



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
ELC.NO.319 OF 2010

MANASSEH YAMINA SASIDA.....PLAINTIFF

=VERSUS=

JANE K. ISANDA.....1ST DEFENDANT

ALFRED MATHENGE NGARI.....2ND DEFENDANT

CITY COUNCIL OF NAIROBI.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGEMENT

By a **Plaint** dated **5th July 2010**, and filed in court on the same date, the Plaintiff herein **Manasseh Yamina Sasida** sought for judgement against the Defendants jointly and severally as follows:

a) An order of rectification of title in respect of Plot No.82 LR No. Nairobi/Block 63/642, Jamhuri Estate Phase II Nairobi from 2nd Defendant, Alfred Mathenge Ngari to the Plaintiff herein Manasseh Yasima Sasida.

b) Costs and interest.

The Plaintiff averred in the **Plaint** that on or about **6th day of September 2001**, the Plaintiff and the 1st Defendant signed a written contract for the purchase of **Plot no.82 LRNo.63/642, Jamhuri Estate Phase II Nairobi, off Ngong Road**. Further that the 1st Defendant was the original allottee from 3rd Defendant and such plot sold in vacant possession and free from any encumbrances except statutory.

It was his allegation that he fully paid all requisite charges including ground rent. Further that immediately after paying all requisite charges, he took possession and began construction of a residential suit(s) of which he is living with his family. Plaintiff further alleged that when he proceeded to register the leasehold interest, he discovered to his surprise and shock that the Chief Land Registrar had issued a title in favour of the 2nd Defendant. It was the Plaintiff's allegation that such transfer and issuance of the title was obtained by either fraud or mistake. He itemized the particulars of fraud in paragraph 11 of the **Plaint**.

Therefore the Plaintiff prayed for an order of cancellation of the aforesaid title and rectification of the title

to be issued in his favour as the rightful and registered owner of the suit property. He urged the court to allow his claim.

All the Defendants were served with **Summons to Enter Appearance**. However, the 1st and 2nd Defendants did not Enter Appearance nor file their Defence. However, the 3rd Defendant Entered Appearance through the **Law Firm of W. S. Ogola & Co. Advocates** and filed its Statement of Defence on **14th October, 2010**. Further, the 4th Defendant entered Appearance on **19th August 2010**, through **Senior Deputy Solicitor General** but did not file any Statement of Defence.

The 3rd Defendant filed its **Statement of Defence** dated **11th October, 2010**, and denied all the allegations contained in the Plaintiff. It averred that it is a stranger to the allegations contained in the Plaintiff and also denied all the particulars of fraud outlined in paragraph 11 of the Plaintiff. The 3rd Defendant prayed for dismissal of the Plaintiff's suit with costs to itself.

The Plaintiff herein filed his **Reply** to the **3rd Defendant's Defence** on **27th April 2014**, and joined issue with the 3rd Defendant on each and every allegation contained in the said Statement of Defence. The Plaintiff further reiterated the claims made in the Plaintiff. Since the 1st and 2nd Defendants did not enter appearance nor file their Defence, the Plaintiff requested for judgement against the 1st and 2nd Defendants and the matter was set down for hearing.

When the matter was set down for **hearing** on **29th October 2015**, the 3rd Defendant was absent together with its Advocate though served with a Hearing Notice. Mr. Terel appeared for the Attorney General, the 4th Defendant and informed the court that the 4th Defendant would not call any witness. They sought to be excused from the proceedings.

Therefore, the matter proceeded as uncontested matter wherein **Mr. Khaminwa Senior Counsel** appearing for the Plaintiff called one witness, the Plaintiff herein, who was sworn in as **PW1 Manasseh Yamina** who identified his **Witness Statement** filed in court on **7th April 2014**. He adopted the said statement fully as his evidence in court. He also relied entirely on the Plaintiff and the annexed List of Documents which he produced as exhibits in court. He testified that the subject matter herein is **Plot No. LR No.63/642 Jamhuri Estate** in Nairobi.

In his Witness Statements, the Plaintiff reiterated the contents of the Plaintiff and confirmed that he did purchase the suit property herein **Plot No.82 LR No.63/642 Jamhuri** from the 1st Defendant who had been allotted this plot by the 3rd Defendant. He also stated that the said plot was sold to him with vacant possession and free from encumbrances. Further that upon payment of all the requisite charges, he took possession of the same and he began construction of a residential house wherein he lives with his family. He also stated that when he attempted to register the leasehold, he discovered that the same had been registered in favour of the 2nd Defendant and therefore such transfer and issuance of the title was obtained either by mistake or fraud. The Plaintiff therefore urged the court to order for the cancellation of the title issued in favour of the 2nd Defendant and that he should be registered as the owner of the suit property.

This court has now carefully considered the available evidence and the annexures thereto. The court has also considered the Written Submissions, the cited authorities and the relevant provisions of law. This suit was filed on **5th July 2010**, by the Plaintiff against all the four Defendants. Though the 1st and 2nd Defendants who are very crucial to this proceedings were served with Summons to Enter Appearance and file their Defence through substituted service, they did not do so and therefore this court did not have benefit of hearing alternative evidence apart from the one advanced by the Plaintiff.

Though the 3rd and 4th Defendants entered Appearance, only the 3rd Defendant filed its Defence. Its Defence was a mere denial of facts. The 4th Defendant did not file any Defence nor participate in the proceedings. Further on the date of the hearing, the 3rd Defendant failed to attend court and therefore the Plaintiff's evidence was not challenged.

Having taken consideration of the available evidence, the court will adopt the issues for determination as drawn by the Plaintiff's Advocate. These issues are:

I. Whether the Plaintiff purchased Plot no.82 Jamhuri Estate off Ngong road from the 1st Defendant.

II. Whether the 1st Defendant was the original allottee from the City Council of Nairobi of this suit plot.

III. Whether the suit plot no.82 Jamhuri Estate is registered in the name of 2nd Defendant.

IV. Was this title processed through mistake or fraud?

V. Is the Plaintiff entitled to the prayers sought.

i. Whether the Plaintiff purchased Plot No.82 Jamhuri Estate, off Ngong Road from the 1st Defendant

The Plaintiff in her Complaint had alleged that on 6th of September 2001, she entered into a **Written Contract** with the **1st Defendant, Jane K. Isanda** for purchase of **Plot no.82 LR No.63/642, Jamhuri Estate Phase II, Nairobi**. The court has considered the Plaintiff's bundle of documents and indeed, there is a **Sale Agreement** dated **6th September 2001**, between **Jane K. Isanda**, the 1st defendant and **Manasseh Yamina Sasida**, the Plaintiff herein for sale and purchase of **Plot no.82** situated at **Jamhuri Estate, off Ngong Road, Nairobi**. From the Sale Agreement, it is indicated that the purchase price was Kshs,820,000/= and the Plaintiff paid Kshs.700,000/= upon execution of the said Sale Agreement.

However, as the court had indicated earlier, the 1st Defendant did not Enter Appearance nor file Defence. The Plaintiff's allegations therefore remain unchallenged and this court will therefore not hesitate to find and hold that the Plaintiff herein did purchase the suit property from the 1st defendant. So with the purchase of the said plot from the 1st Defendant, the Plaintiff had expectations such as taking possession and also having the said plot registered in her name.

ii. Whether the 1st Defendant was the original allottee of the suit property

Though the Plaintiff produced a Letter of Allotment dated **13th March, 1992** for **Jane K. Isanda** showing that the said **Jane K. Isanda**, the Plaintiff herein was allotted this plot on **13th March, 1992**, the court finds that the said document is from Nairobi City Council. However, there was no witness called from the defunct City Council of Nairobi to testify or and shed light on the issue of this letter of Allotment. However, this court had an opportunity to consider the Complaint in **HCCC No.1375 of 2002** attached to the Plaintiff's bundle of documents. The said Complaint is by **Jane K. Isanda**, the 1st Defendant wherein she had sued the 2nd and 3rd Defendants herein in the said Complaint. The said **Jane K. Isanda** had alleged that she had purchased the suit property from one **Taluli Mbasu** who had also purchased the said suit plot from the original allottee of the suit property one **Francis Karani Elijah**.

Taking into account that the Letter of Allotment produced in court by the Plaintiff was issued by the 3rd Defendant who did not attend court to confirm the authenticity of the same and given that there is a Complaint in **HCCC No.1375 of 2002** wherein **Jane K. Isanda** had averred that one **Francis Karani Elijah** was the original allottee of the suit plot, The court cannot hold and find with certainty that indeed, the 1st Defendant herein was the original allottee of the suit plot.

iii. Whether the suit property is registered in the name of 2nd Defendant

The Plaintiff in her Complaint averred that though he purchased the suit property from the 1st defendant and

further took possession of the same and began construction of a residential house, when he proceeded to register the leasehold interest, he was surprised to find that the Chief Land Registrar had issued a title in favour of the said 2nd Defendant. The said 2nd Defendant did not Enter Appearance and/or file any Pleadings to confirm or dispute that allegation. The 4th Defendant too did not participate in these proceedings. However, the Plaintiff produced a **Certificate of official Search** dated **5th November 2004** for **Nairobi/Block 63/642** which showed that the said property is registered in the name of **Alfred Mathenge Ngari**, the 2nd Defendant. However, there was no copy of Certificate of Lease or title attached to the Pleadings. The Certificate of official Search having not been disputed or challenged by any of the Defendants, the court finds and hold that the suit property is registered in the name of the 2nd Defendant.

iv. Was the Title processed through mistake or fraud

This is indeed the bone of contention in this suit. As the court has already analysed the available evidence, it is evident that the Plaintiff purchased the suit property from the 1st Defendant on **6th September, 2001**. The Plaintiff has testified that he took possession of the suit property and started putting up a residential house. The said allegation was not disputed by any of the Defendants. Further, it was the expectation of the Plaintiff that he would be registered as the holder of the leasehold herein. However, from the Certificate of official Search, It is clear that the suit plot is registered in the name of the 2nd Defendant. It is evident that the 1st Defendant herein **Jane K. Isanda** had filed **HCCC No. 1139 of 2002** to challenge the registration of the suit land in favour of 2nd Defendant by the 3rd Defendant. However, it is not clear what happened to that suit since the application for consolidation was not prosecuted and the Defendants did not appear in court to shed light on the outcome of that case.

The 2nd Defendant being the registered owner of the suit property is deemed to be the absolute and indefeasible owner as provided by **Section 26** of the **Land Registration Act**. However, the said Section has exceptions or instances when such title can be challenged. It reads as follows:

26(1) The certificate of title issued by the Registrar upon registration or for a purchase of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easement restrictions and conditions contained or endorsed in the certificate and the tile of that proprietor shall not be subject to challenge except”

a) On the ground of fraud or misrepresentation to which the person is proved to be a party or

b) Where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme.

Therefore, it is clear from the above provisions of law that if a certificate of title is acquired through fraud, mistake, illegally or unprocedurally then the same can be challenged and impeached.

The Plaintiff in his evidence has alleged that he purchased the suit property from the 1st Defendant in **September 2001**. There is a Sale Agreement in support of that allegation. There is also a Plaint by the 1st Defendant challenging the registration of 2nd Defendant as proprietor of the suit land. The Plaintiff purchased the suit land on **6th September, 2001**. The 2nd Defendant was registered as the owner of the suit land on **26th October, 2001**. That is a month after the Plaintiff had purchased the suit land. The Defendants did not avail themselves in court to testify on the circumstances that led to this suit land being registered in the name of 2nd Defendant. The Plaintiff has testified that he is the one in possession of the suit land and that he has constructed a residential house on the said plot where he resides with his family. All these evidence by the Plaintiff remain unchallenged. The court therefore finds and hold that the Plaintiff herein did purchase the suit property from the 1st Defendant. However, the same was either illegally or unprocedurally registered in the name of the 2nd Defendant. Since the 2nd Defendant did not

appear in court to testify on how he acquired this land, then the court will accept the Plaintiff's evidence that he is in possession of the suit land. The Court of Appeal in the case of *Mwangi & Another Vs Mwangi (1986) KLR 328*, where the Court held that;

“the rights of a person in possession or occupation of land are equitable right which are binding”.

The court held that a person who is in possession of land holds a possessory right which is equitable and binding on the land. Equally, this court finds and holds that the Plaintiff herein who is in possession of the suit property holds a possessory right which is an equitable right and he should therefore be the registered owner of the suit property. Therefore this court finds and holds that the 2nd Defendant was illegally and unprocedurally registered as the proprietor of the suit property. The 2nd Defendant's title therefore qualifies to be challenged and/or impeached.

v. Is the Plaintiff entitled to the prayers sought?

The Plaintiff has prayed for an order of rectification of title in respect of plot number **82 LR No.63/642, Jamhuri Estate Phase II, Nairobi** from the 2nd Defendant, **Alfred Mathenge Ngari** to himself, **Manasseh Yamina Sasida**.

The court has indeed found that the registration of the suit property in the name of the 2nd Defendant was not and the Defendants did not offer any evidence to support the said registration. The court therefore arrived at a conclusion that the same was done illegally and unprocedurally and therefore the said Certificate of Title in favour of the 2nd Defendant is impeachable. The Plaintiff has asked the court to rectify that anomaly. Section 80 of the Land Registration Act gives the court power to order for rectification of the Land Register. It reads as follows:

80(1) Subject to Subsection (1) the court may order the rectification of the register by directing that any registration be cancelled and amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”

The court in this matter has held and found that the registration of the suit property in the name of 2nd Defendant was done either illegally, unprocedurally or by mistake and since none of the Defendants have appeared in court to support the said registration, the court finds that the same should be cancelled and the register rectified so that **Plot No.82 LR No.63/642 Jamhuri Estate Phase II, Nairobi** should now be amended and the same registered in favour of the Plaintiff herein **Manasseh Yamina Sasida**. The registration in favour of Alfred Mathenge Ngari is therefore ordered cancelled and the register be amended accordingly. The court therefore finds that the Plaintiff is entitled to the prayers sought in his Pleint.

On the issue of cost, the court finds that the Plaintiff is the successful litigant and he is therefore entitled to costs of this suit.

Having now carefully considered the available evidence, the court finds that the Plaintiff herein **Manasseh Yasima Sasida** has proved his case on a balance of probabilities. For the above stated reasons, the court enters judgement in favour of the Plaintiff as prayed in the Pleint in terms of prayers no.(a) and (b).

It is so ordered.

Dated, signed and delivered in this 23rd day of JUNE, 2017.

L. GACHERU

JUDGE

23/6/2017

In the presence of

MR. Muchiri holding brief for Dr. Khaminwa for Plaintiff

No appearance for 1ST Defendant

No appearance for 2ND Defendant

No appearance for 3RD Defendant

No appearance for 4TH Defendant

L. GACHERU

JUDGE

23-6-2017

Court:

Judgment read in Open Court in the Presence of the above advocate and absence of the other parties though served.

L. GACHERU

JUDGE

23-6-2017