



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 85 OF 2012

JOSEPHAT MUTHUI MWANGI.....PLAINTIFF

VERSUS

CHIEF LAND REGISTRAR.....1ST DEFENDANT

SZAREDO INVESTMENT LIMITED2ND DEFENDANT

MARGARET NYAMBURA KAMAU3RD DEFENDANT

JUDGMENT

(Suit by plaintiff to recover his title to land; land having been fraudulently transferred to 3rd defendant on pretext that plaintiff is deceased when he was alive all along; 3rd defendant fraudulently selling the property to 2nd defendant; 2nd defendant becoming registered as proprietor and utilizing the premises as its own; 2nd defendant arguing that she is a bona fide purchaser for value; whether such title can be upheld; held that the title was acquired through fraud and cannot be upheld; order for rectification of title granted; order for eviction and permanent injunction granted; mesne profits granted on basis that 2nd defendant prior to filing of suit was aware of the fraud but refused to relinquish possession; inquiry on mesne profits ordered; costs of suit to plaintiff)

A. INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of plaint filed on 28 September 2009. The plaint was later amended on 27 October 2011. The plaintiff has pleaded that he has always been the owner of the following 19 land parcels being:-

(a) Naivasha/Mwichiringi Block 4/243

(b) Naivasha/Mwichiringi Block 4/244

(c) Naivasha/Mwichiringi Block 4/245

(d) Naivasha/Mwichiringi Block 4/246

(e) Naivasha/Mwichiringi Block 4/5517

(f) Naivasha/Mwichiringi Block 4/5518

- (g) Naivasha/Mwichiringi Block 4/5519
- (h) Naivasha/Mwichiringi Block 4/5520
- (i) Naivasha/Mwichiringi Block 4/5521
- (j) Naivasha/Mwichiringi Block 4/5522
- (k) Naivasha/Mwichiringi Block 4/5523
- (l) Naivasha/Mwichiringi Block 4/5524
- (m) Naivasha/Mwichiringi Block 4/5525
- (n) Naivasha/Mwichiringi Block 4/5526
- (o) Naivasha/Mwichiringi Block 4/5527
- (p) Naivasha/Mwichiringi Block 4/5528
- (q) Naivasha/Mwichiringi Block 4/5533
- (r) Naivasha/Mwichiringi Block 4/5534
- (s) Naivasha/Mwichiringi Block 4/5535

2. He pleaded that he has held title to the parcels No. 243-246 since the year 1987, and title to the parcels No. 5533-5534 since the year 1995. He pleaded that in the year 2002, the 3rd defendant fraudulently obtained or forged documents to show that he (the plaintiff) had died, and the said 3rd defendant, applied for and was granted letters of administration to the plaintiff's estate. Purporting to be the administrator, the 3rd defendant, on 31 July 2003, caused or misled the 1st defendant to effect transfer of the suit properties into her name, and thereafter on 18 February 2004, into the name of the 2nd defendant, who was then issued with title documents. He has pleaded that when he discovered this calculated scheme, he reported the matter to the police, and at time of filing suit, investigations were ongoing. It is his position that he has always been alive, and no administration could be undertaken in respect of his estate. It is his pleading that the purported conveyance and transfer of the suit properties into the name of the 3rd defendant and 2nd defendant are void ab initio.

3. Through this suit, he has asked for the following orders:-

- (a) A declaration that he is the lawful owner of the suit properties.
- (b) An order directing the 1st defendant to restore and reinstate the plaintiff as the registered owner or proprietor of the suit properties.
- (c) Eviction order against the 2nd defendant.
- (d) A permanent injunction preventing the defendants or any other person from interfering with the plaintiff's titles to the said parcels of land or otherwise from quiet enjoyment and possession of the suit properties.
- (e) A consequent permanent injunction against the 2nd defendant or any other person from trespassing and or remaining on the plaintiff's parcels of land or otherwise from quiet enjoyment and possession of the suit properties.
- (f) General damages against the 2nd defendant for trespass.

(g) Order of account and or mesne profits in respect of the benefits drawn by the 2nd defendant from the suit property for the period of its occupancy until surrender thereof to the plaintiff.

(h) in the alternative, an order directing the 1st defendant to indemnify or otherwise to facilitate the indemnification of the plaintiff in respect of the loss of the suit properties at the current value.

(i) Costs and interest at court rates.

(j) Any other relief that this Honourable Court may deem fit to grant.

4. The 2nd defendant, entered appearance and filed Defence. It is denied that the plaintiff has always been the legal owner of the suit properties. It is pleaded inter alia that the 2nd defendant purchased the suit properties from the 3rd defendant pursuant to a sale agreement dated 17 September 2003 for a sum of Kshs. 458,100/= each, in total, Kshs. 1,832,400/=. It is further pleaded that the official searches revealed that the properties were registered in the name of the 3rd defendant who had also been issued with title deeds; that consent to transfer the properties from the 3rd to 2nd defendant was granted by the Naivasha Land Control Board; that the 2nd defendant paid stamp duty and all relevant fees and became registered as legal owner of the properties; that the 2nd defendant took possession and has been in occupation since; that the 2nd defendant is a purchaser for value; that as registered proprietor her rights over the property are indefeasible; and that the plaintiff's claim lies against the 3rd defendant for damages. The 2nd defendant has denied any knowledge of the alleged scheme and has averred that if there was any, she was not a party thereto. It is averred that the 2nd defendant has been in occupation since the year 2003 and has substantially developed the land. Demand was admitted.

5. The 1st defendant, the Chief Land Registrar, entered appearance and filed Defence through the State Law Office. It was pleaded inter alia that every action taken by the 1st defendant with regard to the suit properties was carried out in good faith without irregularities and in accordance with the law. It is averred that if any transfers were registered, then the same were done legally, procedurally and pursuant to and in exercise of the 2nd defendant's statutory duties. It is contended that the 1st defendant was not under any obligation to ascertain whether the documents presented for registration were forged. It was also pleaded that the prayers sought cannot be granted by dint of Section 16 of the Government Proceedings Act (CAP 40) and that the notice required by Section 13A was never sent.

6. The 3rd defendant could not be traced and leave was granted that she be served by way of advertisement. An appropriate advertisement was placed in the Daily Nation newspaper but no appearance was ever entered on her behalf and no defence was ever filed.

B. EVIDENCE OF THE PARTIES

(i) The plaintiff's evidence

7. The plaintiff testified that he acquired the suit properties by virtue of his membership to a land buying company called Nyerere Suswa. He had 6 shares which entitled him to six parcels of land each measuring 3 acres. These were Naivasha/Mwicingiri/ 241,242,243,244,245 and 246. He sold the parcel No. 242 and sub-divided the parcel No. 241 into 21 plots. He sold some and was left with 15 plots which are the parcel numbers 5517,5518, 5519, 5520, 5521, 5522, 5523, 5524, 5525, 5526, 5527, 5528, 5533,5534, and 5535. He had the original title deeds to these parcels of land. He testified that in the year 2004, he started a private school in Mbeere District which consumed a lot of his time. In the year 2008, he sent his brother to check on the properties as he intended to sell them. The information he got was that there was a flower farm on site. It later transpired that title to his parcels had been transferred to the 3rd defendant, and subsequently to the 2nd defendant, and that the 2nd defendant also held title deeds to the same properties. He discovered that the land records indicated that he had died. He reported the matter to the police and the CID investigations showed that one Zakaria sold the land to the 2nd defendant, and that the person Margaret Nyambura Kamau did not exist. The CID also discovered a sale agreement dated 17 September

2003 between Margaret Nyambura Kamau and Wildfire Ltd. One James Karimi was charged.

8. The plaintiff explained that on the basis that he had died, a fraudulent grant was issued through a purported succession cause NO. 1143 in Kiambu court, later changed to read Cause No. 250/2002. Through the succession cause, the plots were transmitted to the 3rd defendant. He faulted the Chief Land Registrar for not following due process when issuing fresh titles as he still has the original title deeds issued to him. He stated that the Land Registrar ought to have first requested for surrender of title deeds before issuing new ones. He stated that the land could only legitimately have been bought from him and that the title deeds held by the 2nd defendant cannot be genuine.

9. In cross-examination, he stated that CID investigations showed that the purchase price paid by the 2nd defendant was paid to one James Karimi. He denied that he was guilty of any laches but agreed that the 2nd defendant had been in occupation for about 6 years before he raised issue.

10. PW-2 was Susan Muchemi who works in the Naivasha Lands Registry as a Land Registrar. She testified that the first registered owner of the properties is the plaintiff and that he was issued with title deeds. She testified that the 2nd defendant became registered as proprietor on 18 February 2004. She testified that the Green Cards showed that a succession cause No. 250 of 2002 was filed by one Margaret Nyambura Kamau in respect of the estate of the plaintiff and that she was declared administrator. She Margaret then transferred the properties to the 2nd defendant. She testified that the normal procedure is that the original title deeds are surrendered before another one is issued. If a title deed is lost, it has to be Gazetted before a fresh one is issued. In cross-examination, she testified that entries were made on the basis of the letters of administration. She found it strange that there were two sets of title deeds over the same properties. She affirmed that if a title deed is lost, an entry for its loss has to be made in the Green Card.

11. With the above evidence, the plaintiff closed his case.

(ii) Evidence of the defence

12. I already mentioned that the 3rd defendant did not enter appearance to this suit. No evidence was led on her behalf. The 1st defendant did not also call any evidence. The sole defence evidence is that of the 2nd defendant who called forth Mr. Peter Szapary who is a director and shareholder of the 2nd defendant.

13. Mr. Szapary testified that the suit properties were purchased from Margaret Nyambura Kamau through a sale agreement dated 17 September 2003. Prior to purchasing the properties, an official search had been conducted which showed that the properties are in the name of the said Margaret Nyambura Kamau. He was shown the original title deeds and he engaged Mr. Rupert Watson, an advocate of the High Court of Kenya to draw the agreement. The agreement was between Margaret Nyambura as vendor and Wildfire Ltd as purchasers. He testified that Szaredo Ltd and Wildfire Ltd are sister companies. The arrangement between the two is that Wildfire Ltd conducts farming activities on land owned by Szaredo Ltd. After the agreement, Wildfire Ltd nominated Szaredo Ltd to be the title holder. Consent of the Land Control Board was obtained and a transfer effected to Szaredo Ltd. He testified that the sale agreement covered the land parcels No. 243, 244, 245 and 246 which measure 3 acres each. There was an acknowledgment and undertaking where one James Karimi Waiganjo was authorized by the seller, Margaret Nyambura Kamau, to transact on her behalf. The transfers were signed by Margaret and Rupert Watson witnessed the execution of the transfer instruments. He himself met Margaret once, on the date the agreement was being signed. She had an ID card a copy of which was produced.

14. The properties were transferred to Szaredo Ltd on 10 November 2003 for the parcels No. 243 244, 245 and 246. The other 15 smaller parcels were transferred on 18 February 2004. They took occupation and developed a now fully fledged flower farm after investing over kshs. 30 Million. They farm grows flowers for export.

15. He stated that there was no interruption until 2008-2009 when the plaintiff came and produced title deeds showing that he is the owner of the properties. He testified that criminal charges were preferred

against James Karimi Waiganjo, and he, together with the plaintiff, testified as prosecution witnesses. Mr. Waiganjo was convicted, and it seems, he had earlier been convicted of similar offences related to land fraud. He testified that he had no notice of any fraudulent activity. It was his view that the plaintiff be compensated by the Government and that it would be unjust to have them evicted, given the level of investment that they have put in.

15. Cross-examined by Mr. Kisila for the plaintiff, he testified that the written agreement was in respect of 4 parcels of land. There was no written agreement on the 15 smaller parcels. He stated that they proceeded on the basis of the acknowledgement produced by Mr. Waiganjo. He affirmed that Mr. Waiganjo was charged and convicted with defrauding him of Kshs. 1, 832,400/=, which is the money paid for the land. He testified that he was informed that the previous owner, the plaintiff, had died and that his widow (Margaret) had taken over the land. He did not see a Death Certificate and did not cross-check on whether this was true. He testified that in the year 2010, he discovered from the Registrar of Persons, that the ID Card of the seller, Margaret, was a fake ID and did not correspond to any in their records. He denied having been casual in the transactions and stated that they went through all procedures. Some discrepancies with the figures in the sale agreement and the consent of the Land Control Board were pointed out to the witness, but the witness stated that he was not the one who prepared the Land Control Board consents.

16. In cross-examination by Mr. Kirui for the State, Mr. Szapary inter alia testified that he was approached by one Peter Mwangi who informed him that they were four sons and that their mother was old and wished to sell the land. He denied not having done due diligence.

17. With the above evidence, the 2nd defendant closed her case.

C. SUBMISSIONS OF COUNSEL

18. Mr. Kisila for the plaintiff submitted that the transfer of the properties to the name of the 2nd defendant was fraudulent, given that he was not dead at the time letters of administration for his estate were issued to Margaret, who was, a fictitious person. He submitted that the transfer of the properties to her name were a nullity and she could also not confer a good title to the 2nd defendant. He relied on various authorities to support this point, namely *Samson Kagengo Ongeru v Greenbays Holdings & 2 others*; *Benard Kamau Theuri v The Commissioner of Lands & 2 Others (2013) eKLR*; *West End Butchery Ltd vs Arthi Highway Developers Ltd & 6 others (2012) eKLR*; and *Republic vs Kisumu District Lands Officer & Another (2010) eKLR*. He submitted that the plaintiff was not privy to the fraud.

19. He also faulted the mode of acquisition of title by the 2nd defendant of the 15 smaller parcels of land on the basis of a mere acknowledgement. He pointed at Section 3 (3) of the Law of Contract Act, which requires a written agreement for the sale of land. He submitted that Section 143 of the Registered Land Act gives court authority to order rectification of the register by making an order of cancellation. He submitted that it is the title of the plaintiff which ought to be upheld as it was first in time. He relied on the case of *Gitwany Investments Ltd v Tajmal Ltd & 3 Others (2006) eKLR* and *Livingstone Kunini Ntutu vs Minister for Lands & 4 Others (2014) eKLR*. Counsel further submitted that there was constructive fraud on the part of the 2nd plaintiff as it was not shown that Wildfire Ltd is a sister company of Szaredo Investments Ltd and that there was no sale agreement for 15 of the land parcels. He submitted that the plaintiff's rightful remedy is reinstatement as registered proprietor and that the 2nd defendant can pursue the Government for compensation. He also asked for eviction and mesne profits for the duration that the 2nd defendant has occupied and derived benefits from the land. He relied on the case of *Adrian Gilbert Muteshi vs William Samoei Ruto & 4 Others (2013) eKLR*. He asked for mesne profits at Kshs. 10 Million. He submitted that as an alternative, the plaintiff be indemnified in the sum of Kshs. 120 Million for the loss of the properties.

20. Mr. Musangi for the 2nd defendant, submitted that the 2nd defendant is a bona fide purchaser for value. He submitted that prior to the purchase, due diligence was undertaken and the same showed no encumbrance on the subject titles. He submitted that the title of the 2nd defendant is protected by Section

26 of the Land Registration Act. He submitted that cancellation of the title of the 2nd defendant would be a draconian measure since the plaintiff's loss is purely pecuniary and can be compensated. He further submitted that such action will have a negative impact on local and foreign investment in land in the country; that it will lead to significant loss of employment of about 640 employees; that the same will lead to shut down of the operations of the 2nd defendant leading to loss of tax revenues, and that there will be significant damage to investor confidence. He submitted that the plaintiff ought to be compensated by the Government, as the custodian of land records, is the Lands Ministry which ought to take responsibility.

21. Ms. Khatambi for the State, submitted that the Land Registrar was not party to any fraud and that no officer from the Lands office was convicted of any criminal offence. She further submitted that the 2nd defendant did not conduct due diligence, and that due diligence, ought not to stop with the conducting of a search. She submitted that due diligence in the instance would have involved carrying a background check on the seller; perusing the Green Cards; enquiring from neighbours, and establishing the history of the land. She submitted that the land was transferred to the 2nd defendant by way of fraud and the only viable remedy is to reinstate the plaintiff as registered owner. She relied on the case of **Adrian Gilbert Muteshi vs Hon William Samoei Ruto & Others**. She submitted that the plaintiff does not deserve to be indemnified by the Government.

D. DECISION

22. It is with the above pleadings, evidence and submissions that I need to decide this matter.

23. I do not think it is in doubt that the 2nd defendant fell into a trap laid by fraudsters. Probably seeing that the subject properties were vacant, the fraudsters found out who the registered owner of the property was, and feigned his death. They then got hold of an old woman, and passed her off as the widow of the "deceased" owner. They prepared a fake ID card for her, and christened her Margaret Nyambura, and themselves as her sons. They then forged letters of administration purporting to be for the estate of the "late" plaintiff and armed with the same, somehow convinced or colluded, with certain officers in the Lands office to have the suit properties transferred to the fictitious Margaret Nyambura, purporting to be a transfer by way of transmission. Once the properties were transferred to Margaret Nyambura, anyone was fair game, and the 2nd defendant was a prime target. It operated a farm next door, and the rogues knew, that with the right price, it would not be too hard to convince the 2nd defendant to purchase the suit properties. The instinct of the scoundrels was correct. The 2nd defendant could not resist the properties and proceeded to purchase the same. A search conducted at the lands registry by the 2nd defendant inevitably revealed that the suit properties were owned by the fictitious Margaret Nyambura, and the said Margaret Nyambura was armed with an ID, to prove that she was indeed the owner of the suit properties.

24. I cannot really blame the 2nd defendant for being snared by the elaborate scheme that was spun by the rascals. Although counsels for the plaintiff and the 1st defendant were of the view that a bit more due diligence would have revealed the scam, I am not ready to place too heavy a burden on any purchaser of land. The seller had title documents, the search revealed that the seller owned the land, the land was vacant and available, and the seller had an ID card to boot. What more was the 2nd defendant supposed to do? We can hypothesize on hindsight, say that the buyer ought to have talked to the Chief, inquired from the neighbours, even gone to the registrar of births and deaths, or queried whether the letters of administration tabled were genuine; but at that moment, I do not think any prudent buyer would have had reason to doubt that he was dealing with the true owner of the land. True, these could have been done, but I cannot blame the 2nd defendant for not doing the same, as they were truly, in the circumstances, extra to any reasonable due diligence.

25. That said, the 2nd defendant was not completely without blemish. There was indeed a certain degree of casualness with which the 2nd defendant approached the whole transaction. At the most basic level, no sale agreements were drawn in respect of 15 of the land parcels. I would have certainly expected their counsel, Mr Watson, with respect, who was in charge of the transaction, to at least advise the 2nd defendant to draw and execute sale agreements for these parcels of land. I would also have expected the documents at the Land Control Board to tally with the purchase price. The payment of the purchase price

in piece meal to different persons was also not normal, as it is always advisable to pay monies directly into the bank account of the seller or to his advocate. But I do not think the slips of the 2nd defendant would make him a party to the fraud as alleged by counsel for the plaintiff. True, they were mistakes, but they could not have in any way, assisted the 2nd defendant in avoiding the scam.

26. The scam could not have been pulled off without significant involvement of an officer, or officers, of the Lands Registry. It was admitted by PW-2, that a duplicate original title deed cannot be issued without the first one being surrendered, or being gazetted as lost. This was not done, and this omission allowed the fraudsters to obtain a duplicate title which they passed off as a good title for sale.

27. I do not need to stress the point that the title of the 2nd defendant was received pursuant to certain fraudulent transactions. The 2nd defendant may have been a bona fide purchaser for value, but it cannot be avoided that the titles are not good titles. The plaintiff, thank God, is alive and he is entitled to have back his titles. I sympathise with the 2nd defendant, but any title to land obtained through a fraudulent dealing cannot be allowed to stand. That is indeed the import of the provisions of Section 26 of the Land Registration Act, Act No. 3 of 2012 which provides as follows :-

proprietorship.

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.

28. The titles held by the 2nd defendant fall squarely within the ambit of Section 26 (1) (b) above. The 2nd defendant may not have been party to the fraud, or misrepresentation, that led to issuance of titles to itself, but it cannot be escaped, that the titles were acquired illegally, unprocedurally, or through a corrupt scheme. They cannot be allowed to stand and the only remedy is to have them cancelled. I am not swayed by the arguments of Mr. Musangi, that cancellation will be a drastic remedy, considering the value of the investment put in the land or the benefits of the investment to the economy. One cannot be allowed to benefit from a fraud, even if he is not a party to it.

29. Neither I am convinced by the reasoning of the 2nd defendant that the remedy of the plaintiff is an indemnity from the Government. True, indemnity was sought, but this was only as an alternative, in case the plaintiff failed in his quest to have back the properties. In fact, it is the 2nd defendant who should probably consider claiming indemnity from the Government. But I am unable to consider such claim, in this present suit, as it was not pleaded, and the 2nd defendant did not utilize the provisions of Order 1 Rule 24, to make a claim for contribution or indemnity against the Government as co-defendant. Whether they wish to pursue this avenue is up to them, but I am not in doubt that the most prudent remedy in the circumstances, is to take the plaintiff back to the position that ensued before the fraud was committed, and this means that the plaintiff must be reinstated in the register of the suit properties, as the proprietor of the land parcels in question.

30. I therefore order the cancellation of all entries in the register of the suit properties which purported to have the title of the plaintiff compromised and direct the Land Registrar to reflect in the register that the plaintiff is the proprietor of the suit properties.

31. The plaintiff has made several other claims including an order of eviction and permanent injunction. These I have no problem granting, but I take note that the 2nd defendant has been in occupation of the suit properties for a significant period of time, in good faith, and I think that it is only fair that I allow the 2nd defendant some time to move out of the property. As I said earlier, I have a lot of sympathy for him and in my own discretion, I give the 2nd defendant upto 31st December 2015 to vacate the property, but any continued occupation from the date hereof, will be subject to payment of reasonable rent for the duration that she will continue being in possession. If she does not pay reasonable rent, or move out within this period, then the plaintiff will be at liberty to apply for her eviction. Moreover, the 2nd defendant must restore the land to the situation that it was, prior to them moving into the same or to such state as is acceptable to the plaintiff. Upon vacating the premises, the 2nd defendant is permanently restrained from being in the suit properties unless with the permission of the plaintiff.

32. But this is not all that the plaintiff wants in this case. He has also claimed mesne profits and general damages for trespass. It has been argued that the plaintiff is entitled to the loss of user of the land for the duration that the 2nd defendant has been in occupation. Mr. Kisila has relied on the case of ***Albert Gilbert Muteshi vs Hon. William Samoei Ruto & 4 Others, Nairobi High Court Civil Suit No. 510 of 2010***. I have carefully read the decision and nowhere was mesne profits awarded. The facts of the case, are not too dissimilar to this one. Through fraud, the plaintiff in that case was deregistered as owner of the suit land and the property transferred to the 1st defendant. The plaintiff sued to have the property back and also claimed mesne profits. The learned judge (Ougo J) held that the plaintiff was entitled to have back the property, but on the claim for mesne profits, she held that the same had not been proved (See page 27 of the decision). However, an award of Kshs. 5 Million was made "as compensation", which to me, seems to have been an award for general damages for trespass.

33. Should I award mesne profits in this case? The plaintiff testified that he was not using the suit properties. They were vacant and he was not deriving any income from them. Strictly, he did not lose anything by the user of the land by the 2nd defendant for the duration that he was unaware of the existence of the 2nd defendant on the land. It is pleaded in the plaint that a demand letter was issued on 15 April 2009, but I have no record of the demand letter having been produced in evidence. The 2nd defendant in her pleadings averred that they declined to act on the demand letter because in their view, they owned the property. Despite this assertion by the 2nd defendant, I believe that the 2nd defendant was aware that the titles it held were not good titles, or at least an independent bystander would appreciate that the titles were bad, as early as when the plaintiff surfaced as being alive, and latest from the time that the rogue/s were convicted in the criminal matter.

34. The 2nd defendant cannot argue that from this later time, it still believed that it held good title to the land. I think a reasonable person in the shoes of the 2nd defendant, ought to have considered negotiating with the plaintiff for the land, either for purchase or lease, or move out altogether, for it was clear, latest from the time of conviction, that the properties had been sold to her by way of fraud. At that time, the 2nd defendant knew that the plaintiff was alive; it knew that the land had been sold by way of fraud; it knew that the plaintiff had demanded back his land; why would they insist on staying on the land despite this knowledge? Was it to derive full benefit as this suit dragged on? Or was it to deny the plaintiff revenue or occupation of the land for as long as possible? If these were the intentions of the 2nd defendant, then they cannot get away with it. Even if these were not the intentions of the 2nd defendant, it is beyond me why the 2nd defendant continued to insist on using the property despite having knowledge that they were holding illegal titles. Given this scenario, I would be inclined to award mesne profits from the time he(the plaintiff) demanded the 2nd defendant to vacate the premises, but having no proof of when such demand was made, in my discretion, I will award mesne profits from the time this suit was filed, till the time that the 2nd defendant will vacate the premises.

35. What would be the amount of the mesne profits? In my opinion, I think an award of money, equivalent to the amount that would have been paid as rent, for the use of the suit properties, for the same activities that are ongoing in the said properties, will be fair as mesne profits. No figures on the rent payable was tendered, but Order 21 Rule 13 of the Civil Procedure Rules, 2010, does give the court discretion to make inquiry in respect of mesne profits. The said provision is worded as follows :-

Order 21 Rule 13

(1) *Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—*

(a) *for the possession of the property;*

(b) *for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;*

(c) *directing an inquiry as to rent or mesne profits from the institution of such suit until —*

(i) *the delivery of possession to the decree-holder;*

(ii) *the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or*

(iii) *the expiration of three years from the date of the decree, whichever event first occurs.*

(2) *Where an inquiry is directed under subrule (1)(b) or (1)(c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.*

36. It will be seen from the above, that the court when passing decree, has discretion to direct an inquiry into the rent or mesne profits accrued. In my discretion, I will award mesne profits, equivalent to the reasonable rent payable, from the time the suit was filed, till delivery of possession, which as I ordered earlier, has to be done on or before the 31st December 2015, subject to payment of the reasonable rent. I further direct the Government Valuer, Nakuru County, to proceed and make an assessment of what would be paid as reasonable rent, and table his findings within 30 days of this date, so that I can make specific, the amount due and payable as mesne profits.

37. I think I have dealt with all issues save for costs. Costs are in the discretion of the court but ordinarily follow the event. In as much as the 2nd defendant was a victim of fraud, I do not see why she thought fit to drag the plaintiff through this litigation. The 1st defendant was also at fault for the issuance of the duplicate titles. In my view, liability on costs falls jointly and severally upon the 1st and 2nd defendants. They will shoulder the costs save for any costs incurred for service of process upon the fictitious 3rd defendant.

38. I have dealt with all issues herein and now make the following final orders :-

1. *I declare the plaintiff to be the legitimate owner of the following land parcels.*

(a) *Naivasha/Mwichiringi Block 4/243*

(b) *Naivasha/Mwichiringi Block 4/244*

(c) *Naivasha/Mwichiringi Block 4/245*

(d) *Naivasha/Mwichiringi Block 4/246*

(e) *Naivasha/Mwichiringi Block 4/5517*

(f) *Naivasha/Mwichiringi Block 4/5518*

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- (r) *Naivasha/Mwichiringi Block 4/5534*
- (s) *Naivasha/Mwichiringi Block 4/5535*

2. *I hereby order the 2nd defendant to forthwith surrender the original title deeds to the above parcels of land to the Land Registrar, in charge of the Naivasha Land Registry for cancellation. This to be done no later than 30 days from today.*

3. *I hereby order the Land Registrar, in charge of the Naivasha Land Registry, to proceed and cancel all entries in the register that purported to transfer the land to the 3rd defendant and later to the 2nd defendant and ensure that the register reflects that the plaintiff is the proprietor of the parcels of land noted in order 1 above.*

4. *I hereby award the plaintiff mesne profits , equivalent to the reasonable rent payable, from the time the suit was filed, till delivery of possession, which delivery must be done no later than 31st December 2015, subject to payment of the reasonable rent.*

5. *I hereby order the Government Valuer, Nakuru County, to proceed and make an assessment of what would be paid as reasonable rent and table his findings within 30 days of this date, so that I can make specific, the amount due and payable as mesne profits.*

6. *The plaintiff is liberty to apply for an order of eviction if the 2nd defendant continues to be in possession from the date of this judgment but does not pay reasonable rent and in any event has the right to apply for eviction if the 2nd defendant continues being in possession beyond the 31st December 2015 unless with the permission of the plaintiff.*

7. *Before vacating the premises, the 2nd defendant must at its own cost restore the premises to the situation that it was, prior to her entry, or have the premises placed in any other state that is satisfactory to the plaintiff.*

8. *Upon vacating the premises, there is hereby issued a permanent injunction restraining the 2nd defendant from being upon, or in any way, utilizing or dealing with the suit properties.*

9. *Costs hereof shall be shouldered jointly and/or severally by the 1st and 2nd defendants.*

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 12th day of May 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of :-

Ms Mugweru holding brief for Mr Kisila for plaintiff.

Ms Wairimu Kariuki holding brief for Ms Khatambi for 1st defendant

Ms Kamoing holding brief for Mr Mukite Musangi for 2nd defendant.

3rd defendant never entered appearance.

Court Assistant: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU