



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC. CASE NO. 202 OF 2010

PETER GITHINJI KUNGU..... PLAINTIFF

VERSUS

THE ATTORNEY GENERAL1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE DISTRICT LAND REGISTRAR THIKA.....4TH DEFENDANT

JUDGMENT

This suit was commenced by way of a Plaint dated 28th April 2010 in which the Plaintiff sought for judgment be entered against the Defendants as follows:

- (a) That the court do issue a declaration that the Plaintiff acquired the parcel of land known as Thika Municipality/Block 9/702 (hereinafter referred to as the “suit property”) from its immediate registered owner Francis Ngige Nyoike after it ceased being a public utility having followed due process and procedure and paid due consideration.
- (b) That the court do issue a declaration that the suit property is fully developed by the Plaintiff and is not an undeveloped government public utility plot.
- (c) That the court do issue an order removing the inhibition registered against the suit property by the Chief Lands Registrar on 10th August 2005.
- (d) That Kenya Gazette Notice No. 2652 of 2010 revoking the title to the suit property be declared null and void having been issued without due regard to the provisions of the Constitution of Kenya.
- (e) Costs of this suit.

The Plaintiff stated that in the year 1999, he was offered an opportunity to purchase the suit property by the then Housing Finance Company of Kenya, a reputable financial institution operating in Kenya and dealing with long term financial loans. He added that the said company informed him that the registered

proprietor of the suit property at the time was one Francis Ngige Nyoike who was indebted to them to the tune of over Kshs. 1 million and that they were exercising their statutory power of sale as the chargor was in default. The Plaintiff testified further that he carried out an official search upon which he came to learn that the suit property was initially government land under Cap. 280 (now repealed) but that in 1996, a Part Development Plan was drawn readying this parcel for alienation. He added that the Part Development Plan was approved by the Director of Physical Planning on 28th March 1996 and by the Commissioner of Lands on 11th April 1996 upon which it was allocated to one Susan Wairimu Waweru who got registered as the lessee on 17th October 1996 and a Certificate Of Lease issued to her on the same date. The Plaintiff further testified that the official search he conducted on the suit property further disclosed that the said Susan Wairimu Waweru sold the suit property to Francis Ngige Nyoike on 27th August 1997 who, after paying all the rates and rents to the Municipal Council of Thika and to the Commissioner of Lands and further stamp duty on transfer to the government, got registered as the proprietor and a Certificate of Lease was issued to him on 4th September 1997. He produced a copy of this Certificate of Lease. He added that Francis Ngige Nyoike subsequently charged the suit property to the then Housing Finance Company of Kenya, who offered the same to him following the default of Francis Ngige Nyoike. He testified that on 29th June 1999, he entered into a sale agreement with Francis Ngige Nyoike who had been given opportunity by the Housing Finance Company of Kenya to sell the property by private treaty. He confirmed that the purchase price for the suit property was agreed at Kshs. 1.4 million of which he remitted Kshs. 1 million to Housing Finance Company of Kenya and remitted the balance of Kshs. 400,000/- to Francis Ngige Nyoike. He produced a copy of his Certificate of Lease. He confirmed that the transfer from Susan Wairimu Waweru to Francis Ngige Nyoike, the charging to the suit property to Housing Finance and the transfer of the suit property from Francis Ngige Nyoike to himself all required consents and that the Commissioner of Lands granted those consents and all the requisite fees were paid. He testified that he obtained vacant possession of the suit property in June 1999 and that at that time the suit property was vacant. He confirmed that he subsequently erected a 3 storey block of flats on the suit property at a cost exceeding Kshs. 10 million. It was his testimony that the suit property is now occupied by 13 tenants and is charged in favour of Family Finance Building Society of Kenya Ltd for Kshs. 5 million. He further testified that the Chief Land Registrar placed a restriction on the suit property on 10th August 2005 refusing any dealings with that property and that on 19th March 2010, the District Land Registrar, Thika District vide Kenya Gazette Notice No. 2652 revoked the title to the suit property. It was his testimony that this was illegal, oppressive and unjustified and sought that his prayers be granted.

The Defendants, after being duly served with summons to enter appearance, proceeded to enter appearance on 19th May 2010 and to file their Defence on 14th October 2010. In their Defence, the Defendants stated that the suit property is a public utility property which should not have been alienated in the first place and that this was procured through fraud. The Defendants did not attend the hearing of the suit on 10th May 2016 and adduced no evidence in support of their case.

The main issue for determination in this suit is whether or not the suit property is a public utility plot or the validly acquired property of the Plaintiff. The Plaintiff has gone to great lengths to demonstrate the history of the suit property up until the point when he acquired the same. He produced a copy of the Certificate of Lease held by Francis Ngige Nyoike from whom he purchased the same. He also produced a copy of his own Certificate of Lease as the current owner of the suit property. The Defendants rejected this claim, asserting that the suit property is in fact public land which was fraudulently alienated to Susan Wairimu Waweru and the subsequent proprietors. To that assertion, I will be guided by **Section 107** of the **Evidence Act Cap 80** which provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

I am further guided by the finding of the former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** which stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of

probabilities is required.”

In this suit, the Defendants did not appear at the hearing and produced no evidence to support their assertion of fraud. In the circumstances, that assertion must fail. The law is very clear on the position of a title holder of land such as the Plaintiff. The position of the holder of a title deed over a parcel of land is well stated in **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... and the title 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 a corrupt scheme.”

In this suit, the Plaintiff’s title deed has not been challenged by any of the Defendants. The court therefore arrives at the finding that the Plaintiff has proved that he is the duly registered owner of the suit property including the developments standing thereon. With this finding, it follows that the Plaintiff has the rights over the suit property as set out in **section 24(a)** of the **Land Registration Act** provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

In light of the foregoing finding, I hereby proceed to enter judgment in this suit as prayed in the Plaint with costs to the Plaintiff.

DELIVERED, SIGNED AND DATED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE