



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO.556 OF 2017**

**(FORMERLY NAIROBI ELCC 354 OF 2011)**

**BENSON MBURU KINYAGIA.....PLAINTIFF**

**VERSUS**

**BETH NYAMBURA KONGO.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. On **15<sup>th</sup> July 2011**, the Plaintiff namely **BENSON MBURU KINYAGIA** sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, **Beth Nyambura Kongo** and **The Attorney General** respectively by a **Plaint** dated **1<sup>st</sup> July 2011**. He is seeking the following reliefs:-

**a) A declaration directed at that District Land Registrar, Thika District, represented by the 2<sup>nd</sup> Defendant, declaring that the Plaintiff is the legal proprietor of Title Number Ruiru Township/388 and has the right to be registered as the owner of the leasehold interest comprised in Title Number Ruiru Township/388.**

**OR IN THE ALTERNATIVE**

**b) General damages for loss of property, assessed at the current value of the suit premises.**

**c) Costs of this suit.**

**d) Any further or other order as this Honourable Court may deem fit.**

2. The Plaintiff is represented by **Macharia Nderitu & Co. Advocates**, while **Mwihaki Ndudu Litigation Counsel** appears for the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant duly served failed to enter appearance and/or file statement of defence and she is unrepresented in this matter.

3. Briefly, the Plaintiff's case is that he purchased the suit property, **LR.No.Ruiru Township/388** from the 1<sup>st</sup> Defendant as shown on **Sale Agreement** dated **23<sup>rd</sup> December 2011** (PEXhibit 3) and having conducted an official search as per certificate of official search dated **21<sup>st</sup> December 2009** and official receipt dated **21<sup>st</sup> December 2009** (PEXhibits 4, 5). He paid land rent and rates as well as stamp duty for the suit land (PEXhibits 6, 7, 9 to 11). He obtained letter of consent for transfer dated **6<sup>th</sup> January 2010** regarding the land (PEXhibit 8). The Plaintiff did present a Certificate of Lease dated **22<sup>nd</sup> January 2010** between the Plaintiff and the 1<sup>st</sup> Defendant (PEXhibit 14) to the Land Registrar, Thika for registration of the suit land. However, the Land Registrar refused to register PEXhibit 14 and failed to give reasons for his decision hence precipitating this suit.

4. The 1<sup>st</sup> Defendant failed to enter appearance and or file a statement of defence having been served by substituted service on **20<sup>th</sup> June 2016**. I note that the Plaintiff filed a request for Judgment dated **20<sup>th</sup> June 2015** against the 1<sup>st</sup> Defendant.

5. By a statement of Defence dated **16<sup>th</sup> September 2011**, the 2<sup>nd</sup> Defendant denied the Plaintiff's claim, and stated that the Plaintiff's allegations offends the provisions of **Order 2 rule 3** of the **Civil Procedure Rules 2010**. That the alleged rights are not available to the Plaintiff.

6. The Plaintiff (PW1) relied on his statement dated **1<sup>st</sup> July 2011** and list of documents of the even date (PEXhibit 1 to 14) in his testimony. He stated in part that the Land Registrar, Thika refused to register PEXhibit 14 and that he has tried to get title to the sit land in vain.

7. DW1 (**Benard Kipkemoi Leitich**) Land Registrar, Thika, adduced evidence and relied on his statement dated **17<sup>th</sup> July 2018** and his report dated **31<sup>st</sup> October 2018** (DExhibit 1). He testified that PExhibit 14 had not been registered as the rates clearance certificate was not attached to it and that the Government Land Valuer had cautioned him from registering PExhibit 14 without establishing the land owner. That the suit property was owned by **Mary Wanjiru King'ara** as per documents 1 to 18 attached to DExhibit 1. He further stated that the suit property's register was rectified under **Section 79** of the **Land Registration Act 2012**.

8. Learned Counsel for the Plaintiff filed submissions dated **21<sup>st</sup> November 2018**, wherein he framed six (6) issues for determination, among them, whether PW1 obtained valid completion documents from the 1<sup>st</sup> Defendant and whether PW1 is entitled to compensation. He cited authorities namely **Munyru Maina...vs...Hiram Gathiha Maina(2013) eKLR** and **Samuel Kamere..vs..Lands Registrar, Kajiado (2015) eKLR**.

9. Learned Counsel for the 2<sup>nd</sup> Defendant filed submissions dated **26<sup>th</sup> November 2018** whereby he highlighted the reliefs sought in the **Plaint**, as well as the evidence of PW1 and DW1. Counsel submitted that the original lease is still in the custody of the original owner, **Mary Wanjiru King'ara** hence the 2<sup>nd</sup> lease to the 1<sup>st</sup> Defendant remains suspicious. That there are no documents in support of transfer of lease to the 1<sup>st</sup> Defendant by **Mary Wanjiru King'ara**. That PW1 is seeking to enforce rights derived from a title that was obtained by fraud.

10. Counsel further submitted that the Land Registrar cancelled PExhibits 13 and 14 as empowered by the law. Counsel relied on authorities which include:- **Maina...vs...Maina case (supra)**, **Sukhder Singh Laly..vs..Philip Ojwang Kamau & 3 Others (2018) eKLR**, **Section 79** of the **Land Registration Act 2012**, and **Article 40(3)** of the **Constitution of Kenya, 2010**.

11. I have carefully considered the **Plaint**, the 2<sup>nd</sup> Defendant's statement of defence, the evidence of DW1 and submissions of Counsel for the respective parties. Having noted the decision in **Great Lakes Transport Company (U) Ltd...vs...Kenya Revenue Authority (2009) KLR 720** and the Plaintiff's list of issues dated **31<sup>st</sup> October 2017** reflected in his submissions, I find the issues for determination condensed as follows:-

**a) Whether PW1 and the 1<sup>st</sup> Defendant entered into a complete valid transaction in respect of the suit property.**

**b) Whether the Land Registrar was empowered to decline to transfer the suit property from the 1<sup>st</sup> Defendant to PW1.**

**c) Whether the Plaintiff (PW1) is entitled to the reliefs sought in the **Plaint**.**

12. On the validity of the transaction, PExhibit 3 shows that both PW1 and 1<sup>st</sup> Defendant signed it and there were two witnesses to it. PW1 secured PExhibits 5 to 12 and 14 after he had obtained certificate of official Search (PExhibit 4) and PExhibit 3.

13. The statement of PW1 was that the District Land Registrar, Thika refused to register PExhibit 14 and failed to give him reasons of his decision. He stated, inter alia:

**"... I am unable to assert my rights of ownership including occupation and use or the registered owner of the land."**

14. DW1 stated that a Certificate of Lease (PExhibit 13) was issued and registered in favour of the 1<sup>st</sup> Defendant. That the suit property had been registered in the name of **Mary Wanjiru King'ara** and transferred to the 1<sup>st</sup> Defendant on **13<sup>th</sup> January 1992**.

15. PW1 relied on letter of Consent dated **6<sup>th</sup> January 2010** (PExhibit 8), PExhibits 13 and 14 in relation to transfer of the suit property. DW1 confirmed that PW1 made an application for registration of transfer of lease in respect of the property.

16. In his testimony DW1 stated in part as follows:-

**"That however, the application for the transfer was rejected because;-**

**i. The District Valuer had advised that during inspection for valuation there arose a controversy about ownership and therefore suggested the need for the establishment of the owner before registration.**

**ii. There was no rent clearance certificate attached to the documents presented for registration.**

**iii. The seal affixed on the Certificate of Lease surrendered alongside the documents did not correspond with the official seal of Thika Land Registration Office District. (emphasis added)**

17. To fortify his testimony, DW1 prepared his report (DExhibit 1) which reads;-

**"However, we do not have any transfer over the property. Further, a close examination of the original Certificate of Lease attached to the rejected transfer shows that Certificate of Lease is fake. This is because the Seal on the Certificate of Lease does not correspond with the Seal of Thika Land Registry".**

18. To the extent stated above, DW1 could not register PExhibit 14 in favour of PW1. It was maintained by DW1 that he advised PW1 accordingly.

19. On the second issue, DW1 gave reasons why he could not register PExhibit 14. He was empowered to refuse any registration as premised under Section 8(1) of the repealed Act, the Registered Land Act (Cap 300).

20. According to PW1, by PExhibit 13, the 1<sup>st</sup> Defendant was the registered proprietor of the suit property. However, in light of the three reasons contained in the testimony of DW1, including DExhibit 1, the ownership of the suit property by the 1<sup>st</sup> Defendant by the 1<sup>st</sup> Defendant remains doubtful. PExhibit 14 arose out of a transfer arising from an alleged fraudulent purchase. See Kamere Case (supra).

21. Moreover, it is trite law that when a registered proprietor's title is under challenge, that proprietor must go an extra mile to prove the legality of how he or she acquired that title to the property. See Maina Case (supra).

22. Similarly, in the instant case, DW1 stated in DExhibit 1 that PExhibit 13 attached to PExhibit 14 was found to have been obtained by fraud thereby giving rise to a defective title; See Singh Laly Case (supra). Therefore, the Land Registrar, Thika acted within the law in his refusal to effect PExhibit 14 in favour of PW1 and cannot be held culpable.

23. Since PExhibit 3 was made between the 1<sup>st</sup> Defendant and PW1, it is not upon the Land Registrar, Thika to redress any damage that PW1 may have suffered for non-completion of PExhibit 3. Considering the entire case and being guided by the case of Koufor vs...C. Czarnikow Ltd (1967) 3 ALL ER 686 on the principles that guide the court whether or not to award general damages in cases of such nature, I think an amount of Kshs.1,000,000/= would be appropriate in the circumstances of the case. So I would award the same.

24. The upshot is that I dismiss the Plaintiff's claim for a declaration as sought in his Plaint. On the alternative, I enter Judgment for him against the 1<sup>st</sup> Defendant only in terms of general damages assessed at Kshs.1,000,000/= with costs of the suit.

**Dated, Signed and Delivered at Thika this 29<sup>th</sup> day of November 2018.**

**G. M. A. ONG'ONDO**

**JUDGE**

In the presence of

Ms Nakato Learned Counsel holding brief for Mr. Nderitu for the Plaintiff

Ms Chibole Learned Counsel holding brief for Mr. Ndudu for the 2<sup>nd</sup> Defendant

Tom - Court clerk

**G. M. A. ONG'ONDO**

**JUDGE**