



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CAUSE NO. 168 OF 2014

JOSPHINE MWOI WAMBUGU PLAINTIFF

VERSUS

SAMUEL NJOROGE KAGIRI1ST DEFENDANT

THE LANDS REGISTRAR

MACHAKOS COUNTY2ND DEFENDANT

THE OFFICE OF THE ATTORNEY GENERAL..... 3RD DEFENDANT

JUDGMENT

Background

1. This suit instituted vide a plaint dated 7th February 2014 relates to a dispute in which the Plaintiff and 1st Defendant are claiming ownership of the same piece of land. The Plaintiff claims that she is the registered proprietor of LR Mavoko Town Block 12/419 Kamulu measuring approximately 2.00 hectares having purchased it on or about August 2011 for valuable consideration. She came to learn that the defendant had invaded her land in the year 2013 and she therefore seeks the following orders;

a) A permanent injunction restraining the Defendant, whether by himself and/or his agents, servants, employees, assignees, successors or any persons claiming under him or in any other manner whatsoever, from interfering with, and/ or further interfering with, alienating, trespassing upon, construction and/or directing any structure, cultivating, farming on, disposing of, leasing, charging, wasting and/or dealing with parcel known as LR Mavoko Town Block 12/419.

b) A mandatory injunction directed at the 2nd defendant to reverse the purported transfer of LR Mavoko Town Block 12/419 to the 1st Defendant, and the Plaintiff to be declared the beneficial, legal and absolute proprietor of LR Mavoko Town block 12/419.

c) A mandatory injunction directed at the 1st defendant to deliver vacant possession of the property to the Plaintiff failure of which an order of eviction be issued and/or enforced against the 1st Defendant.

d) An order directing the OCS Kamulu/ Ruai Police Post to enforce compliance with the order sought herein above.

e) Cost and interest of suit.

f) Any other or further relief that this honourable Court may deem fit and just so to Grant.

2. The 1st Defendant filed his statement of defence on 18th March 2014 denying Plaintiff's claim while affirming that he bought the suit land, occupied it from year 2013 and that he obtained a title to that effect.

3. The 2nd and 3rd Defendants did file their statement of defence dated 12.3.2014 denying all the averments set out in the plaint. However, the said Defendants did not turn up for the trial despite being aware of the hearing date.

4. At the hearing, the Plaintiff adopted her witness statement dated 3rd February 2014 and produced 4 documents as exhibits namely- Copy of title deed; copy of her ID; copy of the counterfeit ID and copy of letter of verification from the Registrar of Persons. Plaintiff's evidence is that her land had been transferred to the 1st defendant illegally using an identification card and title certificate which did not belong to her. That her ID card number was 10228762 of serial number 215222978 which was verified by Registrar of Persons vide confirmation letter

dated 1st April 2015. She also reported the matter to the police. She availed her original copy of the title deed in court.

5. The 1st Defendant adopted his statement dated 18th March 2014 as his evidence and produced 13 items in his list dated 4th December 2019 as exhibits. His case is that he bought the suit property from Josphine Mwoi Wambugu who gave him an original title which he surrendered to the Land Registrar for transfer of the land to him. After the transfer was effected, he was issued with a title deed by the Land Registrar Machakos. He contends that Josphine Mwoi Wambugu approached him sometime in 2013 for the sale of the suit land. He conducted a search at the Land's office in Machakos and also obtained the relevant land control consent after attending the land board with the seller. He paid a total of Kshs. 3,200,000 on various dates in cash.

6. The 1st Defendant however clarified that the Josphine Mwoi who was present as a Plaintiff in court was neither the Josphine Mwoi who sold to him the land nor the one who attended the meeting at the Land Control Board. Further, the passport photo on the transfer document was not the one of the Plaintiff in court. He also noted that the copy of the ID for the seller in his possession (although the serial number was illegible) was not the same as the one held by the Plaintiff.

He also stated that he was neither shown a photo of the vendor nor her original ID at the lands registry. He only saw the ID when they went for the transfer.

Plaintiff's Submissions

7. In her submissions dated 26th October 2021, the Plaintiff restated her evidence while pointing out the discrepancies in the 1st Defendant's testimony. It was submitted that in the 1st Defendant's testimony, he claimed to have purchased the land for Kshs. 3,200,000 but the sale agreement in his bundle of documents indicated the purchase price was Kshs. 3,500,000. He did not produce evidence of the said purchase. Further, had there been a legitimate transaction where the Defendant paid millions to purchase the suit land, he would have made efforts to have the alleged seller brought to book which was not the case.

8. It was submitted that the Plaintiff had proved her case on a balance of probabilities that she was the rightful proprietor of Title Number Mavoko Town Block 12/419 as there was no sale of land between her and the 1st defendant. As such, the property was fraudulently transferred to the 1st Defendant which he had also confirmed by stating that the person who sold him the land was not the Plaintiff in court.

9. The Plaintiff made reference to **Section 26 (1)(a)(b)** of the Land Registration Act and the case of **Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another [2013] eKLR** where it was held that:

“ ...title to the 1st Defendant was obtained illegally, unprocedurally or through a corrupt scheme... I am satisfied that the provisions of Section 26(1)(b) have been met... I therefore proceed to cancel the title of the 1st defendant and his registration as proprietor of the suit land...”

10. Also cited was the case of **Esther Ndegi Njiru & another v Leonard Gatei [2014] eKLR** where the court stated that “...

“Under Section 26(1)... such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party...”

1st Defendant's Submissions

11. The 1st Defendant's submissions are dated 19th November 2021 where he stated that he purchased the suit land after undertaking due diligence in which he confirmed that the land belonged to Josphine Mwoi Wambugu. That he has an original title to the land and no evidence had been adduced to show that the said document as well as the documents for transfer were not authentic.

12. It was further submitted that Plaintiff alleged that her identity card was verified by the National Registration Bureau, but there was no witness to testify whether the letter adduced in court dated 1st April 2015 was authentic or authored by them. Neither did the firm that received the said letter testify nor did the letter have a stamp from the alleged firm of Kamau Chege & Kagunyi Advocates.

13. It was contended by the 1st Defendant that the issue of fraud had not been proved and that he was the *bonafide* purchaser of the suit property. To this end, reference was made to the Court of Appeal case of **Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR** where it was held that;

“ ...This statutory presumption of indefeasibility of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved...”

Analysis and determination

14. Having considered the pleadings, the evidence, the legal framework and relevant authorities, this court finds that the issues for determination are: (i). *who is the legal owner of LR No Mavoko Town Block 12/419*; (ii). *What are the reliefs flowing from the determination.*

15. The Plaintiff claims that the suit land belongs to her having acquired the same in 2011 as per the title deed of which a copy was produced in court and she still has the original title. The 1st Defendant also stakes a claim on the same property stating that he purchased the said land

from a lady by the name Josphine Mwoi Wambugu (which is the Plaintiff's name) in 2013 and a transfer in his favour was effected. He was consequently issued with a title deed dated 4th June 2013 of which a copy was availed in court.

16. **Article 40** of the **Constitution of Kenya** provides for protection of right to property in the following terms:

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property

(a) of any description; and

(b) in any part of Kenya.

....

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

17. The **Land Registration Act** has the following provisions on effect of registration:

24. Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b)...

17. **Section 25(1)** thereof provides that:

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...

18. **Section 26(1)** provides that:

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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, 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 a corrupt scheme.

18. From the foregoing provisions it is clear that registration of land confers ownership/proprietorship to that person and those rights should not be defeated unless fraudulently acquired. In this case, seeing that both parties have produced title documents regarding the same land, who then holds a genuine title and whose title was illegitimately acquired?.

19. **Section 109** of the **Evidence Act** provides that:

“ The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

20. The Plaintiff stated that she learnt of the transfer when she found the 1st Defendant tilling and cultivating her land without her permission and upon conducting a search, she discovered that the land was registered in the name of the 1st Defendant. She testified that the identification card used in the transfer was not her true identity card and neither was the passport photograph used to effect the transfer. To this end, she produced a letter from National Registration Bureau which confirmed that the ID Number 10228762 of **Serial Number 2152229782** was the true and authentic card in their register. The following is written on the identity card that is said to be the valid document:

“The authenticity of this document is hereby confirmed by the undersigned-The Principal Registrar National Registration Bureau”.

21. The 1st Defendant claims that no evidence was adduced to prove that the letter from the Director of National Registration dated 1.4.2015 was authentic. However **Section 83. (1) Evidence Act** stipulates that:

“The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is-

(a) declared by law to be admissible as evidence of any particular fact; and

(b) substantially in the form, and purporting to be executed in the manner, directed by law in that behalf; and

(c) purporting to be duly certified by a public officer.

(2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document.”

22. The 1st Defendant did confirm that though he purchased the suit land from a Josphine Mwoi Wambugu, that seller was not the Plaintiff in court. The ID card used to transfer the property was not that of the Plaintiff. The photograph of the seller on the transfer document was not that of the Plaintiff. Thus the Plaintiff did not divest her rights and interests in the suit land unto the 1st Defendant.

23. It is also not fathomable that at this age and era, the 1st Defendant could have purchased the suit land so casually with a tidy sum of over 3 million in cash on various dates!. Such a scenario depicts a situation where the two parties were familiar to each other. However, this is a case where the 1st Defendant appears to have no clue as to who the seller of the land was.

24. The Court of Appeal in Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR held:

“... It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo (2008) 1 KLR (G&F) 742* wherein the Court stated that:

“...Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

25. The Court of Appeal in the case of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 Others [2018] eKLR stated that:

“... In our view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence. We are however cognizant that where the Defendant’s case supports that of the Plaintiff and contains evidence on which the Plaintiff may rely, the Plaintiff is entitled to rely on and make use of such evidence...”

26. The entities which effected the transfer of the land (the 2nd and 3rd Defendants) are missing in action despite their awareness of this suit. However, the fact remains that the Plaintiff did not sell the suit land to the 1st Defendant. It follows that the transactions in which the said land was transferred to the 1st Defendant were flout with fraud and illegality and were therefore unlawful. In the circumstances, the title held by the 1st Defendant is but a paper document which cannot be protected by the constitution and the relevant statutory provisions of law.

27. The upshot of this judgement is that Plaintiff’s case succeeds in the following terms:

i. The 2nd Defendant or the relevant Land Registrar is hereby ordered to cancel the certificate of title dated 4th June 2013 in the name of Samuel Njoroge Kagiri and rectify the records regarding LR No Mavoko Town Block 12/419 to reflect the registered owner as JOSEPHINE MWOI WAMBUGU;

ii. The 1st Defendant is hereby ordered to vacate the said land LR No Mavoko Town Block 12/419 within 30 days failure to which the Plaintiff is granted leave to enforce eviction against the 1st Defendant

iii. The Officer Commanding Kamulu/Ruai police stations is hereby authorised to ensure compliance with the said court order (in ii above).

iv. The Plaintiff is awarded costs of the suit to be paid by 1st Defendant, plus interest of which the said interests shall run as from the 31st day after the delivery of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

IN THE PRESENCE OF:-

F. N. NJANJA FOR THE PLAINTIFF

M/S NGANGA HOLDING BRIEF FOR KANYI FOR THE DEFENDANTS

COURT ASSISTANT: EDDEL BARASA