



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 2336 OF 2007

JOSEPH NG'ANG'A MUTHINGA.....PLAINTIFF

VERSUS

LILIAN WAMBUI NDUNG'U.....DEFENDANT

MOSES MACHARIA NGARUKA.....1ST INTERESTED PARTY

MWIKI COMPANY LIMITED.....2ND INTERESTED PARTY

JUDGMENT

The Plaintiff instituted this suit vide a Plaint dated **17th October 2007**. He averred that he purchased a property known as **LR. No. Ruiru/Kiu Block 13 (Mwiki) 568** measuring **0.330** Hectares from **Peter Kimani Ngugi** on **2nd February 1998**, and registered as proprietor on **28th September 1998**. It was his averment that sometime in **2007**, the Defendant without color of right entered into his property and constructed a stone foundation thereon without his consent. Subsequently, that he requested her to vacate the said premises, which request she partially obliged by removing the unused building material but declined to demolish the foundation. The Plaintiff therefore prayed for Judgment against the Defendants for orders that:

1. *Eviction from LR. No. Ruiru/Kiu Block 13 (Mwiki) 568.*
2. *Permanent injunction to restrain the Defendant either by herself, her servants, agents or any other person claiming title through her or otherwise whatsoever from remaining on or continuing in occupation and from entering the suit premises or from repeating the acts of trespass complained of.*
3. *A mandatory injunction requiring the Defendant to forthwith remove all structures she has erected upon the suit premises to its original state.*
4. *Damages for trespass*
5. *Costs of this suit.*
6. *Interest on costs and damages at court rates.*
7. *Any other relief this Court may deem fit to grant.*

The Defendant on her part filed a Defence on **25th August 2008**, and an Amended Defence introducing a Counterclaim dated **24th February 2014**. Thereunder, the Defendant denied the allegations made by the Plaintiff and averred that she is the lawful owner of the suit premises having purchased it from **Moses Macharia Ngaruka** at a consideration of **Kshs. 500,000/-**. It was her averment that the original owner of the property, **Mwiki Company Limited**, confirmed that **Moses Macharia Ngaruka** was the lawful owner of the plot and therefore passed a good title to her. The Defendant averred that in the event the suit property is registered in the name of the Plaintiff, then the registration and certificate of lease was obtained by fraud and thus null and void.

The Defendant outlined the particulars of fraud on the part of the Plaintiff as:

- i. obtaining a certificate of lease for the suit property without a transfer from the registered proprietor;**
- ii. transferring and registering the suit property in his name whereas the registered proprietor had allocated the Plaintiff Plots No. 335 and 338 Mwioko in place of the suit property;**
- iii. transferring and registering the suit property in his name without the knowledge and authority of the registered proprietor;**
- iv. failing to disclose that he had already been allocated a different parcel of land thereby obtaining a certificate of lease for the suit premises illegally.**

In the Counter-Claim, the Defendant reiterated that she is rightful owner of the suit property and that the Plaintiff fraudulently, illegally and by misrepresentation and forgery had the suit property registered in his name. The Defendant prayed for Plaintiff's suit to be dismissed with costs and Judgment on the counter-claim be entered against the Plaintiff for:

- a) Revocation and/or cancellation of the registration of LR. No. Ruiru/Kiu Block 13 (Mwiki) 568 in the name of the Plaintiff and registration of the same in the Defendant's name.**
- b) Permanent injunction restraining the Plaintiff by himself or his agents/servants from denying the Defendant use of the land or interfering with the Defendant's use thereof and from entering into the land laying claim thereon or dealing with it in any manner whatsoever.**
- c) Costs of the counter-claim.**

The Defendant filed an application dated 6th October 2008 and sought for leave to issue third party notices to the interested parties. Following this application, the 1st Interested Party filed a Defence dated **21/10/2009** wherein he denied the contents of the Plaintiff's claim. He averred that he was the owner of the suit property and transferred it to the Defendant at an agreed consideration. He maintained that the Plaintiff's title was obtained illegally and unlawfully and thus should be cancelled. The 2nd Interested Party (the company) filed a Defence dated **26th November 2012**. It averred that the Defendant is the lawful owner of the suit property having purchased it from the 1st Interested Party. Further, that the Plaintiff was fully compensated with two plots (**Nos. 335 and 338**) within **Mwioko Mwiki Farm 3**. Consequently, that the registration of the suit property in favour of the Plaintiff was done fraudulently and is therefore **null** and **void** hence should be cancelled.

The Plaintiff swore a Witness Statement on **16th January 2012**, and gave sworn evidence that he is the owner of the suit property having purchased it from one **Peter Kimani Ngugi**. That on the same date he together with the vendor went to the offices of the 2nd Interested Party where he paid **Kshs. 4,000/-** being transfer fees, whereafter the plot was transferred to him. The Plaintiff testified that on **7th May 1998**, he made a payment of **Kshs. 3,000/-** to the 2nd Interested Party for purposes of processing the title. Subsequently, on **14th September 1998**, he received a letter addressed to the Land Registrar forwarding

the lease document and was advised therein to collect the Certificate of Lease from the Land Registrar, Thika which he did on **7th October 1998**. The Plaintiff testified that the Defendant trespassed on to his property in the year **2000**, claiming to have purchased it from the 1st Interested Party on **10th March 2006**, which date the Plaintiff states was 7 years after he obtained his certificate of title. The Plaintiff maintained that the suit property was not available to sale or transfer and thereby the transaction between the Defendant and the 1st Interested Party is fraudulent.

In support of his evidence, the Plaintiff produced a bundle of documents comprising: Mwiki Company Limited Certificate **No. 1605** for **Plot No. 568** dated **2nd March 1998**; a copy of the sale agreement between himself and the vendor dated 2nd February 1998; receipts by Mwiki Company Limited acknowledging receipt of Transfer and Title Deed fees; a the letter addressed to the Commissioner of Lands dated 7th May 1998; a letter by the Commissioner of Lands addressed to the Lands Registrar dated 14th September 1998 forwarding the lease document and advising the Plaintiff to collect the lease from Thika Lands Registrar; and a copy of Certificate of Lease for the suit property.

On cross-examination by the Defendant's counsel, the Plaintiff testified that he was not a member of the 2nd Interested Party and was not aware that there was a double allocation on the property. Further that he was not aware that the company rectified the double allocation by allocating him two plots. The Plaintiff denied that he forged the title deed testifying that he was not even aware that the 2nd Interested Party was against him taking the plot. The Plaintiff maintained that his title deed was not acquired fraudulently. He admitted that he was summoned at the Police Station where he was coerced to take two other plots whereas he had a title deed to his property. The Plaintiff stated he discarded the letters of allotment to the two plots and does not have the share certificate of the said plots. The Plaintiff contended that he obtained the letter to facilitate him secure the title from the 2nd Interested Party.

On further cross-examination by counsel of the Interested Party, the Plaintiff testified that he purchased the property from Peter Kimani Ngugi and would not be aware how Kimani obtained the same from the company. Further that he was not aware if Kimani was an official of the company but that he took him to the company which assisted him secure title to the property. It was his evidence that he declined to leave the property when the company advised him to do so. On re-examination, the Plaintiff stated that he declined to take the two plots because he did not want to exchange his property with the two plots.

The Defendant swore a witness statement dated **30th July 2012**, and gave evidence that on 10th March 2006, she learnt that the 1st Interested Party was selling the suit property. The Defendant testified that she viewed the property and later went to the 2nd Interested Party's office where they were shown a register that indicated that the 1st Interested Party was the registered owner. It is her evidence that she and the 1st Interested Party together with other witnesses went to an advocate's office in Thika town where they prepared a sale agreement for the purchase of the suit land at a consideration of **Kshs. 500,000/-** which she paid upon signing the agreement. The Defendant stated that she also paid transfer fees of **Kshs. 6,000/-** to the 2nd Interested Party. It was her evidence that the 2nd Interested Party issued her with a share certificate and other documents relevant to effect transfer. Subsequently, that she lodged the said documents at the Lands Registry, Nairobi where she was advised that she will collect her title at the Lands Registry, Thika.

The Defendant testified that at the Lands Registry in Thika, she learnt that Title Deed in respect of the suit property had already been issued in 1998. It is her evidence that she made a report at Kasarani Police Station and got to learn from the statements made by the company's Directors that there was an error in allocation of the land to shareholders and that when the company noted the anomaly, it compensated members including the Plaintiff who was given two Plots in exchange for the suit property. However, that the Plaintiff fraudulently and without the company's knowledge proceeded with the registration of the property in his favour.

In support of her defence, the Defendant filed a bundle of documents comprising of a sale

agreement dated **10th March 2006** between herself and the 1st Interested Party; copy of a cheque in favour of the 1st Interested Party; Company Certificate **No. 648 for Plot No. 568** dated **14th June 1989** issued to **George Thiong'o Njuguna "Transferred"** on 15th October 1998 to **Eunice Wanjiru** who is issued with certificate No. 1619 "**Transferred**" on **2nd November 1998**" to **Peter Njuguna Waweru** who is issued Certificate No. 1623 dated 3rd November 1998 but subsequently transferred to **Benson Kamau Ng'ang'a** issued with **Certificate No. 1638** dated **15th May 1999** who later transferred it to the 1st Interested Party issued with **Certificate No. 1674** dated **23rd September 2000**; Finally a share certificate for the same plot issued to the Defendant on 10th March 2006; a copy of an excerpt of company's register; a copy of receipt by the company acknowledging transfer fees paid by the 1st Defendant; a letter by the company addressed to the Commissioner of Lands dated 10th March 2006 requesting for the release of title in favour of the 1st Defendant; and a response from the District Lands Registrar, Thika dated 13th February 2007 advising the lease document cannot be registered as title for the same plot was already issued in 1998.

On cross-examination, the Defendant testified that after she purchased the property, she learnt that there had been a double allocation of the property before the 1st Interested Party acquired the plot but that the same had been resolved by the allocation of two plots to the Plaintiff.

The 1st Interested Party swore a Witness Statement on 23rd March 2012 and gave oral evidence that he entered into a sale transaction with the Defendant after she undertook due diligence to confirm that he was the owner thereof. He testified that they executed the sale agreement when after the Defendant paid him the consideration and in exchange he gave her the share certificate of the property No. 1674. It was his evidence that he purchased the property from one Benson Kamau.

On cross-examination, the 1st Interested Party testified that he purchased the property in the year 2000 at a consideration of Kshs. 250,000/- and that he paid transfer fees of Kshs. 6,000/- after he inspected the register. It was his testimony that he was not aware that the certificate of title had been issued to the Plaintiff. The 1st Interested Party maintained that the certificate was issued to him by the company after the former owner had surrendered their certificate.

Robert Wairiri, the Secretary of the Company swore a Witness Statement on 26th November 2012 and gave sworn evidence that the company started to sub-divide and sell land to its members in 1985. It was his evidence that the company discovered that Plot No. 568 had been sold to two persons namely: George Thiong'o Njuguna who was allocated the plot on 24th July 1985 and Peter Kimani who later transferred it to the Plaintiff. He stated that the company treated this anomaly as a double allocation and requested either of the parties to surrender their interest and get compensation of a plot of equal value. It was his testimony that the Plaintiff agreed to the proposal and was to be given two Plots Nos. 335 and 338.

The secretary testified that it was further agreed that the Plaintiff would surrender the original certificate of lease of Plot No. 568 to the OCS Ruiru Police Station which would then be handed over to the company. Following this agreement, the Secretary states that the company issued the Plaintiff share certificates No. 1510 and 1511 for the said plots and the company records amended to reflect that the Plaintiff was the owner thereof. However, the Plaintiff failed to surrender the title deed for the suit property. It is the Secretary's evidence that since the year 2000 to date, the two plots are unoccupied and no one has laid claim over them. He testified further that the company did not authorize the letter that allowed the Plaintiff to obtain title to the property and therefore he could have obtained the same fraudulently. In support of the company's case, the Secretary produced an excerpt of the company's register and copies of two share certificates No. 1510 and 1511 for plots No. 335 and 338, respectively both dated 21st March 2000.

On cross-examination, the secretary testified that the company was formed in 1982 and that he has been secretary all since inception. It was his evidence that he realized the anomaly of the double allocation in

1985 and advised the chairman to solve the matter amicably. Further that he reported the matter to Ruiru Police Station in the year 2000 and later issued the Plaintiff with share certificates of the two plots. The secretary admitted that there was no evidence to show that there was a double allocation neither did he produce an OB Number to prove their meeting at Ruiru Police Station. The secretary also admitted that the resolution to compensate the Plaintiff two plots was not done in writing. It was his evidence that the double allocation occurred in 1985 when he was actively involved in the running of the company. In respect to the letter dated 7th May 1998 addressed to the Commissioner of Lands requesting the release of title to the Plaintiff, the Secretary admitted that the same was issued by the company and that the signature thereon was his.

On cross-examination by counsel for the Defendant, the secretary testified that the company records indicate that George Thiong'o Njuguna and not Peter Kimani Ng'ang'a, was the owner of Plot No. 568. It was his evidence that if one did not appear in the register then it meant that they were not a bona fide owner.

In re-examination, the Secretary disowned ever issuing the Plaintiff with a receipt acknowledging payment of transfer fees. The secretary maintained that the property does belong to the Defendant and urged the court to cancel the title.

The suit was further canvassed by way of written submissions. **Irungu Mwangi, Ng'ang'a T.T & Co. Advocates** for the Plaintiff filed submissions dated **28th July 2014** wherein counsel submitted that the 1st Interested Party did not have any or good title to pass to the Defendant, hence the Counter-claim ought to be dismissed.

Mwangangi & Co. Advocates for the Defendant filed submissions dated 11th August 2014 wherein counsel submitted that the Defendant and Interested Parties had established that the Plaintiff obtained title to the suit property wrongfully and fraudulently and that the title was liable for revocation. Further that registration as owner of a suit property was not sufficient proof that one was the lawful proprietor thereof.

F.N. Kimani & Associates Advocates for the Interested Parties filed submissions dated **28th July 2014**. Counsel recapped the testimony of the Company's witness that the Company noted the double allocation of **Plot No. 568** to **George Thiong'o** and Peter Kimani when the latter sold his interest thereon to the Plaintiff. That it was at the process of effecting transfer that the company noted the anomaly. To remedy the situation, the Company offered the Plaintiff two plots (**No. 335 and 338**) in exchange for the suit property. However, that the Plaintiff proceeded to process the title document for the property without authorization from the Company. Counsel submitted that the manner in which the Plaintiff acquired his title was suspect as there was no authorization from the Company allowing title to be prepared in his favour.

From the foregoing narrative, the only issue to be determined is whether the Plaintiff, the registered proprietor of the suit property, obtained title thereto fraudulently. The law is protective of titles but provides for two instances under Section 26 of the Land Registration Act where titles can be challenged. The section reads:

26. Certificate of title to be held as conclusive evidence of proprietorship

(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.

The Plaintiff's evidence is that he purchased the property from one **Peter Kimani Ngugi** in **February 1998**. The 2nd Interested Party admits that indeed that the property was allocated to both **George Thiongo Njuguna** and **Peter Kimani Ngugi**. Further that the anomaly was not picked up until **February 1998** when **Peter Kimani Ngugi** transferred the property to the Plaintiff. In fact the certificates availed by the Defendant shows that the Plaintiff had already acquired title to the property in **September 1998** by the time **George Thiong'o Njuguna** transferred his interest to the next owner. From the admission of the 2nd Interested Party, the property was properly allocated to **Peter Kimani Ngugi** and I therefore find that the Plaintiff acquired good title from the previous owner. This admission rules out any doubt as to whether the property was acquired by fraud.

At the time the Plaintiff purchased the property, there was no title to the property. The Plaintiff narrated the events leading to him securing title in his name, that he paid to the Company transfer fees of **Kshs. 4,000/- and Kshs. 3,000/-** being title processing fees. Subsequently the Company wrote a letter to the Commissioner of Lands to release title in the Plaintiff's favour. Admittedly, the property had been allocated to two owners. Precise dates, however, when the matter was sorted out were not offered in evidence. The Secretary to the company testified that the Plaintiff and the other owner were summoned before the **OCS Ruiru Police** Station and after deliberations an agreement was reached that the Plaintiff would be compensated with two plots in exchange with the suit property. Further that the Plaintiff was to surrender the original certificate of lease in exchange of the share certificates of the two plots in compensation. The Plaintiff admits that he was summoned to the Police Station but that he declined the Company's offer since he already had title to the property.

On perusal of the documentary evidence availed to court by the Defendant and the Interested Parties, there is a statement made to the Police by Peter Kuria Waititu, the Director/Chairman of the 2nd Interested Party on 20th November 2006, following a report made by the Defendant. Therein, the Director/Chairman states that the resolution to compensate the Plaintiff in exchange of the suit property was arrived on 26th March 2006. However, the share certificates for Plot Nos. 335 and 338 allegedly given to the Plaintiff, annexed to the 2nd Interested Party's bundle of documents, indicate that the said certificates were issued on 21st March 2000. My understanding of the Company's evidence is that the Plaintiff was compensated when the double allocation was noted and whether the Plaintiff was offered compensation in the year 2000 or 2006, he had by that time already acquired title to the property in 1998.

In fact, in the Witness Statement sworn by the Secretary of the Company, he states that the Plaintiff was to surrender the original certificate of lease to the OCS Ruiru Police Station for purposes of surrendering the same to the Company. The evidence before court is indicative that the Plaintiff did in fact obtain title to the property lawfully. It cannot be said that he fraudulently, without the company's authorization obtain title whereas the meeting to resolve the double allocation was held after the Plaintiff had obtained the title. It is my finding, and I do so hold that the Defendant and the Interested Parties have failed to establish the Plaintiff was party to fraud or misrepresentation or that title was procured illegally, un-procedurally or through a corrupt scheme.

As to whether the Plaintiff agreed to the Company's proposal to get two plots in exchange of the suit property remains one person's word against the other. The resolution, if at all, was not reduced into writing.

The Plaintiff on his part claims to have been coerced to take the two plots. In the witness statement, the Secretary stated that the Company records were amended to reflect the resolution. The Company availed an excerpt of the register showing change in ownership of the suit property. It is not indicated therein that the Plaintiff had been allocated two plots in exchange of the suit property. On a balance of probabilities, it is my finding that the Interested Parties have failed to establish that compensation was

mutually agreed by both parties, and I therefore find in favour of the Plaintiff.

Before I conclude, however, it is prudent to discuss general damages for trespass as prayed for by the Plaintiff. The evidence before court is that the Defendant took possession of the suit property upon purchase of the same from the 1st Interested Party on 10th March 2006. The Defendant established to this court how she undertook due diligence and with the documentary evidence, took this Court through how the property changed hands from the original allottee to herself. Consequently, it is my finding that the Defendant took possession in good faith in the belief that she had received good title thereto. The award of general damages is discretionary in nature and in exercising this discretion the Court must take into account all the relevant factors. Taking into consideration that this is a dispute arising out of a double allocation and that the Defendant took possession with the belief, albeit mistakenly that she received a good title, it would be unjust to subject the Defendant to pay damages.

I have however noted that all the confusion herein was brought about by the 2nd interested party. The Defendant did purchase the suit plot in good faith from 1st interested party. She purchased the said plot in the year 2006 for **Ksh.500,000/=** . She had legitimate expectation that she would own the said plot and put up a building. The same did not materialize as the construction was stopped when the Plaintiff moved to Court. Though there are no good reasons advanced why this Court should cancel the Plaintiff's title, the Court finds that the Defendant too needs justice.

The Defendant did not however bring any claim against the 2nd interested party. However the Court finds that Sections 1A, 1B and 3A of the Civil Procedure Act give the Court discretion to make any orders that would ensure that the ends of justice is met. For the above reasons, the Court finds that the Defendant herein is entitled to compensation and the said compensation has to be met by the 2nd interested party.

Having now carefully considered the pleadings generally, the available evidence, the exhibits thereto and the written submissions, the Court enters Judgement in the following terms;-

- 1. A permanent injunction be and is hereby entered restraining the Defendant from either by herself, her servants, agents or any other person claiming title through her or otherwise whatsoever from remaining on or continuing in occupation and from entering the suit premises.**
- 2. The Defendant is hereby given 30 days to voluntarily vacate the suit property and remove all structures she erected thereon. In default, the Plaintiff shall take over the suit property.**
- 3. The 2nd interested party to compensate the Defendant herein by payment to her equivalent of her purchase price which was kshs.500, 000/= from the date purchase to the date of this Judgement. The said amount to be paid back with interest at the court's rate. Alternatively, the 2nd interested party to compensate the Defendant with a similar plot as the one that Defendant had purchased.**
- 4. The Defendants' counter claim is disallowed**
- 5. As regards costs of the suit, I deem fit that the Plaintiff shall have the costs borne by the 2nd Interested Party since the double allocation was an error on its part. The interests shall be at the court rates from the date of this Judgment until payment in full.**

It is so ordered.

Dated, signed and delivered this **8th** day of **May** 2015

28 days Right of Appeal

L.N. GACHERU

JUDGE

In the Presence of:-

Ms Butoyi holding brief for Mr Kimani for 1st interested Party and holding brief for Ms Mwangangi for the Defendant.

None attendance for the Plaintiff and 2nd interested party though notified

Court Clerk : Hilda

L.N. GACHERU

JUDGE