



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**E.L.C NO. 324 OF 2017**

**DAVID MWANGI MURATHI.....PLAINTIFF**

**VS**

**SAMUEL MBUTHIA THUO.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit against the Defendant on the 3/4/2017 claiming that the Defendant has fraudulently caused the suit land LOC10/MUKANGU/T.52 to be registered in his name. He sought prayers *inter alia* that the suit revert to the name of Murathi Gakingo the original owner and father of the Plaintiff to pave way for succession and eventual distribution of the estate.

2. The Defendant denied the Plaintiff's claim in his statement of defence filed on the 3/5/2017. He averred that he purchased the land from the Plaintiff's mother in 1980 and obtained a valid title and took possession. He pleaded *inter alia* that the Plaintiffs claim is statute barred.

3. In his evidence the Plaintiff stated that the suit land was owned by his father Murathi Gakingo. That during this lifetime his father did not sell the land to the Defendant. That on 27/9/1980 he discovered upon carrying out a search on the suit land that the Defendant had acquired the title without his knowledge. That the Defendant registered himself as owner through fraud. That he reported the matter to the local chief for arbitration but no resolution hence the suit. He produced a copy of an official search dated the 18/12/2017 to support his averments. In cross examination he informed the Court that he was born in 1939. He gave a detailed history of the land which was registered in the name of his father on 17/2/1963 and through succession proceedings it devolved to his mother Esther Waigwa Murathe on 26/3/1980. That on the 23/9/1980 it became registered in the name of the Plaintiff under unclear circumstances. That his mother died in 1983. He stated that neither of his parents were buried on the suit land.

4. PW2 – Grace Wanjiru testified that she is the sister to the Plaintiff and stated that she does not know who is in occupation of the suit land as she had not visited the said land for a while. She stated that she was sure the Plaintiff's parents did not sell the land to the Defendant. PW3 – Esther Njeri Mwangi stated that she is the wife of the Plaintiff. She denied ever signing a witness statement on record. She disowned a witness statement on record which purported to have been signed by her. When asked by the Court what she knew about the suit land she stated that the land belongs to the Plaintiff and that the suit land is unoccupied.

5. The Defendant testified that in 1980 he entered into an agreement with the Plaintiff's mother Esther Waigwe for the purchase of the suit land. He paid the full purchase price, obtained land control board consent, executed the transfer and was given possession. That he became registered as owner on 23/9/1980. Thereafter he developed the land by planting coffee and he has been cultivating for the last 38 years. He stated that in the recent past the Plaintiff started trespassing onto the land with an attempt to dispose it. The matter was reported to the local chief where the said chief advised him to report the matter to the local police station which he did vide OB No. 11/15/05/2017. However, no action was taken against the Plaintiff. He produced in evidence a copy of the title for the suit land, copy of the letter form the chief Kahuhia location dated the 15/5/2017 and a copy of the official search dated 12/5/2017 to support his case. Further that the Plaintiff is purported to lease the land to a third party on account that he is the owner.

6. In cross examination by the Plaintiff the Defendant stated that he bought the land from the Plaintiff's mother at Kshs 6000/- and the same was witnessed by the Plaintiff and his wife. That he paid the purchase price in cash. That indeed the purchase price was collected by the Plaintiff on behalf of his mother and therefore had full knowledge of the transaction. He stated that his witnesses were Stephen Musyoki and Kingara. He stated that the documents were destroyed when his house caught fire

7. On the 25/5/2017 the parties elected to file written submissions which I have read and considered. The Plaintiff reiterated the contents of his evidence in the submissions. His main concern is to know how the Defendant whom he claims to be a stranger acquired the land.

8. The Defendant through his learned counsel submitted that the suit is time barred and relied on the provisions of section 7 and 13 of the limitation of Actions Act. He submitted that the Defendant has an indefeasible title whose legitimacy has not been challenged by the

Plaintiff. That there is no evidence whatsoever tendered by the Plaintiff to show that the title to the suit title was obtained by fraud. He submitted that the Plaintiff has not discharged his duty to prove fraud which is a serious accusation and must be strictly proved. He urged the Court to disallow the Plaintiff's claim in its entirety.

9. Having considered the pleadings, the evidence and the submissions of the parties the issues for determination are; whether the suit is statute barred; whether the Defendants title was obtained fraudulently and who meets the costs of the suit.

10. According to the copy of the green card produced in Court, it is not in dispute that the suit land was registered in the name of the Plaintiff's father in 1963. Upon his demise in 1979 the suit land devolved to the Plaintiff's mother one Esther Waigwe Murathe through succession. The said land was transferred to the Defendant in 1980. The Plaintiff has pleaded that he discovered that the suit land had been transferred to the Defendant on the 27<sup>th</sup> September 1980. He did not explain why it took him 37 years to file suit against the Defendant. Section 7 of the LAA provides as follows;

“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.”

Similarly, actions based on fraud must be brought within 3 years and failure to do so, the action becomes statute barred. The cause of action arose in 1980 and the Plaintiff's claim became extinguished by 1992. It is therefore statute barred.

11. Section 27 of the Registered Land Act provides that the title of a registered owner shall not be subject to challenged except on the ground of fraud or misrepresentation for which the registered owner is proved to be a party. The Plaintiffs claim is based on fraud. I note that the Plaintiff has not pleaded the particulars of the fraud in his pleadings. Section 107 of the evidence Act provides as follows;

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

12. The Black's Law Dictionary defines fraud thus: -

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another'. (Emphasis is mine).

13. In the case of **Insurance Company of East Africa –vs- The Attorney General & 3 Others HCCC No. 135 of 1998** as thus whether there was fraud is, however, a matter of evidence.

14. In the case of **Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others Civil Appeal No. 246 of 2013** the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. It referred the law as stated in the case of **Dr. Joseph Arap Ngok – Vs - Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** where the Court categorically declared that;-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

15. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence. The onus was on the Plaintiff to prove fraud on the part of the Defendant. He did not.

16. Having reached the conclusions that I have in the analysis of this case, it follows that the Plaintiff's case fails and is dismissed with costs to the Defendant.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11<sup>TH</sup> DAY OF OCTOBER 2018**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Plaintiff – Present

J B for the Defendant

Irene and Njeri, Court Assistants