



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 38 OF 2012

ELMBUKARA LIMITED.....PLAINTIFF

VERSUS

ALICE WAITHIRA KIMANI.....1ST DEFENDANT

LAND REGISTRAR THIKA.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendants by way of a plaint dated 18th January 2012. The plaint was orally amended on 28th July 2016. In the amended plaint, the plaintiff sought the following reliefs:-

- a. General damages.
- b. A declaration that the plaintiff is the only legitimate owner of land parcel number Ruiru Township 393.
- c. Rectification of the register as pertains to Ruiru Township 393 by substituting the 1st defendant as the registered owner with the name of the plaintiff.
- d. Cancellation of the title deed in the name of the 1st defendant.
- e. The removal of the restriction registered on the Green Card of LR No. Ruiru Township 393.
- f. Costs of the suit and interest at court rates.

The plaintiff averred that, it was at all material times the bonafide and legal owner of land parcel No. Ruiru Township 393 (hereinafter "the suit property"). It purchased the suit property in the year 1997. On 17th September 2011, its agents carried out a search on the register of the suit property and discovered that the property had been transferred to the 1st defendant on 22nd July 2003. The said search also revealed that on 17th September 2008, the 2nd defendant unilaterally registered a restriction on the register of the suit property on the ground that the transfer of the said property to the 1st defendant was suspected to have been carried out fraudulently. The plaintiff contended that the transfer of the suit property to the 1st defendant was fraudulent and reckless and was intended to illegally dispossess it of the property.

The defendants were served with summons to enter appearance. The 1st defendant who was served through substituted service did not enter appearance. The 2nd and 3rd defendants entered appearance and filed a statement of defence on 12th July 2012. In their defence, the 2nd and 3rd defendants denied the plaintiff's claim in its entirety and put the plaintiff to strict proof of all the allegations contained in the

plaint.

The suit came up for hearing on 28th July 2016 when Sammy Njoroge Nguchitta (PW1) testified on behalf of the plaintiff. PW1 stated as follows. He was one of the directors of the plaintiff company. The plaintiff purchased the suit property from a Mr. Mwarangu in the year 1997. The suit property was registered in the name of the plaintiff on 13th August 1997 and a certificate of lease was issued to the plaintiff. The 1st defendant is not known to the plaintiff and none of the plaintiff's directors have had any dealings with her. The plaintiff came to know about the transfer of the suit property to the 1st defendant when it did a search at the land registry. The suit property was vacant and the 1st defendant had never occupied the same.

PW1 stated further that the suit property was transferred to the 1st defendant and thereafter a restriction was registered against the title of the property by the 2nd defendant on his own volition. He stated that the plaintiff was unable to use the suit property as it was in the name of the 1st defendant. PW1 produced a bundle of documents which were filed in court on 25th January 2012 and a supplementary bundle of documents which were filed in court on 15th April 2015 as P.Exh. 1 and 2 respectively.

In cross examination, PW1 reiterated that entry No. 5 on the register of the suit property was entered by the 2nd defendant on his own volition. He stated that the restriction was registered to protect the plaintiff's interest in the property. The 2nd and 3rd defendants closed their case without calling any witness. The plaintiff did not make closing submissions. It chose to rely on the evidence on record.

The only issues which arise for determination by the court in this suit are; whether the 1st defendant acquired the suit property fraudulently and whether the plaintiff is entitled to the reliefs sought in the amended plaint. Under section 24 of the Land Registration Act, 2012, the registration of the 1st defendant as the proprietor of the suit property vests upon her absolute ownership of the said property together with all rights and privileges associated with such ownership. Under section 25 of the said Act, the 1st defendant's rights over the suit property are indefeasible except as provided under the Act. Section 25 (1) of the Land Registration Act, 2012 provides as follows:-

- 1. The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject:**
- 2. To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register; and**
- 3. To such liabilities rights and interests as affect the same and are declared by section 28 not to require noting in the register unless the contrary is expressed in the register.**

Section 26(1) of the Land Registration Act, 2012 provides that certificate of title issued by the land registrar upon registration or to a purchaser of land upon transfer shall be taken as prima facie evidence that the person named in such certificate is the absolute and indefeasible owner of the land in respect to which the certificate has been issued and such certificate shall not be liable to challenge except on the ground of fraud or misrepresentation to which the holder is proved to be a party or where the certificate has been acquired illegally, un-procedurally or through corrupt scheme.

I am of the view that since the 1st defendant's title to the suit property is being challenged, the 1st defendant ought to have placed before the court some evidence from which the court could trace the root of that title. In the case of Munyu Maina vs. Hiram Gathiha Maina [2013] Eklr the Court of Appeal stated that when a registered proprietor's root of title is under challenge, it is not sufficient for the registered proprietor to produce the instrument of title as proof of ownership. The court stated that in such

circumstances, the registered proprietor must go beyond the instrument of title and prove the legality of how he acquired the title.

The 1st defendant did not defend this suit. The plaintiff's evidence that the suit property was fraudulently transferred to the 1st defendant was therefore not controverted. The plaintiff placed before the court sufficient evidence on how it acquired the suit property. A transfer annexed to the plaintiff's list of documents filed in court on 25th January 2012 shows that the original owner of the suit property, Simon Mwarangu Makumi transferred the property to the plaintiff at a consideration of Kshs. 150,000. A copy of the register of the suit property which was also produced in evidence shows that the plaintiff was registered as the owner of the suit property and was issued with a certificate of lease on 13th August 1997.

PW1 told the court that the 1st defendant was not known to the plaintiff or its directors and that no transaction had taken place between the plaintiff and the 1st defendant. PW1 told the court that the plaintiff learnt of the transfer of the suit property to the 1st defendant after carrying out a search at the land registry. According to the evidence on record, the 1st defendant was registered as the proprietor of the suit property on 22nd July 2003 and a certificate of lease was issued to her on the same date. On 17th September 2009, 2nd defendant on its own motion entered a restriction on the register of the suit property on suspicion that the 1st defendant had acquired the suit property fraudulently. In the absence of any evidence from the defendants as to how the 1st defendant acquired the suit property, the only inference this court can make on the evidence before it is that the 1st defendant acquired the suit property fraudulently. As I have stated above, the certificate of lease held by the 1st defendant is subject to challenge under section 26(1) of the Land Registration Act. This court has power under Section 80(1) of the Land Registration Act to rectify the land register by directing that any registration be cancelled or amended where the court is satisfied that the same was obtained by fraud or mistake.

Due to the foregoing, I am satisfied that the plaintiff has proved its case against the defendants on a balance of probabilities save for general damages. I therefore enter judgment for the plaintiff against the defendants for;

- (a) A declaration that the plaintiff is the lawful owner of Land Parcel No. Ruiru Township 393.
- (b) An order for the rectification of the register of Land Parcel No. Ruiru Township 393 by the cancellation of registration of the 1st defendant as the owner thereof together with the certificate of lease that was issued to the 1st defendant and the registration of the property in the name of the plaintiff.
- (d) An order directing the 2nd defendant to remove the restriction that was registered against the register of Land Parcel No. Ruiru Township 393 on 17th September 2008.
- (e) The costs of the suit to be paid by the 1st defendant only.

Delivered and Signed at Nairobi this 17th day of February, 2017.

S. OKONG'O,

JUDGE.

In the presence of:-

N/A for the plaintiff

N/A for the 1st defendant

N/A or the 2nd and 3rd defendants

Kajuju Court Assistant