



**REPUBLIC OF KENYA**

HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

ENVIRONMENTAL & LAND CASE 169 OF 2008

**LAWRENCE P. MUKIRI**

ATTORNEY OF FRANCIS MUROKI MWAURA.....**PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL .....1<sup>ST</sup> DEFENDANT**

**JAMES NDIRANGU.....2<sup>ND</sup> DEFENDANT**

**JOSEPH NDIRITU MUGI.....3<sup>RD</sup> DEFENDANT**

**ANNAH WANGARI NDIRITU.....4<sup>TH</sup> DEFENDANT**

**LYDIA MUTHONI NDIRITU.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By his amended Plaintiff dated 18<sup>th</sup> August 2008, the Plaintiff filed suit against the Defendants seeking Judgment to be entered against the Defendant as follows:

- a) A declaration that Francis Muroki Mwaura, the Donor, is the legal registered owner of Land Parcel Known as Ruiru/ Ruiru East Block 7/13 (hereinafter referred to as the “Suit Property”)
- b) Cancellation of the title document issued to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, and reinstating the Plaintiff Donor as the rightful legal owner.
- c) Eviction of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant from the Suit Property
- d) Mesne Profits
- e) Costs of this suit and interest.

The 1<sup>st</sup> Defendant filed its Amended Defence dated 19<sup>th</sup> January 2012 which was a denial of all the claims contained on the Amended Plaintiff. The 2<sup>nd</sup> Defendant did not file any Defence and interlocutory Judgment was entered against him. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants filed their joint Defence dated 14<sup>th</sup> January 2010 in which they stated that they acquired the suit property legally from the then registered owner the 2<sup>nd</sup> Defendant after following all due process of the law and denied the alleged fraud in toto.

They also stated that if the transfer of the Suit Property to the 2<sup>nd</sup> Defendant was fraudulent, they had no knowledge of the same and were not in any way party to the same. They averred that they were innocent purchasers for value. They also stated that the Plaintiff had no cause of action against them.

## **FACTS**

In 1988, Professor Francis Muroki Mwaura the Plaintiff herein purchased the Suit Property from varsity Villa Limited. A title Deed was issued to him in 1992. He lost this Title deed and in 1994 applied for and was issued with Re-issued Title Deed. This Title deed is in the custody of his Attorney, Lawrence Mukiri Mungai.

During the hearing of this case, evidence was adduced by the same Lawrence Mukiri Mungai (PW 1) who stated that he had known the Plaintiff for more than 40 years. He said he worked with the Plaintiff in Nairobi and Kenyatta University before he emigrated to United States of America where he presently lives. He said he was appointed by the Plaintiff to look after his affairs back here in Kenya and one such assignment is representing him in this present suit. He stated that while at Kenyatta University the staff bought a parcel of land and subdivided the same into 1 acre plots which were later sold to members of staff of Kenyatta University. He stated that that is how the Plaintiff acquired the suit property and he himself obtained a neighbouring plot known as Ruiru/Ruiru East Block 7/11. He stated further that he subsequently became a lawyer practicing under the name and style of Lawrence Mungai & Co. Advocates.

He said that in 2008, a client approached him with instructions to help him to purchase a land parcel known as Ruiru/Ruiru East Block 7/12 and that in the course of their conversation, the client said that he was happy with that parcel of land because the neighbouring plot Ruiru/Ruiru East Block 7/11 was already occupied. He stated that being the owner of Ruiru/Ruiru East Block 7/11 and knowing he had not developed the same and having not transferred it to anybody, he grew suspicious, and decided to conduct searches on his own plot No. 11 and No. 12 which his client wanted to buy. He also decided to carry out a search on the Suit Property. The results of the search indicated that his own plot was now registered in someone else's name without his knowledge. He also ascertained that the Suit Property had been transferred to the 2<sup>nd</sup> Defendant. Upon inquiring with Prof. Muroki, he confirmed that Prof. Muroki had not transferred the Suit Property to the 2<sup>nd</sup> Defendant. He stated that upon this discovery, he proceeded to report the matter to the Police in Thika then to the Criminal Investigation Department Headquarters at Kiambu Road. He said that he also visited the Kenya Anti-Corruption Commission (as it then was) and was directed to the Chief Land Registrar. Upon visiting the Chief Land Registrar, he was informed that he should seek the intervention of the court which he did both on his own behalf relating to his own land parcel and on behalf of the Suit Property on behalf of Prof. Muroki. He stated that todate, he still has in his custody the Title Deed in the name of Prof. Muroki in respect of the Suit Property. He stated that the fraud affecting his land parcel and the Suit Property was widespread.

The Defence case was brought by Joseph Ndiritu Mugi, the 3<sup>rd</sup> Defendant who testified that sometime in the year 2005 around the month of August in his usual reading of the Daily Nation Newspaper he noticed a plot put up for sale in the advertisement section. He got interested in it and called the given phone number of the owner. He was told that the owner was James Ndirangu, the 2<sup>nd</sup> Defendant and that the plot was registered in his name. He stated that they arranged for a meeting and he travelled to Nairobi to see the plot and obtained a copy of the title document to enable him to conduct a search. He said he was shown the Suit Property and was given a copy of the Title. He stated that he first went to Survey of Kenya where he confirmed that the Suit Property was actually in the map for that area. He stated that on 18<sup>th</sup> August 2005 he went to the Thika Land Office and applied for an Official Search and was issued with Official Search No. 694/8/05 which indicated the 2<sup>nd</sup> Defendant was in fact the registered owner of the Suit Property. He stated that he subsequently met the 2<sup>nd</sup> Defendant the following day and agreed on a purchase price of Ksh. 850,000/-. He said he thereafter met with his two daughters the 4<sup>th</sup> and 5<sup>th</sup> Defendants and they agreed to buy the suit property jointly. He stated that they jointly raised the purchase price and paid a deposit of Ksh. 200,000/-.

He further stated that on 22/8/05 they applied for Land Control Board consent to transfer to the Thika Land Control Board sitting at Ruiru and the application was approved in its meeting held on 6/9/2005 and consent No. L.C.R. 39/9/05 was issued on the same day.

He stated that they then lodged all the documents for registration and the Suit Property was registered in their names. They then paid the balance of Ksh. 650,000 by a Barclay Bank Bankers Cheque No. 786729 on 12/9/2005. He further stated that sometime in 2007 he fenced the suit property after realizing that there was much activity in the area. He further stated that in the year 2009, they agreed to subdivide the Suit Property and develop it after they realized the prices in the area had gone up because of the By-pass road that was to be constructed. He further said that in June 2009, he went to the Thika Lands Office with the intention of enquiring on the process of sub-division when he decided to conduct a search of the Suit Property. He stated that he was surprised when he found out a Restriction has been registered on the Suit Property and on enquiry he was told it is with respect to this present suit. He further stated that they were not involved in the alleged fraud neither did they have any notice of the same and that they purchased the Suit Property in good faith. He produced a copy of their Title Deed in respect of the Suit Property.

It emerges quite clearly from the facts above that the Plaintiff did not transfer the Suit Property to the 2<sup>nd</sup> Defendant and that the fact that the 2<sup>nd</sup> Defendant managed to obtain title to the Suit property was certainly fraudulent. That is not in dispute. The question that thereafter arises is whether the title obtained by the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants jointly in the Suit Property from the 2<sup>nd</sup> Defendant is in itself tainted by fraud? In a nutshell, the main issue for determination in this suit is whether the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants were bona fide purchasers for value without notice.

## **LAW**

Section 26 (1) of the Land Registration Act provides as follows:-

**“The Certificate of Title issued by the Registrar upon registration or to a purchaser of land upon a transfer ...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...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 corrupt scheme”**

Section 80 of the Land Registration Act provides as follows:-

**“Subject to subsection (2) , the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration unless the proprietor had knowledge of the omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”**

## **ANALYSIS**

The Plaintiff claims that the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants were guilty of fraud in their transaction to acquire the Suit Property. To be specific, in his Amended Plaintiff, the Plaintiff alleged that the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants were guilty of the following fraud:

**“Permitting and/or allowing to be transferred to themselves the Suit Property owned by the Donor without the Donor’s consent.”**

In stating this, the Plaintiff was implying that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were fully aware of the fraud committed by the 2<sup>nd</sup> Defendant whose particulars of fraud were listed in the Amended Plaint as follows:-

- a) Causing the Title Deed of the Suit Property to be issued in his name through fraud.
- b) Transferring the Suit Property to the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants without due regard to the rights of the Donor.

In their submissions, the Plaintiff stated that the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants did not conduct due diligence before embarking on the purchase of the Suit Property as follows:-

I. They delegated the task of conducting an Official Search to a third party who was not called to testify on their behalf.

II. It is doubtful whether an Official Search was done as there is no receipt confirming payment for the same.

III. The 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants entered into an alleged oral agreement with the 2<sup>nd</sup> Defendant contrary to normal practice more so where an advocate is involved.

IV. No formal transfer was exhibited before the court to confirm if the parties had executed any transfer.

V. No receipts for payment of stamp duty were produced or exhibited before this Honourable Court.

VI. No receipts for registration of transfer and payments for Title Deed were exhibited or produced.

But even if the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants failed to exercise due diligence as enumerated by the Plaintiff, does this amount to fraud? Are the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants guilty of fraud?

To my mind, I have not been convinced that the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants were aware about the fraudulent dealings of the 2<sup>nd</sup> Defendant. I believe their testimony with regard to the process they underwent to become the joint registered proprietors of the Suit Property. That being the case, as the law states as cited above, their title to the Suit Property is absolute and indefeasible. Section 80(2) of the Land Registration Act specifically applies to this particular case and protects their title to the Suit Property as they were innocent Purchasers for value without notice.

I wish to rely further on the case of ***Katende v Haridar and Company Limited*** where the court of Appeal in Uganda held as follows:

“... a *bona fide* purchase for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchase to successfully rely on the *bona fide* doctrine, he must prove the following:

- a) He holds a certificate of Title;
- b) He purchased the Property in good faith;
- c) He had no knowledge of the fraud;
- d) The vendors had apparent valid title;

e) He purchased without notice of any fraud;

f) He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner”.

### **CONCLUSION**

I find that the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants were innocent purchasers for value without notice and this court upholds their title to the Suit Property.

Accordingly, this Suit is hereby dismissed. Each party shall bear his own costs.

**SIGNED AND DELIVERED AT NAIROBI ON THE 10<sup>TH</sup> DAY OF MAY 2013**

**MARY M. GITUMBI**

**JUDGE**