



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 486 OF 2010

MARY WANGUI MUTHOGA.....PLAINTIFF

VERSUS

SAMUEL NDUNG’U CHEGE.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

Section 143(1) of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) provides that;

“Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.” (See also Section 80(1) of the Land Registration Act, 2011).

Section 26(1) of the Land Registration Act, 2011 provides that;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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, expect-

- 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, uprocedurally or through a corrupt scheme”.**

In her plaint dated 1st October 2010, the Plaintiff averred that she was at all material times a member of Githunguri Constituency Ranching Company Ltd. in which she held share certificate number 5034 which entitled her to a parcel of land then held by Githunguri Constituency Ranching Company Ltd. (“**GCRC**”) on behalf of its members. The Plaintiff averred that on 26th June 2001, the District Land Registrar, Thika issued her with a title deed for parcel of land known as Ruiru/Riu/Block 2/1306 (Gith) (hereinafter referred to as “**Plot No. 1306**”) as her share of the land that was allocated to her by GCRC. The Plaintiff

averred that she should have been issued with a title deed for land parcel Number Ruiru/Kiu/Block 2/3404(Gith) (“**the suit property**”) which was the correct parcel of land that was allocated to her by GCRC. The Plaintiff averred that she did not notice that she had been with a title deed for a wrong parcel of land until the year 2008. The Plaintiff averred that, when she approached the District Land Registrar, Thika to have the mistake corrected, it was discovered that her parcel of land, Ruiru/Kiu/Block 2/3404 (Gith) (“**the suit property**”) had been registered in the name of the 1st Defendant.

The Plaintiff averred that the 1st Defendant was not a member of GCRC and could not have been allocated land by GCRC. The Plaintiff averred that the 1st Defendant caused the suit property to be transferred to his name fraudulently using a forged clearance certificate purported to have been issued by GCRC. The Plaintiff sought the following reliefs against the defendants.

- a. A declaration that the suit property belongs to the Plaintiff.
- b. An order for the cancellation of the title that was issued to the 1st Defendant in respect of the suit property and for the issuance of a new title for the said parcel of land in favour of the Plaintiff.
- c. Damages for loss of use.
- d. Costs.

The Plaintiff’s suit was defended only by the 2nd Defendant. The 1st Defendant was served with summons but neither entered appearance nor filed a statement of defence. In its statement of defence, the 2nd Defendant averred that the suit property initially belonged to GCRC and that GCRC had confirmed that it had allocated the suit property to the Plaintiff. The 2nd Defendant averred that it was unable to rectify the register of the suit property by cancelling the name of the 1st Defendant as the proprietor of the suit property and replacing the same with the name of the Plaintiff before the 1st Defendant surrendered the title deed that had been issued to him for cancellation. The 2nd Defendant averred that since the 1st Defendant declined to surrender the title deed for the suit property for cancellation, it was only the court which had jurisdiction to cancel the same.

At the trial, the Plaintiff gave evidence and called one (1) witness. The 2nd Defendant did not call any witness. However, the witness statement of Felix Nyakundi and the bundle of documents that were attached to the 2nd defendant’s list of documents were produced in evidence by consent. After the close of evidence, the parties agreed to make closing submissions in writing. The Plaintiff filed her submissions on 24th April, 2016 while the 2nd Defendant did not file submissions. I have considered the evidence on record and the submissions by the Plaintiff’s advocates. From the evidence on record, there is no dispute that the Plaintiff was at all material times a member of GCRC and was entitled to a parcel of land pursuant to that membership. It is also not in dispute that GCRC used to allocate land to its members through balloting system and that the Plaintiff picked ballot number 1306 which entitled her to the suit property. The Plaintiff led evidence that when she went to pick up her title deed at the land office at Thika, she was issued with a title deed for Plot No. 1306. She led evidence that this title deed was issued to her in error because in processing the said title, the District Land Registrar used the Ballot Number 1306 as the plot number instead number 3404 (“**the suit property**”) which was the correct plot number. The Plaintiff was therefore issued with a title deed bearing the ballot number instead of the number of the plot that had been allocated to her by GCRC. The Plaintiff’s witness PW 2 who was the Chairman of GCRC corroborated the Plaintiff’s evidence that the plaintiff was allocated the suit property by GCRC and the title deed for Plot No. 1306 was issued to her in error since that number was for the number of the Plaintiff’s Ballot and not her plot number. PW 2 told the court that the confusion regarding the Plaintiff’s title arose when the secretary of GCRC issued the Plaintiff with a clearance certificate bearing the Ballot number instead of the plot number and when the said clearance certificate was presented to the District Land Registrar, he issued a title on the basis of the said clearance certificate instead of confirming with the survey map and area list whether this clearance certificate related to an existing plot. PW 2 told the court further that the 1st Defendant was not a shareholder of GCRC and that when the Plaintiff brought to the attention of GCRC the fact that she had been issued with a title deed for a non-existent plot No. 1306 and that her parcel of land namely, Ruiru/Kiu/Block 3/3404(Gith) (“**the suit property**”) was registered in the name of the 1st Defendant, GCRC summoned the 1st Defendant to their office to explain how he

acquired the suit property which had been allocated to the Plaintiff but the 1st Defendant did not honour the summon. PW 2 stated that the 1st Defendant was registered as the owner of the suit property after he presented to the District Land Registrar, Thika forged documents purported to have been obtained from GCRC. He stated that a criminal case of forgery had been preferred against the 1st Defendant and he gave evidence against him in that case.

I am satisfied from the evidence on record that the Plaintiff was a member of GCRC and that she was allocated the suit property. I am also satisfied that Plot No. 1306 was registered in his name by mistake and that she was supposed to be registered as the owner of the suit property. As I have stated earlier in this judgment, the 1st Defendant did not defend the suit. All the allegations made against him have not been rebutted. The plaintiff having proved that she was the one entitled to be registered as the owner of the suit property, the onus was on the 1st defendant to show how he acquired the suit property and that he acquired the suit property lawfully. In the absence of any evidence as to how the 1st Defendant acquired the suit property, this court has no option but to conclude on the basis of the overwhelming evidence on record that the 1st defendant acquired that suit property fraudulently.

The 2nd Defendant was only a nominal Defendant. Its contention is that the suit property belonged to GCRC and that it is ready to register the property in the name of whoever the court would determine to be the owner of the property. The 2nd Defendant contended that the Plot No. 1306 was registered in the name of the Plaintiff and the suit property registered in the name of the 1st Defendant on the basis of the information that was presented to the District Land Registrar. The 2nd Defendant denied any blame for the error if any which occurred in the registration of Plot No. 1306 in the name of the Plaintiff and the suit property in the name of the 1st Defendant. The 2nd Defendant contended that it was unable to rectify the register of the suit property as had been requested by GCRC and the Plaintiff due to the refusal of the 1st Defendant to surrender the original title deed for the suit property in his name for cancellation. The 2nd Defendant contended that as it is only the court which can cancel the 1st Defendant's title and direct the registration of the Plaintiff as the owner of the suit property.

Having reviewed the evidence and other material before me, I am satisfied that the Plaintiff has proved her case against the 1st Defendant on a balance of probabilities. I am not satisfied that the 2nd Defendant was to blame for the error which occurred when the Plaintiff was registered as the owner of Plot No. 1306 and the 1st Defendant as owner of the suit property. I am satisfied that the Plaintiff was registered as owner of plot No. 1306 as a result of a genuine mistake on the part of GCRC and the Plaintiff while the suit property was registered in the name of the 1st Defendant as a result of fraud that was perpetrated by the 1st Defendant against the Plaintiff and GCRC. As I have stated at the beginning of this judgment, this court has power to cancel a title and make an order for the rectification of the register of land where the title was acquired fraudulently. I am persuaded that this is an appropriate case in which an order for rectification of the register should be made.

In conclusion, I hereby enter judgment for the Plaintiff against the 1st Defendant as prayed in paragraph (a) and (b) of the plaint as amended. I decline to award the Plaintiff any damages as none was proved. The Plaintiff's claim against the 2nd Defendant is dismissed with no order as to costs. The Plaintiff shall have the costs of the suit to be paid by the 1st Defendant.

Delivered and Dated at Nairobi this 4th day of November, 2016

S. OKONG'O

JUDGE

In the present of

Mr. Kamere

for the Plaintiff

N/A

for the Defendants

Kajuju

Court Assistant