



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 489 OF 2016**

**JOSEPH KIMANI GITAU.....PLAINTIFF**

**VERSUS**

**LAND REGISTRAR NAIVASHA.....1<sup>ST</sup> DEFENDANT**

**CHRISTOPHER NGUGI CHIURI.....2<sup>ND</sup> DEFENDANT**

**PAUL GITAH MWAURA.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. This suit was commenced by way of a plaint that was filed on 10 November 2016. In the suit, the plaintiff has averred that he has all along been the rightful owner of the land parcel Gilgil/Gilgil Block 1/3814 (Kekopey) (hereinafter also described as "the suit land") and that through a series of fraudulent transactions, the title to the said land was transferred to the 2nd defendant who later transferred the same to the 3rd defendant. In this suit, the plaintiff inter alia has asked that the title of the 3rd defendant be cancelled and he be declared the legal owner of the suit property. Despite being served with summons, none of the defendants entered appearance nor filed any documents to defend this case.

2. The case of the plaintiff as pleaded and as revealed in his evidence is that he has was the registered proprietor of the land parcel Gilgil/Gilgil Block 1/3814 (Kekopey). On 24 September 2015, he and his wife, who is the plaintiff in the case Nakuru ELC No. 488 of 2016 and proprietor of the land parcel Gilgil/Gilgil Block 1/3843 (Kekopey) , found that their house had been broken into and on inspection, they found that a handbag which contained their title deeds had been stolen. In total they lost five title deeds including the title deed in issue in this case. They reported the loss at Naivasha Police Station and also proceeded to the Lands Office in Naivasha to register a restriction and seek a replacement of their lost title deeds. A restriction was duly registered on 2 October 2015 and through a gazette notice of 11 December 2015, the Land Registrar, Naivasha, gave notice of intention to issue new title deeds on expiry of 60 days from the date of gazette.

Without the plaintiff's authority, the restriction was fraudulently lifted on 11 November 2015 and the land transferred to the 2nd defendant on 1 December 2015. The 2nd defendant then transferred the suit property to the 3rd defendant on 10 February 2016. The plaintiff testified that the application seeking that the restriction be lifted was not authored by him and was a forgery. The Identity Card (ID) number which was used to transfer the land to the 2nd defendant was a forged ID card. It bore a different serial number from the plaintiff's genuine ID card and the signature therein was not the plaintiff's. The place of issue of this forged ID card indicated Nakuru whereas the plaintiff's genuine ID card was issued in Naivasha. The

photographs used in the transfer form were also not the plaintiff's photographs. A document examiner's report which was produced in evidence showed that all signatures used to transfer the land from the plaintiff were not authored by the plaintiff. In short, all the documents used to transfer the land from the plaintiff to the 2nd defendant were forgeries. On further investigations, the 2nd defendant was arrested and he is now facing criminal charges of forgery and stealing.

3. In this suit, the plaintiff wants the title deed irregularly obtained by the 2nd and 3rd defendants cancelled ; a declaration that he is the rightful owner of the suit land; damages and mesne profits; and costs of the suit.

4. As I mentioned earlier, the suit is not defended. It is apparent from the evidence that the 2nd defendant fraudulently caused himself to be registered as the proprietor of the suit land in place of the plaintiff by using forged documents. He then transferred this title to the 3rd defendant. In as much as the law is protective of title, a title that has been procured fraudulently cannot be allowed to stand. This is the import of Section 26 of the Land Registration Act, 2012, which provides as follows :-

*26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser 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, easements, restrictions and conditions contained or endorsed in the certificate, 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.*

*(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

5. There is no question that the title of the 2nd defendant was procured by way of fraud and/or misrepresentation for which he himself was a party. His title is impeachable by virtue of the provisions of Section 26 (1) (a) above. The title of the 3rd defendant emanates from a fraudulent title and the same cannot be protected. The title was acquired illegally, unprocedurally or through a corrupt scheme and it is not necessary for there to be any proof that the 3rd defendant was involved in the fraud.

6. I am convinced that the entries that caused the transfer of the suit property to the 2nd defendant and the 3rd defendant are fraudulent and need to be cancelled. I hereby order the 1st defendant to proceed and cancel these entries which I observe are entries number 5, 6, 7,8 and 9 in the register of the land parcel Gilgil/Gilgil Block 1/3814. In essence the register should reflect that the proper owner of the suit land is the plaintiff herein, that is, Joseph Kimani Gitau, and that there is a restriction on the title. I also order the Land Registrar to issue the plaintiff with a title deed to the suit land. I declare the title held by the 2nd and 3rd defendants to be forgeries and null and void, and the Land Registrar is hereby ordered not to register any dealings flowing from any of these titles. I also issue an order of permanent injunction barring the 2nd and 3rd defendants from entering into any sale or any other dealing in respect of the land parcel Gilgil/Gilgil Block 1/3814 (Kekopey). In addition, I issue an order of permanent injunction stopping the 2nd and 3rd defendants and/or their servants/agents from entering or taking possession or in any other way interfering with the plaintiff's possession of the suit land.

7. There was a claim for mesne profits but the evidence on record shows that the plaintiff's possession of the land was not disturbed and he could have continued to use it. I am not persuaded that he suffered any actual loss of user of the land and I will therefore not make any award for mesne profits or general damages.

8. On costs, the plaintiff has succeeded and he is entitled to costs jointly and/or severally against the

defendants.

9. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 18<sup>th</sup> day of October 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of: -**