



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 655 OF 2017(formerly Machakos ELC Case NO. 304 of 2009)

BEATRICE WAIRIMU GITHII.....PLAINTIFF

VERSUS

1. PETER GACHENGA KIMUHU

2. JOEL ATUTI NYAMBAKA

3. LAND REGISTRAR KAJIADO.....DEFENDANT

JUDGEMENT

By a Plaint dated the 22nd September, 2009, the Plaintiff prays for the following Orders against the Defendants:

- a) THAT the 3rd Defendant be and is hereby ordered to rectify the register in respect of LR NO. KAJIADO/ KITENGELA/ 11080 and do cancel the entry in the name of the 1st Defendant and do re-register the 2nd Defendant as the proprietor thereof, and do re-register the Plaintiff as the proprietor thereof.
- b) THAT the Defendants be condemned to pay the costs of this suit in any event to the Plaintiff.
- c) Any other or further relief this Honourable Court may deem just and fit to grant to the Plaintiff.

The 1st and 2nd Defendants filed a Defence dated the 27th November, 2009 where they admitted the descriptive contents of the Plaint but denied that the Plaintiff was the registered owner of land parcel number KAJIADO/ KITENGELA/ 11080 hereinafter referred to as the 'suit land'. They stated that the suit land was registered in the name of BEATRICE WAIRIMU GITAHU who sold it to the 1st Defendant on 25th November, 2008, who then sold it to the 2nd Defendant.

The Plaintiff had one witness, while the 1st and 2nd Defendants failed to attend court for hearing. The 3rd Defendant also had one witness.

Evidence of the Plaintiff

PW1 who was the Plaintiff herein confirmed that she purchased the suit land from Mugumo Estates Limited and she was issued with a title deed which she has in her custody. She denied knowing the 1st Defendant nor selling the suit land to him in 2008. In cross examination she confirmed that there was no one on the suit land. She explained that when she went to the Land Registry, she found the Green Card missing. She undertook a search and discovered the suit land was no longer registered in her name. She wanted the Land Register rectified and the suit land restored back to her.

Evidence of the 3rd Defendant

DW1 Mr. David Nyambaso Nyandoro who was the Principal Land Registrar, Kajiado County admitted that he was unable to trace transfer documents between BEATRICE WAIRIMU GITAHU and the 1st Defendant. He confirmed that the purported transfer documents between BEATRICE WAIRIMU GITAHU and the 1st Defendant were presented by the 1st Defendant for registration. The Land Registrar admitted that once the vendor sells the land, he/she is expected to surrender the original title deed for cancellation and it was a mystery that the Plaintiff still had her original title deed in her custody.

The Plaintiff and the 3rd Defendant filed their respective submissions where they each reiterated their claims. The Plaintiff relied on various

cases including **Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 others (2015) eKLR**; **Samuel Kamau Macharia Vs. Ali Khan Ali Muses & 2 others (2014) eKLR**; **Samuel Kamere Vs Lands Registrar, Kajiado (2015) eKLR**; **Munyu Maina Vs Hiram Gathiha Maina Civil Appeal No. 239 of 2009**; **Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Another (2013) eKLR**; **Arthi Highway Developers Limited Vs West End Butchery Limited & 6 others (2015) eKLR** to support her claim. The 3rd Defendant relied on the case of **ELC Civil Suit No. 1189 of 2007 Charles Gathuma Munge Versus Peter Icharia Munge & Ichamu Investments Ltd; Ratilal Gordhanbhai Patel Vs Lalji Makanji (1957) EA 314 and Koinange & 13 Others Vs Koinange (1986) KLR 23** to support his argument. I have considered the respective submissions of the two parties.

Analysis and determination

After perusal of the pleadings including documents and witness statements filed herein and upon hearing the testimony of PW1, and DW1, I frame the following issues for determination:

- Whether there a lawful transfer of the suit land from the Plaintiff to the 1st Defendant
- Whether the 1st Defendant had a good title to pass to the 2nd Defendant.
- Whether the 3rd Defendant colluded with the 1st and 2nd Defendants respectively to fraudulently effect transfer of the suit land from the Plaintiff to the 1st Defendant
- Whether the Plaintiff is entitled to the prayers sought in the Plaintiff.
- Who should bear the costs of the suit?

On the first issue as to whether there was a lawful transfer of the suit land from the Plaintiff to the 1st Defendant. I note the Plaintiff was initially proprietor of the suit land, having purchased the same from the Mugumo Estates Limited. The Plaintiff produced the original title deed as well as various documents to wit: Letter of Consent, Transfer Form, Receipt of Payment of Registration Fees to prove she obtained the suit land legally. It was the Plaintiff's evidence that she did not sell the suit land to the 1st Defendant as she still had the original title deed in her custody. From the evidence of the Land Registrar, he was emphatic that if one sold their land, they had to surrender the original title deed for cancellation. Which brings me to the point that if indeed the Plaintiff sold the suit land to the 1st Defendant, why did she still hold the original title deed in her custody. The Land Registrar testified that from the presentation book, it was the 1st Defendant who presented the documents of transfer of the suit land from Beatrice Wairimu Gitahi to himself and also from himself to Joel Atuti Nyambane. The 1st and 2nd Defendants however did not come to court to tender their evidence, despite being duly served. From the extract of the Green Card that was produced in Court, it indicated that Beatrice Wairimu Gitahi purchased the suit land from Mugumo Estates Ltd on 19th June, 2001 and a title deed issued to that effect. Her identity card number was however not indicated in the Green Card. The said Beatrice Wairimu Gitahi transferred the land to the 1st Defendant on 26th November, 2008 who in turn transferred to the 2nd Defendant on 28th April, 2009. However, from the documents produced by the Plaintiff whose name is Beatrice Wairimu Githii, the Consent of the Land Control Board as well as the transfer form clearly indicates the Plaintiff's name, the said documents were registered at the Kajiado Lands Registry on 19th June, 2001 and a receipt for Kshs. 4500 issued confirming the transaction. It was DW1's evidence that they could not trace any documents to support the purported transfer of suit land from Beatrice Wairimu Gitahi to the 1st Defendant. In the case of **Samuel Kamere v Lands Registrar, Kajiado [2015] eKLR** the court of appeal when dealing with the absence of requisite document in respect of a transfer, held as follows: ' **In totality, despite the reference to the various registration documents, it is remarkable that the only documents that were available for scrutiny by the trial court were the plaintiff's original title dating back to 5th April 1991, the appellant's title issued upon registration of the transfer, and the Land Register. Other than these documents, there is nothing to show why the appellant's name was entered on the Land Register, or on what basis the registration was effected. Without any documents to support the registration of the appellant as the proprietor of the suit property, the appellant failed to discharge the evidentiary burden of proof as required, and the only conclusion that we can reach on a balance of probabilities is that, since the appellant has not proved or shown the root of his purported title, he could not acquire title to the suit property, which in any event, was incapable of passing to him upon the registration of the purported transfer.**'

The Plaintiff produced all relevant documents confirming the transaction between himself and Mugumo Estates LTD, but the 1st Defendant failed to produce any documents in court to prove his transaction was valid. There was no indication of consideration paid between himself and BEATRICE WAIRIMU GITAHU nor her identification number indicated in the Green Card. In relying on this case and evidence as presented, I find that that there was an unlawful transfer between Beatrice Wairimu Gitahi and the 1st Defendant. Further, that there was no valid transfer between the plaintiff and the 1st defendant

As to whether there was fraud, I note there were no documents to support the transfer between Beatrice Wairimu Gitahi and the 1st Defendant. DW1 who was the Land Registrar confirmed that it is the 1st Defendant who presented the documents for transfer for registration but he was not able to access them. To my mind, it seems the 1st Defendant was the mastermind of the whole fraudulent transaction and perhaps created a fictitious Beatrice Wairimu Gitahi and that was the reason there was no identification nor documentation to support the transfer. In the case of **Arthi Highway Developers Vs West End Butchery Limited & 6 others (2015) eKLR**, the Court in deciding on the issue of transfer of land by a Vendor possessing a fraudulent title held as follows:.....' **It is our finding that as between West End and Arthi, no Valid title passed and the one exhibited by Arthi before the trial Court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof....;**

I note the 1st Defendant transferred the suit land to the 2nd Defendant who holds a title to the same. But since I have already held that there was no valid transfer between the plaintiff and 1st defendant, and the transfer between Beatrice Wairimu Gitahi and the 1st Defendant was

fraudulent, in relying on the aforementioned judicial decision, I find that the 1st Defendant did not have a good title to pass to the 2nd Defendant.

As to whether the 3rd Defendant colluded with the 1st and 2nd Defendants to effect transfer to the 1st Defendant. I note that it was DW1's evidence that the Land Registry could not trace any documents to support the transaction between BEATRICE WAIRIMU GITAHU and the 1st Defendant. Further, that except for the records in the presentation book, it was clear it was the 1st Defendant who presented the documents for transfer. He however did not explain how BEATRICE WAIRIMU GITHII changed to BEATRICE WAIRIMU GITAHU who effected transfer to the 1st Defendant. I note from the Green Card, the Land Registrar registered a restriction over the suit land on 12th June, 2009 until the complaint was resolved. He insists the alleged fraud was occasioned by the 1st and 2nd Defendants. It is against the foregoing that I opine that since the 3rd Defendant registered a restriction over the suit land, until complaint was resolved, he could not have colluded with the 1st and 2nd Defendants to transfer the suit land to them.

As to whether the Plaintiff is entitled to the Orders Sought, I note that that she seeks for cancellation of the title and the rectification of the land register to reflect the suit land in her name. **In the case of Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 others (2015) eKLR**, the Court held as follows: ' **I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.** '

Further, Section 80 of the Land Registration Act provides as follows: '**(1) 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. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**'

From her testimony, I find that the Plaintiff's land was fraudulently taken away from her by the 1st and 2nd Defendants and she did not have knowledge of the fraud; I hold that the plaintiff having purchased the suit land legally is entitled to have the same reverted to her.

It is against the foregoing that I find that the Plaintiff has established her case on a balance of probability and proceed to make the following order:

1. A declaration be and is hereby issued that BEATRICE WAIRIMU GITHII is the legal proprietor of Land Parcel Title No. Kajiado/Kitengela/ 11080.
2. A declaration be and is hereby issued that the transfer of the title deed over all that piece of land known as LR Number Kajiado/Kitengela/ 11080 to the JOEL ATUTI NYAMBAKA is invalid, null and void ab initio.
3. The Land Registrar Kajiado be and is hereby directed to recall, revoke, cancel and or nullify the Title Deed issued to JOEL ATUTI NYAMBAKA on the 28th April, 2009 for land parcel number Kajiado/Kitengela/ 11080.
4. The Land Registrar Kajiado be and is hereby directed to rectify the records and or register at the Lands Registry, Kajiado and or any such successor land registry, to cancel the entry of the JOEL ATUTI NYAMBANE and rectify to read BEATRICE WAIRIMU GITHII as the registered proprietor of Land Parcel Number Kajiado/Kitengela/ 11080.
5. The costs of the suit are awarded to the Plaintiff to be borne by the 1st and 2nd defendants respectively.

Dated signed and delivered in open court at Kajiado this 9th day of October, 2018

CHRISTINE OCHIENG

JUDGE