



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 41 OF 2004

SAMSON KURIA KANGETHE.....1ST PLAINTIFF

ALICE WANJIRU KURIA.....2ND PLAINTIFF

VERSUS

CHARLES CHEBUNGEI.....DEFENDANT

JUDGEMENT

Background and Pleadings.

1. The plaintiffs claim to be the rightful owners of Land Parcel **Dundori Mugwathi/Block 2/56 Koilel** situated within Nakuru County having bought the same on the 10/5/1985 from Samuel Kirui and Christopher Maritim, being shareholders of a Company known as **Kalenjin Enterprises Ltd** which shareholding is stated to constitute three (3) acres, out of the larger land parcel and a subdivision of **LR NO.10457 Dundori/Mugwathi Block 2 Koilel**.

2. It is the plaintiffs claim that upon the purchase for valuable consideration by a sale agreement dated 16/5/1985 executed by the plaintiffs and the vendors aforesated the defendant, without any authority or colour of right and without the plaintiffs knowledge, and before the land parcel could be transferred into their names, caused the said property to be fraudtently registered in his name and a title deed issued on the 15/9/1989 in his favour while the plaintiffs were in occupation having taken such possession soon after the purchase in 1985.

3. It is upon the above brief facts that the plaintiffs filed this suit vide a **plaint dated 16/2/2004** against the defendant seeking the **Orders for**

(a) A declaration that the plaintiffs are the rightful and lawful owners of the LR NO. Dundori/Mugwathi/Block 2/56 Koilel and that they are entitled to mense profits from the defendant.

(b) An order authorizing the Land Registrar, Nakuru to rectify the register LR. Dundori Mugwathi/Block 2/56 Koilel by removing the name of Charles Chebungei Komen and replacing it with the names of the plaintiffs.

(c) A permanent order restraining the defendant his agents and/or those acting under him from interfering and/or claiming ownership of LR Dundori Mugwathi/Block 2/56 Koilel.

(d) Costs of the suit.

4. The defendant filed a statement of defence and a Further Amended Defence dated 6/8/2010 and filed on the 11/8/2010.

It is the defendant's statement that he acquired the suit property lawfully having purchased shares from Kalenjin Enterprises Ltd and being the lawful owner having obtained title to the property lawfully without any fraud. He prays for dismissal of the plaintiffs' case with costs.

5. Plaintiff Case.

The **1st plaintiff Samson Kuria Kangethe** testified for both plaintiffs, as **PW1**.

He produced the Sale Agreement dated 16/5/1985 between himself as the purchaser, and the shareholder, and initial allottee of the land, one Samson Kuria Kangethe, by Kalenjin Enterprises Ltd – PExt 1, and share certificates issued on the 12/6/1980 PExhibit 3 (a) and the Purchase price receipts dated 4/8/2003, 3/4/2006, 3/12/2006 – Pexh 4 (a), (b), 5.

Further, a shareholder certificate in favor of Samuel Kirui, the seller for 50 shares was also produced as PExh 6.

6. An official search certificate for the suit property dated 16/1/2006 (PExhib.7) shows that the defendant was registered as the proprietor of the suit property on the 15/9/1989 and the Title Deed issued on the same day.

PW1 further testified that the plaintiffs took possession and occupied the suit parcel soon after purchase in 1985 and have been in open occupation and use since then. It was his evidence that they learnt of the defendant's title in 1990 and upon reporting to the directors of the Kalenjin Enterprises Ltd, the Company wrote a letter stating that the defendant was not a member of its Company and therefore not a shareholder. The letter was produced as PExhibit 8, and dated 8/9/2003. He testified that he registered a caution on the suit property on the 16/9/2003.

7. The plaintiff further produced a letter stating the Directors of Kalenjin Enterprises Ltd then (PExh 10) and payment receipts to their Advocates, Muhia Advocate being transfer fees for the property in the sum of Shs.4,000/= - PEXht 12 & 13.

He thus urged that he was the bonafide purchaser, and in possession occupation and use of the suit land, and that the defendant's title ought to be cancelled and replaced with their names.

8. Defendant's case.

The defendant testified as **DW1**.

His evidence was that he used Kalenjin Enterprises Ltd to be allocated land that he did not know where the land was, and in 1989 he obtained a title in his name.

It was his testimony that he visited the property in the year 2005 whereon he found buildings, but did not stay there for fear of his security.

He produced a copy of the green card and official search certificate of the property as DExh 1 & 2 respectfully. He testified not to have collected the Title Deed nor signed any documents at Kalenjin Enterprises Ltd.

9. On cross examination, the Defendant testified that he did not have any papers or the certificate of Title in respect of the suit property. He stated that he never met the plaintiffs, but found houses constructed on the suit property. He denied using shortcuts or fraud to obtain the title. He testified that one William O. was used to allocate the land to him and also obtained the title for him. He did not know how much he paid for the land parcel.

10. At the close of the case both parties filed written submissions, which they highlighted before me.

11. Issues For Determination

(1) Whether the plaintiffs have a valid and lawful claim over the suit property.

(2) Whether the Defendant acquisition of the Title to the suit property was legal, formal and free from any irregularity and /or fraud.

(3) Whether the parties are entitle to their respective prayers in their pleadings.

(4) Costs.

12. The Plaintiffs submissions are dated 8/2/2013.

It is submitted that Kalenjin Enterprises Ltd which transferred the shares of its shareholders Samson Kuria Kangethe to the plaintiffs and thus equivalent of three acres thereof to the plaintiff denied that the defendant was its shareholder, and could therefore not allocate the suit land to him or cause a title to be issued to him in respect of the plot as it that it had already transferred the shares as well as the land parcel to the plaintiffs, demonstrated by the Sale Agreement – Pexhbit 1.

It is further stated that having admitted that the defendant had no documents for the land parcel nor did he know how much he paid for the alleged purchase of the suit property from Kalenjin Enterprises Ltd, it follows that the Title thereof was illegally and fraudently obtained, hence the plaintiff is entitled to the reliefs sought in the plaint.

13. The Defendant's Submissions are dated 27/6/2018. He asserts ownership of the suit property by acquisition of a Title thereto by production of the green card and copy of official search certificate.

In that regard, it is submitted that the defendant has a title, having purchased the suit property through shares at the Kalenjin Enterprises Ltd and had taken possession and has been cultivating the suit property.

14. It is further submitted that the plaintiffs cannot assert a claim of legal ownership yet they hold no title to buttress the claim, and that the plaintiffs have not proved that the title acquired by the defendant was fraudently acquired.

Reliance was made to Provisions of **Sections 26, 30, and 108 of the Land Registration Act 2012 (LRA)** and **Section 6 of the Land Control Act, Cap 302** to urge that no fraud or illegality was proved against the Defendant that the Title was obtained unprocedurally or through a corrupt scheme.

15. Several authorities were cited to buttress the legal principle that he who alleges must prove and that the plaintiffs failed to discharge the burden of proof that the Title to the suit land was obtained illegally.

The defendant has urged that the plaintiffs claim be dismissed with costs.

16. Analysis and Determination.

ISSUE NO. 1

Whether the plaintiffs have a valid and lawful claim over the suit property.

The factual evidence adduced by the plaintiffs and the defendant are fairly straight forward. The plaintiffs have been able to prove how they acquired the suit property, by outright purchase from a shareholder of the Kalenjin Enterprises Ltd, which shares translated to allocation of the suit property to them.

It was not necessary for the seller or the company to testify as the plaintiff produced, with no objection from the defendant, all the documents necessary to prove that indeed the sale of the shareholding took place.

17. The sale agreement, purchase price receipts and, share certificates were produced to prove the fact of purchase by transfer of shares to the plaintiffs. The letter the Company wrote was further proof that the shares, that translated to three (3) acres of land were duly transferred to the plaintiffs. The Company, Kalenjin Enterprises Ltd further denied that the defendant was its shareholder and thus could not sale any shares, as it did not have in the first instance.

18. The defendant had a title to the suit land, but by his evidence, could not demonstrate how he acquired the said title, only stating that one William O. gave him the land and obtained the Title for him. He did not know where the property was, and only visited it in 2005, sixteen years (16) after he obtained the Title. All what the defendant had was a Title but could not state the process used to obtain the said Title.

19. In the case **Jennifer Nyambura Kamau VS. Humprey Mbaka Nandi (2013) e KLR**, the Court of Appeal rendered that

“----- it is trite that possession is nine-tenths ownership; it is also trite law that possession is not title and it is not proof of ownership. Ordinarily, proof of ownership is prima facie proof of possession but where there is a dispute, the presumption is that the person having title to the land is in possession”.

20. The plaintiffs took possession of the property soon after payment of the purchase price. They paid fees for the transfer of the property to their advocates, but before they could have the title processed, the defendant, in a manner he could not demonstrate to the court got himself registered as the proprietor and a title issued in his favour.

De facto possession, as that of the plaintiffs, give a party a right to retain possession as against all wrong doers, but not sufficient as against the lawful owner, the title holder. **Section 116 of the Evidence Act** stipulates that where the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

21. In a matter of two competing claims over the same suit property, and where the title to one is under challenge, in order to be considered a bona fide purchaser for value, that party must prove that he had carried the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and that he paid valuable consideration for the purchase of the property – **Samuel Kamere Vs. Land Registrar, Kajiado (2015) e KLR**.

22. The plaintiffs were able to sufficiently demonstrate how they acquired the lawful ownership of the suit property, by outright purchase for valuable consideration. They indeed conducted due diligence, entered into a sale agreement for transfer of the vendors shares from the selling company, Kalenjin Enterprises Ltd, who authenticated the process by a letter and allowing the plaintiffs to take possession and develop the suit property, pending registration of the title in their favour.

It is instructive that the defendant did not challenge the plaintiffs' evidence at all. Indeed he testified to have visited the property in 2005 where he found buildings developed thereon, sixteen years after acquiring the title.

I am satisfied that the plaintiffs have established a valid and lawful claim over the suit property.

23. ISSUE NO 2.

Whether the Defendant's acquisition of the Title to the suit property was legal, formal and free from any irregularity and or fraud.

By their statement of claim, the plaintiffs challenge the defendant's root of the title, by claiming to be the lawful owners, and seeking a declaration of ownership and further seeking for cancellation and rectification of the title in their favour.

In essence, they challenge the process upon which the Title was obtained. The circumstances upon which the title was obtained are very similar to those in the case **Samuel Kamere Vs. Land Registrar Kajiado (Supra)**. Where the Court of Appeal stated with regard to valuable consideration that:

“----- there is nothing in evidence to show that the appellant paid valuable consideration, or indeed, any consideration at all, for the property. He did not produce a bank statement evidencing the cash withdrawal, or provide any relevant proof of payment. Further, no sale agreement was produced showing that a purchase had taken place. There was no seller in evidence who testified. He did not produce any acknowledgements confirming receipt of the purchase price. Without such evidence, we are not satisfied that that the appellant actually paid any consideration, and if at all, to whom-----”

24. I need not state anything more, but to add that the defendant owned up that he did not know what he paid, nor did he sign any documents in respect of the property, nor did he have any knowledge as to how the title was obtained or registered in his favour. Further, **the Court of Appeal**, in the case of **Munyu Maina Vs. Hiram Gathiha Maina, Civil Appeal No. 239** rendered that

“We state that when a registered proprietors root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register”.

25. Thus when the Defendant, by his advocates submits that as the Defendant has a title deed to the property, the valid argument to make is that he is the lawful registered proprietor, I beg to disagree as the same is not based on any valid legal provisions or arguments under any of the Land laws governing land registration.

26. **Section 26 (1) of the Land Registration Act 2012**, recognizes that a certificate of title issued by a Registrar as *prima facie* evidence that the person named as proprietor is the absolute and indefeasible owner, and that such title shall not be subject to challenge, except on grounds of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme – **Kimathi Kilonzo Vs. Susan Waigan Kiiru & Another (2019) e KLR** – and of more weight where the title holder is proved to have been party to the scheme.

27. The defendant submits that the plaintiffs did not plead fraud against the defendant in their pleadings in the acquisition of the Title. I have considered the plaint. I agree there is no statement expressly speaking to fraud.

I have read the cited decisions to buttress the defendant’s assertion. In **Vijay Morjaria Vs. Nausigh Madhusingh Darbar & another (2000) e KLR Tanui J** (as he then was) stated that fraud must be specifically pleaded and the particulars stated on the face of the pleadings, and that fraudulent conduct must be distinctly alleged and proved. However, the plaintiff claim was not based on fraud alone but also on illegalities, irregularities and unprocedural manner in the matter of acquisition of the title.

28. **Section 2 of Registration of Titles Act** (repealed) defines the word “Fraud” thus

“Fraud on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that Registration”.

29. As a serious accusation, fraud ought to be specifically pleaded and proved on higher balance of probability but not beyond reasonable doubt. It is not necessary that the word Fraud be stated or used, but the facts stated in the pleading must be so stated to show that fraud was used, and the circumstances leading to reasonable inference that fraud, illegalities and irregularities were the cause of the loss or damage complained of as rendered by the **Court of Appeal in Highway Development Co. Ltd Vs. WestEnd Butchery Ltd & 6 others (2015) e KLR**.

30. Proof of the legality leading to obtaining of the Title by the Title holder is paramount, and if a claim of bonafide purchaser for value as envisaged under **Section 26 (1) (a) (b) and 27 (1) (a)** thereof of the **Land Registration Act** the holder must prove that

(a) *he holds the certificate of Title, that*

(b) *purchased the property in good faith*

(c) *that he had no knowledge of any fraud*

(d) *he paid valuable consideration, that*

(e) *the vendor had apparent valid Title, and that he was not a party to the fraud, illegality or irregularities - See*

Katende Vs. Haridali & Co. Ltd (200) e KLR and **Richard Kipkemoi Limo Vs. Hassan Kipkemoi Ngeny & 4 Others (2019) e KLR**.

31. Maraga J (as he then was) in the case **Republic Vs. Minister of Transport & Communication & 5 others Exparte WAA Ship Garbage Collector & 15 others (2016)** reiterated that

“-----courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead principle of the indefeasibility of title deed----”

In my considered opinion, the above represents the defendant’s actions and mischief. Just because he holds a document, that alone does not necessarily give him indefeasible rights to the property notwithstanding the process used to acquire the same.

32. I am persuaded that the only justifiable finding and conclusion is that the Defendant’s title was irregularly obtained, the process being tainted with a scheme of fraud, where he was party to. Anybody purchasing a property in good faith would have some documents, if not, a sale agreement or a certificate of ownership or share certificate, if the purchase is from a Land buying company, in which case there would be no requirement for consent from the Land Control Board.

33. When the defendant cannot state what he paid as consideration to acquire the suit property, and by own admission that he does not know how the title was processed in his favour, nothing else can be deduced from his conduct save that of being a party to a corrupt scheme with a view to deprive the lawful owners of the property, the plaintiffs, by waving a title deed to them, and claiming legal ownership.

In the circumstances, **Section 26 of the Land Registration Act** cannot offer protection to him.

34. **Section 80 (1) (2) of the Act** offers relief to a party who has been deprived of his property through irregular, illegal and unprocedural schemes. It states

80 (1) *“Subject to Sub-Section (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”.*

35. Having rendered as above and considering the plaintiffs prayers in their plaint, I find that the plaintiffs failed to adduce evidence of mense profits. That prayer must fail.

Consequently, I enter judgement in favour of the plaintiffs against the defendant as hereunder.

(a) A declaration that the plaintiffs are the rightful and lawful owners of Land Parcel LR NO. Dundori/Mugwathi/Block 2/56 Koilel.

(b) An order authorizing the Land Registrar, Nakuru County to rectify the register in respect of LR. No. Dundori Mugwathi/Block 2/56 Koilel by removing the name of Charles Chebungei Komen the defendant, and replacing it with the names of the plaintiffs, Samson Kuria Kangethe and Alice Wanjiru Kuria upon compliance with registration process of titles.

(c) A permanent order restraining the defendant his agents and/or those acting under him from interfering and/or claiming ownership of LR No. Dundori Mugwathi/Block 2/56 Koilel.

(d) The plaintiffs shall have costs of the suit

Delivered, signed and dated at Nakuru this 27th Day of February 2020.

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J.N. MULWA

JUDGE.