



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO 24 OF 2012

(Appeal from the Judgment and Decree dated 19/11/2012

in Murang'a SPMCC No 488 of 2006 – AK Kaniaru, SPM)

DUNCAN KIONGA.....APPELLANT

VERSUS

1. MILLICENT NJERI KIURU

2. DAVID PAUL NGUGI KIURU

3. ISAAC KANYI KIURU.....RESPONDENTS

J U D G M E N T

1. This is an appeal from the judgment and decree of the lower court by which the plaintiff's suit against the three defendants was dismissed with costs, and the counterclaims of the 2nd and 3rd defendants allowed. The Appellant, **DUNCAN KIONGA**, was the plaintiff, while the Respondents, **MILLICENT NJERI KIURU**, **DAVID PAUL NGUGI KIURU** and **ISAAC KANYI KIURU** were the defendants.

2. The Appellant had originally sued the 1st Respondent alone for a declaration that land parcels MAKUYU/MAKUYU BLOCK 1/5502 and MAKUYU/MAKUYU BLOCK 1/5503 belonged to him, and for an order that the 1st Respondent do withdraw cautions placed by her upon the parcels of land.

3. The 1st Respondent filed defence and denied that the Appellant was the rightful owner of both parcels of land. She alleged that the Appellant had obtained title to both parcels of land illegally and fraudulently. She pleaded particulars of fraud.

4. Eventually the 2nd and 3rd Respondents were added as the 2nd and 3rd defendants in the suit at their own application. They then filed their respective defences. They put the Appellant to strict proof of his claimed ownership of the respective parcels of land. They also counterclaimed, the 2nd Respondent in respect to parcel No 5502, and the 3rd Respondent in respect to parcel No 5503.

5. The 2nd Respondent counter-claimed that he was the rightful owner of parcel No 5502, and that the Appellant had obtained registration and title to the parcel illegally and without any colour of right. He sought a declaration that he was the rightful owner of the parcel of land and an order that the Appellant do transfer the same to him.

6. Similarly the 3rd Respondent counterclaimed in respect to parcel No 5503 and sought a similar declaration and order.

7. The Appellant filed defense to both counterclaims. He denied the 2nd and 3rd Respondents' claims and pleaded that he obtained registration and title to the parcels of land by following due process of the law, and that he had all relevant documents in respect to each parcel of land. He put them to strict proof of their allegations.

8. The suit went to full trial in the court below. The Appellant testified. He did not call any other witness. The Respondents also each testified and they called one witness (DW4).

9. In its judgment the court below found the Appellant's (plaintiff's) case unproven to the required standard in respect to each Respondent (defendant) and dismissed the same with costs. The court also found that the 2nd and 3rd Respondents' (2nd and 3rd defendants')

counterclaims were proved to the required standard and allowed the same.

10. The Appellant then lodged the present appeal. There are 11 grounds of appeal. They all relate to the way the trial court dealt with various aspects of the case and evidence placed before it. The Appellant found fault with all the findings of fact of the trial court.

11. This being a first appeal, I have read through the testimonies of the 5 witnesses (the four parties and DW4) in order to assess the evidence placed before the trial court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses myself, and have given due allowance for that fact. I have also closely examined the documentary evidence placed before the trial court in the same spirit.

12. The two suits parcels of land, LR Makuyu/Makuyu Block 1/5502 and LR Makuyu/Makuyu Block 1/5503 (hereafter referred to as plots 5502 and 5503, originally belonged to a land-buying company, **Pundamilia Farmers Co-operative Society Limited** (hereinafter called Pundamilia). They were part of the resulting sub-divisions of its Mogera Estate; it sub-divided the land into various plots to be allocated to its members.

13. The main issues that the trial court had to deal with were –

i. Whether the Plaintiff was a genuine member of Pundamilia?

ii. Whether the Plaintiff had been duly allocated by Pundamilia the plots of land that eventually became the suit parcels?

iii. Whether the documents from Pundamilia that the Plaintiff used to have himself registered as the proprietor of the two suit parcels of land were genuine?

iv. Whether the Plaintiff acquired good title to the two suit parcels of land?

v. Whether the 2nd and 3rd Defendants were genuine members of Pundamilia?

vi. Whether the 2nd and 3rd Defendants were the genuine beneficial owners of the respective suit parcels of land?

vii. Whether the 1st Defendant was justified in placing cautions over the suit parcels of land.

14. Of great assistance to the trial and also to this court, was the testimony of DW4 (JOSEPH WANYOIKE NGARUIYA). Although his **bona fides** were challenged by the Plaintiff, the trial court found, upon good documentary evidence, that he was the current (when testifying) Chairman of **Pundamilia** and the custodian of its books and documents. He had been such Chairman since the year 2004.

15. The testimony of DW4, in brief was as follows –

i. The Plaintiff did not appear in the books of Pundamilia (Mogere Estate) as a member.

ii. The ballot papers (for the two plots that eventually became the suit parcels of land) and their share certificates that the Plaintiff had were not genuine documents issued by Pundamilia.

iii. The ballot papers and share certificates that the 2nd and 3rd defendants had and produced in evidence were the genuine documents issued by Pundamilia for the two plots of land that became the two suits parcels of land. In addition, they had the necessary clearance certificates from Pundamilia which they would take to Land Control Board and the Land Registry in order to be registered proprietors of their respective parcel of land. The Plaintiff produced no such clearance certificate.

16. Only the plaintiff testified in support of his case. He did not call any official from **Pundamilia** or the **Land Registry** to verify his documentation. On their part the 2nd and 3rd defendants called DW4 who verified as genuine their documents issued by **Pundamilia**. DW4 also produced in evidence the register of members of **Pundamilia** (Mogere Estate). It did not have the name of the Plaintiff as a member.

17. Upon my own evaluation of the evidence placed before the trial court, it is clear that the plaintiff cannot have used genuine documents to obtain title to the two suit parcels of land. The process by which he obtained title was clearly not sourced at **Pundamilia** and was not lawful. The documents he presented and uttered to the **Land Registry** in order to obtain title cannot have been genuine and must have been fraudulent or otherwise illegally obtained. He therefore cannot have acquired good title to the two parcels of land even on a first registration.

18. On the other hand, the documentary evidence presented before the trial court proved on balance that the 2nd and 3rd defendants were the genuine and lawful allottees and owners of the respective suit parcels of land, entitled to obtain good titles to them.

19. As for the 1st defendant, she had lawful licenses from the 2nd and 3rd defendants to use their respective parcel of land, and had been using them for a number of years. When her licenses were threatened by the plaintiff illegally obtaining title to the two parcels of land, she was entitled to protect them by lodging cautions against the title.

20. Having considered the issues before the trial court in light of the evidence placed there, I find no merit in this appeal. It is dismissed with costs to the Respondents. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 11TH DAY OF AUGUST 2021.

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 29TH DAY OF OCTOBER 2021