



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 409 OF 2017

(FORMERLY NAIROBI ELC CASE NO. 876 OF 2012)

MATHEW NJENGA MWAURA.....1ST PLAINTIFF

BERNARD MWAI MWAURA.....2ND PLAINTIFF

VERSUS

PAUL NJENGA GATUGUTA alias

PAUL NJENGA GATUTA.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR THIKA.....2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL...3RD DEFENDANT

JUDGMENT

1. The 1st and 2nd Plaintiffs namely **MATHEW NJENGA MWAURA** and **BENARD MWAI MWAURA** respectively have sued the 1st defendant namely **PAUL NJENGA GATUGUTA** alias **PAUL NJENGA GATUTA**, the District Land Registrar, Thika (2nd Defendant) and the Honourable Attorney General (3rd Defendant) by a Plaint (Fast Track) dated, **14th November, 2012** and filed on **22nd November, 2012**. They are seeking an Order directing the cancellation of the Land register over **RUIRU EAST/JUJA EAST BLOCK 2/5109** (Hereinafter referred to only as the suit land) allegedly opened on **14th January, 1991** and costs of the suit.

2. The Plaintiffs are represented by learned Counsel, **Mr. L. Maina Irungu** while the 2nd and 3rd defendants are represented by learned litigation counsel, **Ms Mwihaki Ndudu**. The 1st defendant is unrepresented in this suit.

3. The gist of the Plaintiffs' claim is that they are the administrators of the estate of **Peter Mwaurya Njoroge (Deceased)** as per grant of letters of administration intestate issued on **14th November, 2011 (P Exhibit 1)**. The deceased was the registered proprietor of the suit land with effect from **6th November, 1989** as revealed in title deed issued on even date (**P Exhibit 2**).

4. The Plaintiffs further claim that the 2nd defendant collaborated with the 3rd defendant and opened a fresh and a parallel register to the suit land depicting the same to have been opened on **14th January, 1991 (P Exhibit 4b)**. The factual situation is that there was a register of **6th November, 1989** regarding the land (**P Exhibit 4a**). The deceased had charged the suit land and another land, **L.R. No. RUIRU EAST/JUJA EAST BLOCK 2/T-5464** to the **Standard chartered Bank (K) Ltd** on or about **30th September, 1992**. The charge was discharged on **23rd March, 2012** as per the discharge of charge (**P Exhibit 3**). The Plaintiffs did discover **P-Exhibit 4 b** during a search over the suit land which could not permit **P Exhibit 3** hence precipitating the instant suit.

5. In their statement of defence dated **21st March, 2013**, the 2nd and 3rd defendants deny the Plaintiffs' claim and term it strange to them. The 1st defendant was duly served but failed to enter appearance or file statement of defence herein.

6. In their reply to the 2nd and 3rd defendants' defence dated **28th March 2013**, the Plaintiffs state that the 2nd defendant being the custodian of land registry records was aware of the deceased's proprietorship of the suit land. They reiterated **paragraphs 7, 8 and 9** of their Plaint and aver that **P Exhibit 4b** was not existing at the time of registering the charge by the deceased as expressed in **P. Exhibit 3**.

7. On **7th November, 2018**, the 1st Plaintiff (P.W.1) testified that he relied on his statement dated **14th November, 2012**. He further relied on exhibits which include **P Exhibits 4(a) and (b)**, a letter dated **27th September, 2012** by the Director of National Registration that the 1st

defendant was the rightful owner of **I.D No. 3428903** as shown on **P Exhibit 4b (P Exhibit 5)** and notice to the 3rd defendant (P Exhibit 6).

8. The 1st, 2nd and 3rd defendants offered no evidence. They did not submit, too, in this suit.

9. In his submissions, learned counsel orally submitted that title to the suit land in the name of the 1st defendant's is a fabrication. That the title ought to be cancelled to enable the Plaintiffs utilise their property. He relied on **P Exhibits 1 to 6**.

10. I have examined the Plaintiff, the 2nd and 3rd defendants' statement of defence, evidence of P.W.1 and Submission by the Plaintiff's counsel. The issues for determination in a suit generally flow from pleadings or as framed by the parties; see **Great Lakes Transport Company (U) Ltd & Kenya Revenue Authority (2009) KLR 720**.

11. Learned Counsel for the Plaintiff filed issues for determination dated 10th June, 2013 which include:-

1. **Whether the deceased, Peter Mwaura Njoroge was the registered proprietor of the suit land, from the 6th November, 1989.**
2. **Whether the 2nd defendant has caused to be opened and maintained a parallel register over the suit land in the name of the 1st defendant as proprietor thereof.**
3. **Could there have been intent to defraud the deceased's estate of the suit land between the 1st defendant and the 2nd defendant and/or officers under him?.**

12. The Plaintiffs stated that the deceased was the registered proprietor of the suit land as clearly shown on **P Exhibit 2**. The suit land belonged to the Government of Kenya as at 6th November 1989 and the deceased obtained the land on 6th November, 1989 as discerned in **P Exhibit 4 a**. In the circumstances, I am of the considered view that the deceased was validly registered as owner of the suit land following a lawful process as noted by **M. Mutungi Judge in Lepore Ole Maito Vs Letwat Kortom e 2 others (2016) eKLR**.

13. The deceased charged the suit land to **Standard Chartered Bank Ltd** for a loan of **Kshs, 55,000/=** as revealed in **P Exhibit 3**. It is doubtful that the 1st defendant could have been registered as the proprietor of the suit land on 14th January 1991 as shown on **P Exhibits 4(b)** and in view of the date of registration of **P Exhibit 3**.

14. The custodian of land records including **P Exhibit 4(a)** and **(b)** is the 2nd defendant. In the light of **P exhibits 2** and **4(b)**, it is pretty clear that **P Exhibit 4(b)**, is a parallel land register thus not valid in the circumstances.

15. P.W.1 stated that on search of the record of the suit land, he found **P Exhibit 4(b)** which shows that the owners of the suit land is the 1st defendant. During cross examination, P.W.1 testified that:

“The person who is registered as owner of the suit land is the 1st defendant. He does not stay on the property. I know not him-----“

16. Learned counsel contented that there are two titles namely **P Exhibit 4(a)** and **(b)** to the suit land. That the intent of **P Exhibit 4(b)** is to defraud the estate of the deceased. Quite clearly, the Plaintiff are the administrators of the estate of the deceased who had charged the suit land to the bank and the charge was still in force at the time of obtaining **P exhibit 4(b)** which can't be held to be genuine.

17. The **Black's Law dictionary 9th Edition** define the term **“fraud”** as a knowing misrepresentation of the truth or concealment of material fact to induce another to act to her or his detriment. Fraud is usually a tort, but in some cases, especially when the conduct is wilful, it may be a crime.

18. It is trite Law that in Civil cases where a party alleges fraud such a party needs to prove it and though the Standard of proof is not beyond any reasonable doubt, it is proof higher than a balance of probabilities; see **Paul Kimaru Njuguna –vs- Pius Karuri Kiguni & another (2009) eKLR and Raila Odinga and 2 others –Vs -IEBC (2017) eKLR**.

19. The Plaintiffs have shown that **P. Exhibit 4b** was issued by the 2nd defendant in favour of the 1st defendant. However, P Exhibit 4(a) was in existence at the time. To that extent, **P Exhibit 4b** stands in the way of a representation of the truth with regard to the registration of the suit land.

20. In the case of **Linus Ng'ang'a Kiongo & 3 others –vs Town Council of Kikuyu (2012) eKLR**, it was held that the Plaintiffs' stood unchallenged and unsubstantiated. Similarly, the instant Plaintiff's claim stands unchallenged. The defence remains mere denial, unsubstantiated and it flops.

21. I find the Plaintiff case cogent and steadfast. It has been proved by the Plaintiffs against the defendants to the required standard.

22. A fortiori, I enter Judgement for the Plaintiff against the defendant in the following terms:

- a. An Order directing the land Registrar to cancel the register over **Ruiru East/Juja East Block 2/5101** allegedly opened on 14th January, 1991.

b. Costs of this suit shall be borne by the defendants.

Dated, signed and delivered at Thika this 27th day of **November, 2018**.

G.M.A ONG'ONDO

JUDGE

27/11/2018

Mr. Maina Irungu learned Counsel for Plaintiffs

Non appearance for the Defendants