



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 724 OF 2013
MINNIE WAITHIRA NDINDIRI.....PLAINTIFF
VERSUS
FRANCIS CIERA MBUGUA.....DEFENDANT

JUDGMENT

By a Plaintiff dated **18th June 2013**, the Plaintiff herein **Minnie Waithira Ndindiri** , brought this claim against the Defendant herein **Francis Ciera Mbugua** , and sought for these prayers.

- 1. A declaration that the Plaintiff is the sole legal and rightful owner and or proprietor of all that piece or parcel of land known as plot No. Ruiru/Mugutha/Block1/T4597 situated within Kiambu County.**
- 2. A permanent injunction to issue against the Defendant restraining him from in any way whatsoever either by himself and or through his agents representatives, servants or employees from interfering, selling transferring, transacting and or disposing off plot No. Ruiru/Mugutha Block 1/T.4597.**
- 3. An order directing the District Land Registrar to cancel and/or revoke the Title Deed No. Ruiru/Mugutha block 1/T.4597 held by the Defendant and issued on **6th June 2005** and in its place issue one in favour of the Plaintiff.**
- 4. Costs of this suit plus interest thereon at court rate.**

In her Plaintiff, the Plaintiff had alleged that she sought the suit property from **Felista Mugure Wakia** who was acting through her representative and husband **Stephen Kaira Nyaga** vide the sale agreement attached to the bundle of documents dated **13th January 2005** .She further alleged that she bought the suit property for **Kshs.120,000/-** and the sale agreement was drawn and witnessed by **Wakahiu Mbugua Advocates**. She further alleged that she was issued with the **certificate no. 7928** dated **27th May 2005**, and **Nyakinyua Investment Ltd** confirmed that the Plaintiff was the true owner of the suit property vide their clearance letter dated **16th October 2006**.

The Plaintiff further alleged that when she visited the Thika Land Registry and carried a search, she discovered that the said parcel of land had been registered in favour of the Defendant and also had been

issued with a Title Deed. She also testified that she discovered that the suit land was sold to the Defendant on **2nd June 2005**, by one **Esther Wambui Nganga** and that the said sale was fraudulent as neither **Esther Wambui Nganga** nor the Defendant had ballot parties from the original owner **Nyakinyua Investment Co. Limited**. It was her further allegation that the Title Deed in favour of the Defendant was obtained by means of **fraud** and the same should be revoked. It was her contention that the Defendant had no color of right to claim ownership of the suit property.

The Defendant herein though served with summons on **8th July 2013**, did not file his defence. The Law Firm of **Mutahi Wanyama & Co. Advocates** filed a memo of Appearance and a Notice of Preliminary objection on **3rd September 2013**. However, they did not file any Defence nor prosecute the said Preliminary objection. Interlocutory judgment was entered against the Defendant on **3rd September 2013**. The matter proceeded for formal proof on **21st September 2015** wherein the plaintiff testified as the sole witness and adopted her witness statement. She also produced various exhibits in court. Plaintiff reiterated that she bought the suit property from **Felista Magua Wakia** on **13th January 2005**, as per the sale agreement exhibit **No. 2** and she was subsequently issued with the share certificate exhibit **No.3**. She further testified that she paid for plot as evident from her bundle of receipts produced as exhibit **No. 5** and she was issued with the clearance letter by **Nyakinyua Investment Ltd** which was exhibit **No. 7**. The Plaintiff alleged that though the Defendants title was issued **6th June 2005**, she bought the property in **January 2005**, and she was therefore the rightful owner of the property and not the Defendant. It was her allegations that she placed a **caution** on the suit property exhibit **No. 9** and she now wished to be declared the owner of the suit property and an injunction be issued to preserve the suit property. After the close of the Plaintiff's case, the court directed the Plaintiff to file written submissions which submissions were filed **on 2nd October 2015**.

The court has now carefully considered the evidence on record, the annexures thereto, the written submissions and the relevant laws and the court makes the following findings:

The Plaintiff has sought to be declared the sole and legal and rightful owner of **LR No. Ruiru/Mugutha/Block 1/T.4597**. The Plaintiff has also sought for cancellation and revocation of Title Deed No. **Ruiru/Mugutha Block1/T.4597** held by the Defendant.

It is evident that the Defendant herein was served with the summons to enter appearance as Law Firm of **Mutali Wanyama & Co. Advocates** filed a memo of Appearance on his behalf and even filed a Notice of Preliminary Objection. However, they failed to file a Defence and thus suit is not defended. However, even if the suit is not Defendant, the Plaintiff had a duty to formally proof her case. The onus of proof is on her as it is trite law that he who alleges must prove.

There is no doubt that the Defendant herein is the registered owner of **Ruiru/Mugutha/1/T.4597** as evident from the Title Deed provided in court by the Plaintiff. The Defendant being the registered proprietor. Section 26(1) of the Land Registration Act, provides that such certificate of title is conclusive evidence of proprietorship. It provides as follows:-

“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—

The Defendant being the **absolute** and **indefeasible owner** of the suit land, the said proprietorship can only be challenged on ground of **fraud**, or **misrepresentation** to which the Defendant is proved to be a party. Secondly, if the certificate was acquired **illegally, unprocedurally** or **through corrupt scheme**.

Since the Plaintiff is the one who has alleged, she had a duty to prove that the title herein held by the Defendants was acquired through **Fraud** or **Misrepresentation** and that the defendants knew or was part of the said fraud.

It is evident that the Defendant herein bought the suit land from one **Esther Wambui Ngugi** as per the Sale Agreement dated **2nd June 2005**. Thereafter the Defendant as the proprietor of the suit land on **6th June 2005**. It is evident that the Plaintiff had also purchased the suit land from one **Felistas Mugure Wakia** on **13th January 2005**. However, it is not evident weather after the purchase, the plaintiff presented her documents immediately to the Land's Office for registration that the purchase by the Defendant was fraudulent because **Esther Wambui Ngugi** did not have ballot receipt from **Nyakiagana Investment Ltd** .

However, that evident is from Plaintiff who was also a purchaser and not from officials of **Nyakinyua Investment Ltd**. Though Plaintiff produced a letter dated **18th October 2006**, from **Nyakinyua Investment Ltd**, confirming that the suit land belongs to the Plaintiff **Minnie Waithira Ndindiri** , the said official was not called as a witness to testify in court in respect to that letter.

As it is the duty of the person alleging to prove, the Plaintiff needed to call offices from the Thika Land's Office to testify on how this land was registered in the name of the Defendant. The fact that the Plaintiff's sale agreement was signed earlier does not mean it was the genuine one for the suit land and not the one signed by the Defendant and **Esther Wambui Ngugi** . The Plaintiff doubted that authentication of the Defendants sale agreement and that it was not witnesses and stamped by **Wakahiu Mbugua** though it allegedly drawn by the said **Wakahiu Mbugua Advocate**. However, the said **Wakahiu Mbugua Advocate** was not called as a witness to confirm or dispute the authenticating of the sale agreement that is being doubted by the Plaintiff herein.

The certificate of title was issued by Thika Land Registry. However, the land Registrar was not joined as a part herein and the Plaintiff is asking the court to direct the District Land Registrar Thika who is not a party to this suit to cancel and revoke the Title Deed. The said Title was issued by the said District Land Registrar and the court has not been made aware under what circumstances. Asking the said Land Registrar to cancel a document that he/she issued is tantamount to condemning him /her unheard as she is not a party to this suit.

This Court after analyzing the available evidence finds that the Defendant holds a certificate of certificates which is conclusive evidence of proprietorship. In the absence of any evidence of fraud, misrepresentation, or corrupt means of registration, the court finds that he is the absolute and indefeasible owner of this suit law. The court cannot cancel his Title Deed without conclusive evidence of Fraud or irregularity herein.

For the above reasons, the court finds that sanctity of title has to be respected and the Court holds that the Plaintiff has failed to proof her case on a balance of probability. Consequently, the Court dismisses the Plaintiff's claim entirely and since the suit was not defended, I make no orders as to costs. Judgement accordingly.

It is so ordered.

Dated, Signed and delivered this **29th day of March, 2016**

L. GACHERU

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

Court Clerk :

L.GACHERU

JUDGE