



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 166 OF 2017**

**RICHARD GITAU MUGURO**

**PLAINTIFF**

**VS**

**BENSON MACHARIA WANDUNGO**

**1<sup>ST</sup> DEFENDANT**

**FRANCIS MWANGI WAITHAKA**

**2<sup>ND</sup> DEFENDANT**

**MIRIAMU WANGECHI NGUTHIRU**

**3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced suit by way of Plaint filed on 10/8/15 seeking the following orders; -

a) A declaration that the transfer of the suit property No. NGINDA/SAMAR/BLOCK 2/129 into the 1st Defendant was fraudulent and all other subsequent transfers and entries made in the register in the names of 2nd and 3rd Defendants were fraudulent and ought to be cancelled.

b) An order directed at the Lands Registrar Murang'a to revoke and cancel Title Number NGINDA/SAMAR/BLOCK 2/129 in the names of the 3rd Defendant and in its place the Plaintiff herein be registered as the proprietor of the same.

c) A Permanent injunction restraining the Defendants themselves, agents, servants or anyone else claiming through them from selling, alienating, charging, transferring or interfering with the ownership, use and possession by the Plaintiff of Title Number NGINDA/SAMAR/BLOCK 2 /129.

d) Cost of the suit.

e) Any further or other relief that the Court may deem fit and just to grant.

2. The Plaintiffs case is based on fraudulent transfer and registration of LR NO NGINDA/SAMAR/BLOCK 2 /129 by the Defendants thus depriving him of his rightful ownership of the said property.

3. The Plaintiff avers that on or around 26/11/91 he applied for and was allocated plot No. 95 by Mboi Kamiti Farmers Co. Ltd., a land buying company. The plot measured 1.0 acres. On completion of the purchase price he signed all the instruments of transfer of the suit property and paid the transfer and registration fees and was given vacant possession of the property in 1993.

4. He states that on 24/7/15 he went onto the suit land and started building a perimeter wall when he was

accosted by strangers and warned of dire consequences if he continued with his intended development plans. Startled by the new developments he proceeded to Murang'a lands office whereupon on carrying out a search it dawned on him that the suit property had been registered in the name of the 1st Defendant, on 16/6/14, who had transferred it to the 2nd Defendant on 28/7/14 and to the 3rd Defendant on 15/4/2015.

5. Maintaining that the registration and Title transfers were fraudulent, he has pleaded eleven particulars of fraud on the part of the 2nd and 3rd Defendants. He avers that as a result of the fraud pleaded the defence of an innocent purchaser for value without notice is not available to the 2nd and 3rd Defendants. It is his position that the Defendants concealed material facts from the Land Registrar Murang'a for purposes of fraudulently arguing the suit property which rightly belonged to him.

6. That he lodged a caution on the suit property on 24/7/15 claiming licencees interest to protect and safeguard his interest in the suit property.

7. The Defendants neither filed a Memorandum of appearance nor a defence despite summons having been duly served on them as evidenced by Affidavit of service on record dated 25/8/15. The Plaintiff filed request for judgement on 24/9/15 paving way for formal proof of the suit. The evidence of the Plaintiff is therefore uncontroverted.

8. At the hearing of the formal proof the Plaintiff testified and relied entirely on his statement filed on record and the list of documents filed on 10/8/15.

9. He testified that on 26/11/91 he formally applied to purchase 1 acre of land part of Samar Estate Maragua which land belonged to Mboi-Kamiti Farmers Company Limited. The land was being sold at Kshs. 40,000/= per acre which payments were paid as follows;

a) Kshs. 20,000/= - 26/11/91

b) Kshs. 20,000/= - 10/12/91

c) That on the 17/1/95 and 26/11/91 he also paid Ksh. 4,000/= & 2,000/= being survey and application fees respectively.

10. That the Company wrote to him on completion of payment acknowledging the same and granting him vacant possession of the suit land. He was also given the go ahead to develop the land as he awaits the processing of the Title deed in his name.

11. On 3/1/92 he received another letter from the Company informing him that demarcation was complete and calling him to collect vacant possession forms and be shown the land on the ground. The plot was delineated No. 95 on the ground. On 12/7/93 he received another letter from the Company calling for Kshs. 4,000/ being processing fees for the Title deed. On 27/9/93 the Company Lawyers Messrs Gichuru Mathenge & Company Advocates wrote to him informing him that the transfer was ready for his signature and asked him to attend to their offices to sign the same to enable registration to proceed. The same letter called for payment of Kshs. 10,610/- being *interalia* stamp duty and legal fees.

12. That late in 2015 he realized that a 3rd party had illegally and fraudulently registered herself as the proprietor of land without his consent. That the same was perpetrated by the 1st and 2nd Defendant. That he did not transfer his land to the Defendants and that the transactions are fraudulent having been done through misrepresentation of material facts. He produced documents marked as PW1 No. 1-10 to support his case.

13. In his submissions the Plaintiff avers that the 1st Defendant did not obtain a good Title and neither had any to convey to the 2nd and 3rd Defendants. That the 3rd Defendant Title is vitiated by fraud, misrepresentation of materials fact and corrupt scheme and should be cancelled. That the Plaintiff is empowered by Act 40(1) to acquire and own property of any description in any part of Kenya and he

should not be deprived of the same unprocedurally or illegally.

14. He relied on the case law as:

Chase International Corporation and another-vs-Laxman Keshra and others, (1978) KLR 143: (1976-1980) eKLR 891

Katende –vs- Haridas and Company Limited,

ELC Case No 178 of 2013 – ELC Court at Malindi. Daniel Ricci -vs- County Land Registrar Kilifi & Attorney General

ELC No 609 of 2012 – High Court at Eldoret. (formerly HCC 47 of 2010 - Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Anor)

ELC case no 747 of 2012 at Eldoret – formerly HCC No 147 of 2011- Solomon K. Songok –vs- Susan Jepkosgei.”

15. Relying on the case of **Katende vs Haridas** the Plaintiff maintains that the defence of innocent purchaser for value and without notice is not available to the 3rd Defendant on account that the title is tainted with fraud committed by the 1st and 2nd Defendant. That fraud went to the root of the Title. That if indeed the 1st and 2nd Defendants, had any Title documents, the same must have been forged and therefore invalid. That the Plaintiff is the bonafide owner of the property.

### **Analysis & determination**

16. It is on record that the Defendants elected not to defend the Plaintiffs claim and therefore the same remains uncontroverted.

17. Section 26 of the Land Registration Act states as follows;

“ (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.”

18. The law provides for two instances within which a Title may be challenged: first is where Title is obtained through fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme. It is the Plaintiffs case that the 1st Defendant Title was obtained through fraud. By misrepresenting that he was the registered owner of the property while he was not and 3rd Defendant though no evidence is available that they were part of the fraud, obtained a Title that is already tainted. They then were caught by Section 26 (b) where they acquired a Title that has been procured illegally unprocedurally or through a corrupt scheme. Section 26 (b) therefore removes protection from an innocent purchaser or innocent title holder. The taint of illegality and fraud runs to the root of the title and not even the 3<sup>rd</sup> defendant is spared the same. There was no valid interest that was conveyed.

19. It is clear from the evidence from the material presented in Court that the Plaintiff has demonstrated how he acquired the suit property on a balance of probability and I find no reason to deny him the right to the suit property. Article 40 (6) does not protect title that is unlawfully acquired. Such is the title being held by the 3<sup>rd</sup> Defendant.

20. In the absence of evidence to the contrary, I am satisfied that the Title of the 1st Defendant was obtained fraudulently illegally, unprocedurally or through a corrupt scheme. The Title he conveyed thereafter to the 2nd and 3rd Defendant was equally tainted by that illegality.

21. In conclusion judgement is entered in favour of the Plaintiff as follows;

a) A declaration that the transfer of the suit property No. NGINDA/SAMAR/BLOCK 2/129 into the 1st Defendant was fraudulent and all other subsequent transfers and entries made in the register in the names of 2nd and 3rd Defendants were fraudulent and are hereby cancelled.

b) The Lands Registrar Murang'a be and is hereby ordered to revoke and cancel Title Number NGINDA/SAMAR/BLOCK 2/129 in the names of the 3rd Defendant and in its place the Plaintiff herein be registered as the proprietor of the same.

c) A Permanent injunction restraining the Defendants themselves, agents, servants or anyone else claiming through them from selling, alienating, charging, transferring or interfering with the ownership, use and possession by the Plaintiff of Title Number NGINDA/SAMAR/BLOCK 2 /129.

d) The cost of the suit is payable by the defendants.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 16TH DAY OF NOVEMBER, 2017.**

**J G KEMEI**

**JUDGE**