st</sup> Defendant and as such she is entitled to the orders sought.

35. The evidence in this case points to the fact that the title to the 1<sup>st</sup> Defendant was obtained illegally, un-procedurally and/or through a corrupt scheme. There are no documents in the lands registry that conveyed title to him. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1<sup>st</sup> Defendant is liable to be cancelled.

36. Section 80 (1) of the Land Registration Act, 2012 gives the court power to order rectification of the register by directing that any registration be cancelled or amended where the court is satisfied that the registration was obtained, made or omitted by fraud or mistake.

37. In this regard thereof I hereby enter judgment for the plaintiff against the 1<sup>st</sup> Defendant on the following terms;

i. A permanent injunction is herein issued restraining the 1<sup>st</sup> Defendant by himself, his servants, or agents from selling, entering and or transferring L.R No. Nyandarua /Milangine 3666.

ii. The title held by the 1<sup>st</sup> Defendant in respect of L.R No. Nyandarua /Milangine 3666 is hereby cancelled and re -issued in the Plaintiff's name.

iii. The Land Registrar, herewith do amend the Register to reflect Cecelia Njoki Njenga as the sole proprietor of LR Nyandarua /Milangine 3666.

iv. Costs to the Plaintiff at the lower scale since the suit was undefended.

**Dated and delivered at Nyahururu this 21<sup>st</sup> day of June 2018.**

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE