



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.42 OF 2017

MARY MUTHONI NJOROGE.....PLAINTIFF

VERSUS

JOSEPH WACHIRA NDERITU.....1<sup>ST</sup> DEFENDANT

KYANJAU CO-OPERATIVE SOCIETY.....2<sup>ND</sup> DEFENDANT

JUDGEMENT

The matter for determination is the Plaintiff's claim filed on **15<sup>th</sup> January 2016** vide a **Plaint** dated **11<sup>th</sup> January 2016** wherein the Plaintiff has sought for Judgement against the Defendant herein for orders that:-

- a) *That the transfer of residential plot no.208 be revoked and proprietorship thereto reverts to Plaintiff.*
- b) *Such other and further relief as the court may deem fit and just to grant.*

In her claim, the Plaintiff alleged that she is the owner of **residential plot No.208** which was formerly owned by the 2<sup>nd</sup> Defendant. However in the **year 1993**, the 1<sup>st</sup> Defendant who is her son colluded with the employees of the 2<sup>nd</sup> Defendant and fraudulently transferred the suit property to a 3<sup>rd</sup> Party. The particulars of fraud by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant were enumerated in paragraph 5 of the **Plaint**. It was her contention that the Plaintiff did not learn of the fraudulent transfer until **May 2012** when she sought to obtain a lease document in respect of the said property and when she confronted the 1<sup>st</sup> Defendant, he conceded to the said fraud and he wrote a letter to 2<sup>nd</sup> Defendant requesting him to revoke the transfer and have the property revert to the Plaintiff. However the 2<sup>nd</sup> Defendant has failed and/or neglected to ascend to the said request. Further that the Plaintiff has written on several occasions to the 2<sup>nd</sup> Defendant requiring that the 2<sup>nd</sup> Defendant do revoke the fraudulent transfer and put her into proprietorship of the said land, but the 2<sup>nd</sup> Defendant has failed to do so. Therefore as a result of the said fraudulent transfer, and the 2<sup>nd</sup> Defendant's refusal to revoke the transfer, the Plaintiff has been deprived of her proprietorship of the suit land and has suffered loss. She urged the Court to allow her claim.

The claim is vehemently opposed by the 2<sup>nd</sup> Defendant who filed its **statement of Defence** together with a **Notice of Preliminary Objection** on **11<sup>th</sup> February 2016**. The 2<sup>nd</sup> Defendant denied all the allegations made by the Plaintiff in the claim. The 2<sup>nd</sup> Defendant further contended that the Plaintiff was the owner of the subject property **plot No.208** before the year **1993** but the same has since changed hands to 4 other different owners. Further, the 2<sup>nd</sup> Defendant denied the allegations of fraud and collusion as alleged by the Plaintiff and contended that it acted with due diligence as the 1<sup>st</sup> Defendant who is the son of the Plaintiff took to the 2<sup>nd</sup> Defendant all the relevant documents being copy of the Identity Card of the Plaintiff and duly signed transfer forms signed in favour of the Plaintiff to her son and the 2<sup>nd</sup> Defendant acted accordingly. Further that the Plaintiff was aware of this transfer **since 1993** as she had severally visited the 2<sup>nd</sup> Defendant's office and was informed of the same. Further, it was alleged that the 2<sup>nd</sup> Defendant was a stranger to the alleged letter written by the 1<sup>st</sup> Defendant and if that was the case, the 1<sup>st</sup> Defendant ought to have been charged with a **Criminal Offence of Forgery**. The 2<sup>nd</sup> Defendant contended that it has no mandate and/or authority to transfer or invalidate the title documents of the suit property since the property is now registered property and therefore the Plaintiff's claim should not be directed at them. It was also contended by the 2<sup>nd</sup> Defendant that the suit is time barred caught by **Limitation of Actions Act, Cap 22 Laws of Kenya** as the transfer was effected in **1993** and the suit was only filed in the **year 2016**. Therefore, the 2<sup>nd</sup> Defendant further contended that the suit as filed is **frivolous, vexatious** and **an abuse** of the court process as it is time barred and discloses no cause of action against the 2<sup>nd</sup> Defendant and it was its prayer that this suit should be dismissed with costs.

In the **Notice of Preliminary Objection**, the 2<sup>nd</sup> Defendant averred that:-

- 1) *That the entire suit is time barred the course of action having arisen in 1993 a period of 23 years hence offends the provisions of Limitation of Action Act.*

2) *That this suit is vexatious, frivolous and an abuse of the court process which should be dismissed with costs.* and it urged the Court to dismiss the entire suit with costs.

The **Preliminary Objection** was not argued first but was incorporated in the main suit.

The 1<sup>st</sup> Defendant who is the son of the Plaintiff did not enter any Appearance nor file any Defence and an Interlocutory Judgement was entered against him on **6<sup>th</sup> April 2016**.

After complying with Order 11, the matter proceeded for hearing on **25<sup>th</sup> July 2017** wherein the Plaintiff herein **Mary Muthoni Njoroge** reiterated the contents of her **Plaint** and also adopted her written statement as part of her evidence in court. She only added that she reported the matter to the CID who arrested her son, the 1<sup>st</sup> Defendant. However, she was later advised to file a **Civil Suit** against the Defendant as she did not transfer the suit property to her son, the 1<sup>st</sup> Defendant.

On the part of the 2<sup>nd</sup> Defendant, one **Michael Njuguna Njoroge** the Chairman of the 1<sup>st</sup> Defendant testified on behalf of the 2<sup>nd</sup> Defendant. He also adopted his written statement as part of his evidence in court. He further testified that indeed **plot No.208** initially was allotted to the Plaintiff herein **Mary Muthoni Njoroge**. However, in the **year 1993** the said plot was transferred to **Joseph Wachira Nderitu** the 1<sup>st</sup> Defendant after he presented a letter from the Plaintiff requesting for such transfer. The said letter was signed by the Plaintiff, **Mary Muthoni**. After the transfer to **Joseph Wachira**, the said plot was later transferred to **Mutema Kibiru** on **16<sup>th</sup> April 1993**. This **Mutema Kibiru** sold the said plot to **Gichia Muigai** in **December 1993** vide a letter dated **21<sup>st</sup> December 1993** and a transfer was effected to that effect. Further **Gichia Muigai** transferred the said plot to **Jane Njeri** on **8<sup>th</sup> June 2011** and acquired a lease as is evident from a copy of the **Green Card exhibit 5**. Later **Jane Njeri** sold the suit property to **Jolivima Enterprises Ltd** on **24<sup>th</sup> June 2015** and that the 2<sup>nd</sup> Defendant stopped handling the suit property once the property was registered and a lease certificate issued.

The witness therefore denied that the 2<sup>nd</sup> Defendant colluded with **Joseph Wachira Nderitu**, the 1<sup>st</sup> Defendant to transfer the suit property to the said **Joseph Wachira Nderitu** as the normal procedure was followed. It was his evidence that from their record, it was the Plaintiff who transferred the suit property to her son, 1<sup>st</sup> Defendant. He contented that the prayers sought by the Plaintiff are beyond their powers as the suit property has already been registered in another proprietor's name who has even acquired a lease.

The parties thereafter filed their written submissions to support their rival positions. The **Law Firm of Kanyi Kiruchi & Co. Advocates** for the 2<sup>nd</sup> Defendant filed their written submissions on **24<sup>th</sup> August 2017** and reiterated that the suit herein is time barred and has been caught by **Limitation of Actions Act** as the suit property was transferred from the Plaintiff to 1<sup>st</sup> Defendant in the **year 1993**. The 2<sup>nd</sup> Defendant relied on **Section 7 of Limitation of Actions Act, Cap 22** which states:-

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.**

It was further submitted that since the suit property is now registered in the name of a 4<sup>th</sup> person after the initial transfer, the 2<sup>nd</sup> Defendant has no control over registered property. Further no orders can be issued to affect persons who are not parties to this suit. The 2<sup>nd</sup> Defendant relied also on the case of **Peter Chepkochoi Mitei...Vs...Esther Jelagat Ng'eny & 3 Others (2014)eKLR**, where the Court held that:-

**“From the above, I do find the Plaintiff's action is time barred by dint of Section 7 of the Limitation of Action Act, Cap 22 Laws of Kenya”.**

On the part of the Plaintiff the **Law Firm of Waithira Mwangi & Co. Advocates** submitted that the suit property is not time barred since the basis of the claim herein is fraud and in fraud cases time begins to run from when the fraud was discovered. It was submitted that in this case, fraud was discovered in the **year 2012** and the Plaintiff filed the suit **three years later**. Therefore the right to the claim accrued in the **year 2012** when the Plaintiff discovered the instant fraud. The Plaintiff relied on the case of **Richard Odour Opole...Vs...The commissioner of Land & Others, Court of Appeal at Kisumu, Civil App.No.285 of 2007**, where the Court held that:-

**“The action is for relief from the consequences of a mistake, the period of Limitation does not begin to run until the Plaintiff has discovered the fraud or mistake...”**

The Plaintiff therefore submitted that a claim for fraud had been established and the said transferee could not transfer title and any subsequent transfers could not confer good title because no amount of passage of time could sanctify fraud. The Plaintiff urged the Court to allow her claim entirely.

This Court has now carefully considered the pleadings in general, the annexures thereto and the evidence adduced in Court. The Court has also carefully read and considered the rival written submissions, the cited authorities and the relevant provisions of law and makes the following findings:-

There is no doubt that the Plaintiff herein is a member of **Kyanjau Co-operative Society** as testified by herself and admitted by **DW1**, the Chairman of the Co-operative Society. There is also no doubt that the Plaintiff was also the owner of **plot No.208** within **Kyanjau Co-operative Society**. However, she ceased being the owner on **7<sup>th</sup> April 1993** vide a letter dated **7<sup>th</sup> April 1993** allegedly written by herself (**Mary Muthoni Njoroge**) to the **Chairman of Kyanjau Farmers Co-operative Society**, the 2<sup>nd</sup> Defendant instructing the said Chairman to transfer the said residential **plot No.208** to **Joseph Wachira Nderitu**, the 1<sup>st</sup> Defendant who is her son. The said transfer was approved on the same date and **Joseph Wachira Nderitu** became the new owner. There is also no doubt that the said **Joseph Wachira Nderitu** later

transferred the suit **plot No.208** to **Mutema Kiburu** on **16<sup>th</sup> April 1993** which transfer was also approved on **16<sup>th</sup> April 1993**. From the available exhibits, it is also not in doubt that **Mutema Kiburu** later transferred this suit property to **Gichia Muigai** vide a letter dated **21<sup>st</sup> December 1993**. Therefore, it is clear that in the year **1993**, the suit plot changed from the Plaintiff to three other persons, with the approval of the 2<sup>nd</sup> Defendant.

From **exhibit no.4** produced by the Defence, it is also evident that on **8<sup>th</sup> June 2011**, **Gichia Mungai** transferred the suit property to **Jane Njeri Kariuki** which approval was also given.

The Plaintiff alleged that she was not aware of the said transfers until the **year 2012**, and when she confronted her son, the 1<sup>st</sup> Defendant, he admitted to have transferred the said plot to her fraudulently, with collusion from the employees of the 2<sup>nd</sup> Defendant. Though the Plaintiff alleged that her son made an admission of having forged the transfer of the said transfer documents, there is no evidence that the said **Joseph Wachira Nderitu** was ever charged with any offence of **Forgery** in any court of law. From the alleged admission letter written by the 1<sup>st</sup> Defendant on **31<sup>st</sup> May 2012**, he had sought for revocation of the agreement of transfer of the suit **plot 208**. However, by then the suit plot had changed hands from **Mutema Kiburu** to four other persons and as the court stated earlier, there were no criminal charges preferred against the 1<sup>st</sup> Defendant and there was no injunction or any bar served on the 2<sup>nd</sup> Defendant to bar them from dealing further with **plot No.208**.

Further, from the copy of the Green Card produced in court by the Defendant, the said suit plot was registered in the name of **Jane Njeri Karuki** on **1<sup>st</sup> April 2014** and there is no evidence of any encumbrances on the said title. Therefore as from **1<sup>st</sup> April 2014**, and as provided by **Section 26(1)** of the **Land Registration Act**, the said **Jane Njeri Kariuki** was deemed to be the absolute and indefeasible owner of the suit plot which became known as **Thika Municipality Block 18/208**.

As the registered proprietor, the said **Jane Njeri Kariuki** had her rights protected under **Section 25(1)** of the **Land Registration Act**. Therefore the said **Jane Njeri Kariuki** could do whatever she wished with the said parcel of land. In line of her rights under **Section 24(a)** and **25(1)** of the **Land Registration Act**, the proprietor **Jane Njeri Kariuki** transferred this parcel of land **Thika Municipality Block 18/208** to **Jolivima Enterprises Ltd** on **24<sup>th</sup> June 2015**. There is no evidence whether the said **Jolivima Enterprises Ltd** have sold or transferred the suit property to any other party. Without any evidence of change of proprietorship, the Court will presume that **Jolivima Enterprises Ltd** is now the absolute and indefeasible owner of this suit property. Its proprietorship can only be challenged if it was acquired through fraud, misrepresentation or corrupt practices.

Has the Plaintiff herein proved that the current proprietor of the suit property as provided by Exceptions of **Section 26(1)(a)&(b)** of the **Land Registration Act**?

It is evident that the Plaintiff herein has sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for orders that the transfer of **plot no.208** be revoked and the said proprietorship be reverted back to the Plaintiff. However as the court observed earlier this suit property was registered in the name of **Jane Njeri Kariuki** under the **Land Registration Act** in the **year 2014**. Therefore the suit land stopped being in control of the 2<sup>nd</sup> Defendant once the suit property became registered under the Land Registration Regime.

The Court had seen the **Demand Letter** dated **10<sup>th</sup> November 2015** written to the Chairman of the 2<sup>nd</sup> Defendant demanding that the transfer of the suit plot be cancelled and the ownership be revoked. However by then, this suit property was registered in the name of **Jolivima Enterprises Ltd** and the 2<sup>nd</sup> Defendant had no power or authority to cancel any title. The cancellation or revocation of any title acquired fraudulently, through omission or mistake can only be done by the court as provided by **Section 80(1)** of the **Land Registration Act**, which provides:-

**“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”.**

Can the court order for revocation or cancellation of the suit property herein?

The Plaintiff has based her claim on allegations of fraud or forgery. Fraud is a serious allegation which must be strictly proved. See the case of **R.G Patel.Vs..Lalji Makenji(1957)EA 314**, where the court held that:-

**“Allegation of fraud must be strictly proved. It was incumbent upon the Plaintiff therefore to demonstrate to this court that the transfer of the titles to the Defendants names was fraudulent and specifically explain the actions which constituted the fraud”.**

Further, it is evident that prove of fraud can lead to challenge of a Certificate of title and thus revocation or cancellation of the same. However, the said allegations of fraud must be proved to the required standard. See the case of **Railal Gordhanbhai Patel.Vs...Lalji Makenji (1957) EA 315**, the Court held that:-

**“Allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond any reasonable doubts, it ought to be more than a balance of probabilities.”**

In the instant case, though the 1<sup>st</sup> Defendant had allegedly admitted having forged the transfer documents, there was no evidence that he was ever charged in any court of law and found guilty of such forgery. Secondly, there was no evidence that any officials of 2<sup>nd</sup> Defendant was involved in any fraud or forgery as the 1<sup>st</sup> Defendant did not enter appearance nor file Defence to elaborate on his letter allegedly written **31<sup>st</sup> May 2012** wherein he allegedly admitted forgery through the assistance of the 2<sup>nd</sup> Defendant clerks. For the above reasons, the Court

finds that the allegation of fraud has not been proved on the required standard herein by the Plaintiff.

Further, the suit property is now in the name of **Jolivima Enterprises Ltd** who is not a party to this suit. The Court cannot issue orders of revocation or cancellation of the said registration in favour of **Jolivima Enterprises Ltd** without having heard them. By doing so, that would be tantamount to going against the rule of natural justice which dictates that no party should be condemned unheard. See the case of **Pashito Holdings & Another ..Vs...Ndungu & 2 Others, Civil Appeal No.138 of 1997**, where the court held that:-

***“The rule of ‘audi alteram Partem’ which literally means ‘hear the other side’ is a rule of natural justice. It is a indispensable requirement of justice that the party who has to make a decision shall hear both sides giving each an opportunity of hearing what is argued against him.”***

From the above analysis of the available evidence, it is clear that the Court cannot issue any order of revocation of **plot no.208** as the said plot has now been registered under a new title **Thika Municipality Block 18/208** and it is no longer in the hands and control of 2<sup>nd</sup> Defendant. Further, the Court cannot issue orders that would affect a party who is not enjoined in the suit and who has not been heard. The said revocation of a registered property would be directed to be effected by the Land Registrar. The Land Registrar Thika was also not made a party to this suit and it is trite that courts do not issue orders in vain.

The Defendant did file a **Preliminary Objection** and averred that the suit is time barred and thus cannot stand. The said allegation was premised under **Section 7** of the **Limitation of Actions Act** which provides:-

***“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.***

However, the Plaintiff’s suit was based on allegation of fraud. It is trite that in cases of fraud, time starts running from the time of discovery of the alleged fraud. In the instant suit, the Plaintiff allegedly discovered the alleged fraud in the **year 2012** and the suit was filed in the **year 2016**.

The Court will concur with the Plaintiff’s submissions that this suit is not time barred nor caught by **Limitation of Actions Act**. See the case of **Richard Oduol Opole...Vs...The Commissioner of Lands & 2 Others (2015) eKLR**, where the Court held that:-

***“According to Section 7 of the Limitations of Actions Act, the cause of action would not normally be time barred for a period of 12 years from the date the cause of action arose. Consequently by the time the suit was filed there was still a substantial period left to lapse before limitation could be invoked....”***

Equally in this matter, the Court finds that if the alleged fraud was discovered in the **year 2012**, then the suit has not been caught by Limitation of time and therefore the **Notice of Preliminary Objection** is not merited and the same is dismissed entirely with no orders as to costs.

Having now carefully considered the available evidence, the Court finds that the Plaintiff herein has failed to prove her case on the required standard of balance of probabilities. Consequently, the Court finds the Plaintiff’s suit is not merited and it is dismissed entirely.

On the issue of costs given that the Plaintiff is the mother to 1<sup>st</sup> Defendant and member of the 2<sup>nd</sup> Defendant and her advanced age, the Court will order and directs that each party to bear his/her or its own costs given that **Section 27** of the **Civil Procedure Act** provides that costs are granted at the discretion of the Court.

It is so ordered.

**Dated, Signed and Delivered at Thika this 19<sup>th</sup> day of October 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

M/S Mwangi for the Plaintiff

Mr. Maina holding brief for Mr. Kanyi for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Lucy - Court clerk

**L. GACHERU**

**JUDGE**

**Court** – Judgement read in open court in the presence of the above advocates.

**L. GACHERU**

**JUDGE**

**19/10/2018**