



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 452 OF 2014

(Formerly Nyeri HCC No. 179 of 2008)

LUKA WAGANA.....1ST PLAINTIFF

GODFREY MAINA MWANGI.....2ND PLAINTIFF

JAMES WANGUO KANYI.....3RD PLAINTIFF

-VERSUS-

CHARLES ALEXANDER KIAL.....1ST DEFENDANT

JOHN CIIRA GATHONGO.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 15th December, 2008 and filed on 16th December, 2008 the plaintiffs herein instituted this suit seeking judgment against the defendants for:-

- (i) A declaration that the 1st defendant holds the parcel of land known as LR No. Loc. 14/Kiru/2836 (suit property) in trust for them;**
- (ii) A declaration that they are entitled to have the title deed in the name of the 1st defendant revoked and retransferred to their names;**
- (iii) An injunction to restrain the 1st defendant by himself, his servants or agents or otherwise howsoever from remaining on or continuing in occupation or use of the suit property and to trespass thereon;**
- (iv) An order for payment of the amount found due to them in respect of the rent collected by the 1st defendant from the buildings on the suit property from January 1999 until the date of judgment;**
- (v) General damages;**
- (vi) Costs of the suit;**
- (vii) Interest thereon at court rate from the date of filing suit until payment in full**
- (viii) Further or other reliefs as the court may deem fit to order.**

2. The plaintiffs' accuse the 1st defendant of having unlawfully taken possession of the suit property and later on fraudulently caused it to be registered in his name.

3. It is pointed out that there were previous proceedings between the parties herein over the suit property presented before the Land Disputes Tribunal established under the Land Disputes Tribunals Act No. 18 of 1990 (now repealed) and that there is a suit pending in court between the plaintiffs and the 1st defendant over the suit property.

4. On 3rd April, 2009 the defendants filed a joint statement of defence through which they denied the allegations leveled against them and put the plaintiffs to strict proof of those allegations.

EVIDENCE

The Plaintiff's case

5. When the matter came up for hearing, James Wanguo Kanyi, who is the 3rd plaintiff in this matter relied on the witness statement recorded on 13th December, 2012 and list of documents dated 28th December, 2010. He informed the court that Mwangi Kariuki alias Norman Mwangi, deceased (who is represented by the 1st and the 2nd plaintiffs herein) and the 2nd defendant were partners, doing business in the name of Kiriaini Steady Timber Sales. On 23rd May, 1990 the partners obtained title to the suit property. He produced the title as **Pexbt 1**. He also produced an official search made on 15th January, 1999 showing that the suit property was registered in the partners' names as **Pexbt 2**. He further produced a green card in respect of the suit property showing the other registered dealings with the suit property.

6. P.W.1 further informed the court that they were prompted to carry out the search referred to above after they learnt that the 1st defendant was constructing on the suit property. They wrote to the 1st defendant complaining about his activities in the suit property and reported to the District Officer (D.O) who wrote to the first defendant. Later on, the D.O referred the matter to the Land Dispute Tribunal (LDT) which determined that the suit property was jointly owned by the partners of the above mentioned partnership.

7. The court further heard that an appeal was lodged at the Land Disputes Appeals Committee and a suit filed in the High Court in respect of the suit property.

8. The High Court reserved the issue of ownership of the suit property for determination by this court.

9. On 11th December, 2000 P.W.1 conducted a search in respect of the suit property and established that the decision of the Appeals Tribunal had not been effected.

10. Arguing that the decision of the Appeals' Committee lapsed after the time fixed for complying with it lapsed without being complied with, P.W.1 informed the court that by a letter dated 2nd October, 2007 they wrote to the 1st defendant asking him to vacate the suit property and account for the rent he was collecting from it.

11. The court heard that the letter triggered the 1st defendant to initiate the process of transferring the suit property to himself. On 3rd September, 2008, P.W.1 learnt that the 1st defendant had transferred the suit property to himself.

12. The partners wrote to the Land Registrar who gave them all the documents relied on in effecting the transfer. They also wrote to court and obtained the documents relied on in obtaining the order for transfer of the suit property.

13. Concerning the affidavit sworn in support of the application for transfer of the suit property to the 1st defendant, P.W.1 denied having been served with the application as purported in the affidavit of service pursuant to which the order of transfer of the suit property to the 1st defendant was made. He further stated that most of the people included in the affidavit of service (for instance Ngure Maingi and Peter Kiago Maingi) had died by the time of the purported service.

14. P.W.1 maintained that the order pursuant to which the suit property was transferred to the 1st defendant was given on account of falsehoods.

15. Concerning the averment to the effect that the 2nd defendant received the money ordered by the Appeals' Tribunal on their behalf (as their chairman); P.W.1 stated that the 2nd defendant was not their chairman and that he was not acting on their behalf.

16. On 24th April, 1999 the partners wrote to the Provincial Commissioner, Central Province, complaining about the proceedings of LDT Appeal No. 71 of 1999 but their complaint was not responded to.

17. P.W.1 maintained that he was never invited to the hearing and the award day and stated that he learnt about the award in about November 2000.

18. In cross examination, P.W.1 stated that he knows Charles Alexander Kiai (2nd defendant), as their partner. They used to sell timber together. The 2nd defendant is also his maternal uncle.

19. The partnership had four partners, Mwangi Kariuki (deceased), Ngure Maingi (deceased), the 2nd defendant and him.

20. They had another partnership, comprised of 9 partners which had been dissolved.

21. In the second partnership, comprised of the above mentioned partners, they contributed Kshs.5,000/= each.

22. The court heard that the partnership was not registered. They formed it in 1987.

23. They bought the suit property from John Githinji Mbogo.
24. Upon being referred to the green card in respect of the suit property, P.W.1 *inter alia* stated that John Githinji Mbogo was registered as the proprietor of the suit property on 24th February, 1987.
25. They were issued with a title deed in respect of the suit property on 23rd May, 1990.
26. The title held by the 1st defendant was issued on 31st October, 1999.
27. The court heard that John Ciira, who was their manager, registered the suit property in his own name (alone). They reported the matter to the area chief.
28. P.W.2, Godfrey Maina Mwangi, informed the court that his father Mwangi Kariuki was in partnership with John Ciira Gathogo.
29. He further informed the court that they brought the suit against the defendants for remaining on their parcel of land from 1999 to date.
30. He stated that the 2nd defendant, who was a partner with his father, jointly with the 1st defendant transferred the suit property to the 1st defendant. He relied on his statement dated 13th December, 2012 as his evidence. He also relied on the list of documents filed on 26th February, 2012 and 28th January, 2010.
31. P.W.2 informed the court that pursuant to an order given by the court that they file a valuation report in respect of the suit property, they filed a valuation report in respect of the suit property. He urged the court to consider it.
32. In cross examination, P.W.2 stated that when they filed this suit, they did not know that a similar suit had been filed in respect of the suit property namely Nairobi HCCC No.171 of 1998. He acknowledged that the issues raised in that suit were similar to the issues raised in this suit but pointed out that the suit was concluded.
33. The court heard that in its judgment, the court directed that issues relating to the suit property be handled by this court.
34. He also acknowledged that the dispute herein was brought before the LDT and the Appeals Committee but stated that Luka Wagana did not participate in those proceedings.
35. He further acknowledged that this suit was filed 8 years after the Appeals Committee made its decision about the dispute brought before it.
36. He stated that the suit property was hived off from parcel No. 2741.
37. In cross examination, he admitted that his two brothers and he participated in the proceedings before the LDT. Luka Wagana Maingi did not participate in those proceedings.
38. He also admitted that the current suit was filed 8 years after concluding the matter before the LDT.
39. He informed the court that the 2nd defendant bought the suit property for the company where he was a partner of James Kanyi, Mwangi Kariuki and Ngure Maingi.
40. He stated that he is not aware that the 2nd defendant obtained or purchased the suit property fraudulently from John Gachatha Mbogo or the seller had defrauded his father.
41. He denied the allegation that the 3rd plaintiff advised him on what to say in this matter and the matter in Nairobi.
42. In re-examination, he stated that the 1st plaintiff and he are in court to represent Mwangi Kariuki who was a partner in the partnership hereto.
43. He maintained that the 2nd defendant was the manager of the business owned by the partners.
44. He informed the court that the suit property was bought from John Gachatha Mbogo in 1987 by which time he was old enough.
45. The court heard that the suit property was first registered in the name of John Ciira Gathongo in 1989. Later, it was transferred to the three partners.
46. He told the court that he does not know whether John Gathongo had defrauded the 1st defendant's father or whether any court had upheld the fraud or whether the suit property was part of LOC. 14/Kiru/2741.
47. He stated that in the matter before the LDT, they chose to represent the family and with their agreement, their elder brother did not participate in the proceedings before the LDT.

48. P.W.3, David Chege Kariuki, a registered and licensed valuer practicing in the name and style of Tuliflocks Limited, informed the court that on instructions from the plaintiffs he prepared a valuation report in respect of the suit property. He produced the report.

49. In cross examination, he admitted that his report is not detailed. He also stated that he was right to include mesne profits in his report because that was part of his instructions from his client.

The Defence case

50. D.W.1, John Ciira Gathogo, informed the court that he used to sell timber and that he used his personal savings to buy the suit property. He did not use any money from the partnership to buy the suit property. He relied on the statement he recorded on 19th December, 2012 as his evidence in chief and the documents attached thereto as **Dexbt 1 to 8**.

51. In cross examination, he acknowledged that the dispute before court relates to the suit property.

52. He stated that he purchased the suit property from John Gathanga Mbogo and denied the contention that he bought it together with his business partners, James Wanguo Kanyi, Mwangi Kariuki and Ngure Kariuki. He denied having knowledge of any title registered in their joint names.

53. Upon being shown the title issued in their joint names, he stated that it must have been changed when he fell ill and got admitted in hospital in 1988.

54. He admitted that the title shown to him is for the suit property and that it is where the 1st defendant has lived since 1999.

55. He admitted that they took the 1st defendant to the LDT and gave evidence.

56. He acknowledged that the Tribunal determined that the land belonged to him and his partners.

57. Before purchasing the suit property, he knew the 1st defendant as the owner's son. The 1st defendant was over 20 years at that time. The 1st defendant did not raise any objection to them buying the land.

58. After the LDT gave its decision, the 1st defendant appealed to the Land Disputes Appeals Tribunal. The Appeals Tribunal asked them to negotiate and reach an agreement on how much the 1st defendant was to pay them.

59. Only Mwangi Kariuki did not participate in the appeal as he was deceased. Godfrey Maina represented his father, Mwangi Kariuki.

60. He denied having received Kshs. 180,000/= from the 1st defendant.

61. He admitted that he had knowledge of the letter from the plaintiffs' dated 11th December, 2000 and stated he did not respond to it because he had no advocate.

62. He stated that Ngure Maina was from the household of Mwangi Kariuki but he was a partner in his individual right.

63. He further stated that administrators of the estate of Mwangi Kariuki were not present when they were negotiating. The people present were the ones registered in the title and they attended court but they had no right to write the letter dated 11th December, 2000 as they were not among the partners registered in the title.

64. He informed the court that the 1st defendant was given up to 31st August, 2000 to pay the decretal sum, Kshs.180, 000/= and that the 1st defendant paid the decretal sum plus costs of Kshs. 5000/=, but was unable to confirm whether he paid the decretal sum within the time ordered by the Appeals Tribunal.

65. He admitted having received the decretal sum from the 1st defendant on behalf of his partners and stated that he did not share it. He failed to share the money with his colleagues because he purchased the suit property alone.

66. The court heard that his partners breached the agreement they had to the effect that they would refund him Kshs.30, 000/= each. He maintained that he did not buy the suit property on behalf of his partners and himself.

67. Despite the fact that the 1st defendant paid the decretal sum outside the time ordered by the Appeals Tribunal, he had no problem because the money was his (he was not receiving it to share with any one). He did not perceive any irregularity in receiving the money outside the time ordered by the court.

68. He stated that he was aware of the notice of motion filed by the defendant seeking to enforce the decision of the Appeals Committee. He did not inform his partners because they were very hostile to him (they wanted to kill him).

69. He denied having received the notice of motion on behalf of his partners and at all.

70. Despite being aware of Nairobi HCC No.171 of 1998, he entered into an agreement with the 1st defendant because the land belonged to him.

71. He acknowledged that he has never filed any case between himself and his partners demanding the money they allegedly owed him.

72. D.W.2 Charles Alexander Kiai, relied on his statement recorded on 19th December, 2012 as his evidence in chief and the documents marked CAK 1 to 22 as his exhibits.

73. He informed the court that he complied with the decision of the Appeals Committee that he pays the partners 180,000/=. He paid the 2nd defendant who was the chairman of the partners.

74. At the time the agreement for payment was made before the Appeals Committee all partners except Mwangi Kariuki who was represented by his two sons, were present.

75. The application dated 28th May, 2008 was seeking adoption of the decision of the appeals committee. There was no fraud in bringing that application as he moved to court to give effect the order of the Tribunal.

76. Concerning the contention that he lied to court to obtain the orders pursuant to which the suit property was transferred to him, he denied having told the court lies.

77. On whether he irregularly obtained the suit property, he stated that the court in Nairobi HCCC No.171 of 1998 found that the suit property was properly sold to him.

78. He obtained the suit property after the plaintiffs refused to sign transfer documents yet he had paid the Kshs.180, 000/= as directed by the court. The court executive officer signed the transfer documents on their behalf.

79. He obtained his title through the court process and did not participate in any fraud.

80. In cross examination, he stated that despite there having been no valid sale agreement between his father and Maina Mbogo, he did not go to court. Nevertheless, the matter went to the LDT which found that the plaintiffs and the 2nd defendants were the rightful owners of the suit property. He appealed to the Appeals Committee which after negotiations with the plaintiffs, ordered him to pay Kshs.180, 000/= on or before 31st August, 2000.

81. He paid Kshs.150, 000/= on 28th July, 2000 and the balance after the executive officer signed transfer documents in his favour. He dealt with the 2nd defendant as the chairman of the partnership.

82. With regard to the averments contained in the affidavit of service sworn in support of his application for transfer, he acknowledged that it does not state which plaintiffs were present in the meeting and which of them declined to sign for the documents.

83. He stated that before filing the application for an order for executive officer to sign the transfer documents, D.W.2 had presented the documents to the 2nd defendants but they were not signed.

84. D.W.2 denied having received the letter dated 11th December, 2000 or having heard of it. He learnt about it through these proceedings. He explained that at the time the letter was written, he had an advocate who was handling all his affairs.

85. He maintained that he did not work with the 2nd defendant (in exclusion of the other partners) as all others were included.

86. At close of hearing the parties to this suit filed submissions which I have read and considered.

Analysis and determination

87. From the evidence adduced in this case, the following facts are either common ground or uncontroverted:-

(i) That there were previous proceedings between the plaintiffs' and/or the plaintiff's predecessors in entitlement to the suit property at the defunct Land Disputes Tribunal;

(ii) That in those proceedings, it was determined that the suit property belonged to the partnership herein;

(iii) That on appeal to the Appeals Committee, the 1st defendant was ordered to pay the claimants Kshs.180,000/= before the suit property could revert to him (the payment was to be done within the time stipulated in the award but there was no indication as to what the consequences of none payment of the amount awarded within the time ordered were);

(iv) That the 1st defendant fulfilled the obligation imposed on him albeit out of the time ordered by the Appeals Committee.

(v) That the 1st defendant obtained orders for execution of the award of the Appeals Committee.

(vi) That pursuant to the orders, referred to above, the 1st defendant got the suit property transferred to him.

(vii) That the orders pursuant to which the 1st defendant got registered as the proprietor of the suit property were neither appealed from nor set aside;

(viii) That eight years later, the plaintiffs' brought this suit *inter alia* claiming that there was fraud in the transfer of the suit property to the 1st defendant.

88. I find the issue for the court's determination to be whether the plaintiffs have proved that there was fraud in the transfer of the suit property to the 1st defendant. With regard to that issue, although there are certain procedural flaws in the manner in which the process of obtaining the order for transfer of the suit property was obtained, in that some of the persons indicated as having been served with the application for the order may not have been served, being of the view that the plaintiffs' ought to have applied for setting aside of those orders on the grounds urged in this suit, which application they did not do, I find the plaintiffs' claim to be unsustainable on that ground. If anything, the evidence adduced in this suit shows that the 2nd defendant who was a partner of the plaintiffs participated in the proceedings. There being no evidence of collusion between the 1st defendant and the 2nd defendant in effecting the impugned transfer and being of the view that the action of the 2nd defendant as a partner of the plaintiffs could bind the partners, I find and hold that the plaintiffs have not made up a case for interference with the title held by the 1st defendant.

89. There is evidence that the plaintiffs participated in the arbitration process that led to the suit property being awarded to the 1st defendant. Since the agreement did not stipulate the consequences for non payment of the decretal sum, the plaintiffs' contention that the agreement lapsed after the 1st defendant failed to pay the amount within the time ordered is not supported by the evidence adduced in this case. It can also not be said to be the intention of the parties as the plaintiffs' through 2nd defendant accepted the decretal sum outside the time ordered by the court.

90. In my considered view, the plaintiffs remedy is not cancellation of the title held by the 1st defendant as it was obtained through a legal process. The plaintiffs should pursue the 2nd defendant who admittedly was their partner and received the money in his capacity as a partner pursuant to the proceedings they had instituted before the Land Disputes Tribunal.

91. The upshot of the foregoing is that the plaintiffs have not made up a case for being granted the orders.

92. Consequently, I dismiss the suit with costs to the 1st defendant.

93. Orders accordingly.

Dated, signed and delivered in open court Nyeri this 30th day April of 2019.

L N WAITHAKA

JUDGE

Coram:

Mr. Aswani for the plaintiffs

Charles Alexander Kiai – 1st defendant

John Ciira Gathogo – 2nd defendant

Court assistant - Esther