



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**ELC NO. 488 OF 2016**

**ZIPORAH NYAMBUGU MBUGUA .....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**

**JUDGMENT**

***(Suit seeking to have title to land restored to the previous owner; plaintiff having lost the title deeds; 2<sup>nd</sup> defendant forging transfer documents and transferring the land title to himself; 2<sup>nd</sup> defendant later transferring the land to 3<sup>rd</sup> defendant; clear that title of 2<sup>nd</sup> defendant was procured by way of fraud; 3<sup>rd</sup> defendant's title cannot be allowed to stand; titles of 2<sup>nd</sup> and 3<sup>rd</sup> defendants cancelled; plaintiff be restored as proprietor and be issued with a new title deed).***

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 she has all along been the rightful owner of the land parcel Gilgil/Gilgil Block 1/3843 (Kekopey) and that through a series of fraudulent transactions, the title to the said land was transferred to the 2<sup>nd</sup> defendant who later transferred the same to the 3<sup>rd</sup> defendant. In this suit, the plaintiff inter alia has asked that the title of the 3<sup>rd</sup> defendant be cancelled and she be declared the legal owner of the suit property. Despite being served with summons, save for the 3<sup>rd</sup> defendant, none of the other defendants entered appearance to this suit. Even then, the 3<sup>rd</sup> defendant did not file any defence and did not participate at the hearing of this suit.

2. The brief facts of the case is that the plaintiff in this suit, who is the wife of one Joseph Kimani Gitau, the plaintiff in a related matter Nakuru ELC No. 489 of 2016, was the registered proprietor of the land parcel Gilgil/Gilgil Block 1/3843 (Kekopey) whereas her husband was the registered proprietor of the land parcel Gilgil/Gilgil Block 1/3814 (Kekopey). On 24 September 2015, she and her husband, 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 for the land 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 gazettelement.

3. Without the plaintiff's authority, the restriction was fraudulently lifted on 19 October 2015 and the land transferred to the 2nd defendant on 26 October 2015. The 2nd defendant then transferred the suit property to the 3rd defendant on 16 November 2015. The evidence shows that the application seeking that the restriction be lifted was not authored by the plaintiff but was a forgery. The Identity Card (ID) which was used to transfer the land to the 2nd defendant was also a forged ID card. The photographs used in the transfer form were also not the plaintiff's photographs. A document examiner's report which was produced in evidence also showed that none of the instruments used to transfer the suit land to the 2nd and 3rd defendant were 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.

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 thereafter transferred the 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 9, 10, 11, 12 and 13 in the register of the land parcel Gilgil/Gilgil Block 1/3843 (Kekopey). In essence, the register should reflect that the proper owner of the suit land is the plaintiff herein Zipporah Nyambugu Mbugua, and that there is a restriction on the title. I also order the Land Registrar to issue the plaintiff with a new title deed to the suit land to replace the stolen title deed. I further declare the title held by the 2nd defendant, and that currently held by the 3rd defendant, to be 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 against the 2nd and 3rd defendants barring them from entering into any sale, or any other transactions over the land parcel Gilgil/Gilgil Block 1/3843 (Kekopey) or taking possession of the suit property or in any other way interfering with the plaintiff's use of it.

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 she could have continued to use it. I am not persuaded that she suffered any actual loss of user of the land and I will therefore not make any claim 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: -**

Mr. K.A. Owuor instructed by M/s Achieng Owuor & Company Advocates for the plaintiff.

No appearance on the part of the defendants.

Court Assistant : Carlton Toroitich

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**