



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO.305 OF 2017**

**(FORMERLY NAIROBI ELC CASE NO.834 OF 2012)**

**ELIZABETH WAMBUI KIRAGU.....PLAINTIFF**

**VERSUS**

**NDIRANGU MACHARIA.....DEFENDANT**

**JUDGEMENT**

By a **Plaint** dated **12<sup>th</sup> November 2012**, the Plaintiff herein **Elizabeth Wambui Kiragu** has sought for **Judgement** against the Defendant in the following terms:-

- a) That the Defendant, his agents/servants or anyone claiming title under him be restrained from offering for sale, selling, charging, leasing or in any other way dealing and interfering with the said parcel of land known as Ruiru Kiu Block 2/2820, pending the hearing of this application.***
- b) That the Defendant his agents/servants or anyone claiming title under him be restrained from offering for sale, selling, charging, leasing or in any other way dealing and interfering with the said parcel of land of land known as Ruiru/Kiu Block 2/2820, pending the hearing of this suit.***
- c) A declaration that the Plaintiff is the rightful owner of the suit property.***
- d) Costs of the suit.***
- e) Any other relief the court may deem fit to grant.***

The Plaintiff in her statement of claim had averred that she was and still is the registered owner of all that parcel of land known as **Ruiru Kiu Block 2/2820**, vide a title deed issued to him on **2<sup>nd</sup> September 2010**. She also averred that in **March 2012**, the Defendant entered on the said parcel of land and erected beacons on it claiming to be the rightful owner of the parcel of land and started offering the subdivisions for sale to several unsuspecting buyers. She also stated that she had not sold the said piece of land to the Defendant or any other person. Therefore the Defendant's act of erecting beacons on the said parcel of land are unwarranted and geared towards dispossessing the Plaintiff of her parcel of land. She alleged that she was apprehensive that the Defendant might offer for sale the said piece of land to third parties. Further that even with **Demand** and **Notice of Intention to Sue**, the Defendant has continued to interfere with the above stated parcel of land.

The Defendant **Ndirangu Macharia** filed his statement of Defence on **5<sup>th</sup> June 2013**, and denied all the allegations made by the Plaintiff in her **Plaint**. He averred that he has been the registered owner of the suit property, **Ruiru Kiu Block 2/2820** for the last **12 years** and is still the registered owner as evidenced by the Certificate of official Search dated **21<sup>st</sup> March 2012**. He further denied having entered on the suit property in **March 2012**, but alleged that he has always cultivated on the said parcel of land since **1997** as the rightful owner. Further that as a rightful owner, he is entitled to do as he so wishes with his parcel of land. It was his further allegation that he is no longer the owner of the suit property as he has already sold the same to a third party before the institution of this suit. Therefore, the Defendant urged the Court to dismiss the suit with costs.

Simultaneous to the **Plaint**, the Plaintiff also filed a **Notice of Motion** application even dated and sought for injunctive orders against the Defendant to restrain him from dealing in whatsoever manner with the suit property **Ruiru Kiu Block 2/2820**, pending the hearing and determination of this suit. After interparties hearing, the Court on **7<sup>th</sup> March 2013**, delivered a **Ruling** and held that:

***“The Court would need to hear the parties and their witnesses at the trial to determine who between the two holds the genuine title and therefore entitled to the suit property”.***

Therefore, the Court directed that the parties do maintain the *status quo* and that there would be no subdivision and/or registration or disposal of the suit property pending the hearing and determination of the suit.

The matter proceeded for hearing on **20<sup>th</sup> July 2015**, wherein the Plaintiff gave her evidence and called two more witnesses. She adopted her witness statement fully and reiterated that she bought the suit property from one **Joseph Kungu** for **Kshs.420,000/=** and was issued with a title deed on **20<sup>th</sup> September 2010**. That the said **Joseph Kungu** showed her all his ownership documents and after purchase, she took possession of suit property. However, the Defendant invaded her land and alleged that he had a title deed for the same. That the Defendant’s first title deed was allegedly issued on **7<sup>th</sup> January 1997**, indicating the land was in **Sheet No.3**. He also obtained a 2<sup>nd</sup> title deed on **17<sup>th</sup> October 2011**, indicating the suit land was in **Sheet No.4** and the Plaintiff’s parcel of land was also in **Sheet No.4** as per the **Survey Map**.

**PW2 – Joseph Kungu Kamau** confirmed to have sold the suit property to the Plaintiff having obtained the same in **1988** from **Githunguri Constituency Ranching Co. Ltd**, where he was a **shareholder**. He alleged that he had never sold the suit property to any other person apart from the Plaintiff herein.

On his part, **PW3-Joseph Njoroge Waweru**, confirmed to be the one who introduced the Plaintiff to Vendor, PW2. That after purchasing the suit property, the Plaintiff was given a **Clearance Certificate** and later obtained a **title deed**.

Though the Defendant had filed his defence, he failed to turn up in court on several occasions to adduce his evidence. The Court even allowed him vide its **Ruling of 29<sup>th</sup> September 2017**, to avail his evidence even after the matter had been reserved for a **Judgement** date. However, the Defendant failed to adhere to the conditions issued by the Court and on **17<sup>th</sup> May 2018**, the Court reserved the matter for Judgement without the Defendant’s evidence.

The Plaintiff had filed her written submissions on **5<sup>th</sup> December 2016**, and Defendant filed his submissions on **26<sup>th</sup> June 2018**, a few days before this Judgement.

The Court has now carefully considered the available evidence and the written submissions herein. The Court has also considered the exhibits produced in court. It is evident that the Plaintiff herein **Elizabeth Wambui Kiragu**, and the Defendant **Ndirangu Macharia** are each claiming ownership of the suit property herein **Ruiru Kiu Block/2/2820**. Each of them has a title deed allegedly issued by the **Land Registry, Thika** over the suit property.

This is therefore a case of competing titles and as the Court held on **7<sup>th</sup> April 2013**, evidence needed to be called to unravel which of the two titles is the genuine one. The unravelling of the said mystery would only be done through calling of evidence and interrogating the same through cross-examination.

The Plaintiff gave evidence for herself and called two witnesses. She produced a copy of **Certificate of Lease** for **Ruiru Kiu Block 2/2820**, issued on **2<sup>nd</sup> September 2010**, which showed that she is the registered owner of the suit property which falls on **Index Map Sheet No.4**.

Further, the Plaintiff produced a **Sale Agreement** between herself and **Joseph Kungu Kamau** whom she called as **PW2**. She also produced **Share Certificate** in her name and the other documents of ownership that she allegedly received from the **Vendor, Joseph Kungu Kamau**. The said **Joseph Kungu Kamau** gave evidence and confirmed that he was a **Shareholder** of **Githunguri Constituency Ranching Company Ltd** as from **1988**. He allegedly purchased the suit property in 1988 and later sold it to the Plaintiff in the **year 2010**. Therefore from the evidence of **PW2**, he was the initial owner of the suit property which he later sold to the Plaintiff herein.

Though the Defendant alleged in his defence that he was the owner of the suit property from **1997**, he did not avail himself in court to testify and subject his testimony to the usual test of cross-examination. His defence therefore remains mere allegations. He further alleged that he had sold the suit property to a third party. However, he did not call the said third party as a witness or avail any evidence to confirm that the suit property has now been transferred from the name of the Defendant to that of the third party.

Though Defendant alleged that he purchased the suit property in **1997** and was issued with a title deed to that effect, the Court finds that from the documents produced in court by the Plaintiff, one **Joseph Kungu Kamau**, was allocated the suit property in **1988** and he paid for survey fees on **18<sup>th</sup> June 1988**. He transferred the suit property to **Elizabeth Wambui Kiragu** in the **year 2009** and she was issued with **share certificate No.079** on **13<sup>th</sup> January 2009** and **clearance certificate** on **17<sup>th</sup> February 2009** by **Githunguri Constituency Ranching Company Limited**.

There was no evidence that the said **Joseph Kungu Kamau** ever sold the suit land to any other person apart from the Plaintiff. Therefore from the **Share Certificate** held by the Plaintiff, **Joseph Kungu Kamau** was the initial owner of the suit property in **1988** and he obtained the land before the Defendant was allegedly issued with his title deed in **1997**.

It is also evident that the Plaintiff obtained a **Clearance Certificate** and got registered as proprietor of the suit property in the **year 2010** and her land is on **Index Map Sheet No.4**. Though the Defendant was issued with the title deed in **1997**, the **Index Map Sheet** was indicated as **Sheet No.3**. It was only changed in the **year 2011**, and by this time, the Plaintiff was the registered owner of the suit property. Therefore, it is evident that the root of the Plaintiff’s title is traceable. See the case of **Munyru Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, where the 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.”***

Further, there are two competing titles herein over **Ruiru Kiu Block 2/2820**, which parcel of land lie on **Index Map Sheet No.4**. The Plaintiff obtained her title deed over **Sheet No.4** on **7<sup>th</sup> September 2010**, and the Defendant obtained his in the **year 2011**. Therefore this Court finds that the Plaintiff’s title is the first in time and should therefore prevail. The Court will rely on the maxim of Equity which states; **“when two equities are equal, the first in time prevails”**. See the case of **Gitwany Investment Ltd & 3 Others...Vs...Commissioner of Lands, HCCC No.1114 of 2002**, where the Court held that:-

***“The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently are and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail”.***

Having found that the Plaintiff’s title deed is the first in time and that it should prevail, then the Court further finds as a holder of Certificate of registration, she is deemed to be the **absolute** and **indefeasible** owner. See **Section 26(1)** of the **Land Registration Act**. It 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.***

As a registered proprietor, the Plaintiff has the right to deal with the suit land as she so wishes. Her rights are protected by **Article 40** of the **Constitution of Kenya 2010** and **Section 24(a)** of the **Land Registration Act 2012**, which states:-

***“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.***

Further, her above stated rights can only be defeated by operation of law as provided by **Section 25(1)** of the said **Act 2012**

***“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”***

Though the Defendant alleged that he had sold the suit property to a third party, he did not avail evidence to that effect. Further the Defendant could not sell what did not rightly belong to him. He could therefore not pass a good title to the alleged purchaser and the only option is for him to refund the purchase price.

Having now carefully considered the available evidence, and the exhibits produced thereon, the Court finds that the Plaintiff has proved her case on the required standard of balance of probabilities.

For the above reasons, the **Court enters Judgement for the Plaintiff against the Defendant as prayed in the Plaint in terms of prayers No. (c) and (d) and in respect to prayer No.(e), the Defendant to give the Plaintiff vacant possession of the suit property forthwith.**

It is so ordered.

**Dated, Signed and Delivered at Thika this 6<sup>th</sup> day of July 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Waitere for Plaintiff

No appearance for Defendant

Lucy – Court clerk

**L. GACHERU**

**JUDGE**

**Court** – Judgement read in open court in the presence of M/S Waitere for Plaintiff and absence of Defendant.

**L. GACHERU**

**JUDGE**

**6/7/2018**