



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CIVIL SUIT NO. 98 OF 2018

MARY NGONYO KIUME.....PLAINTIFF

VERSUS

CHARLES MUISYO DAVID.....1ST DEFENDANT

WINFRED WANJIKU MAINA.....2ND DEFENDANT

MACHAKOS COUNTY LAND REGISTRAR..... 3RD DEFENDANT

EXAMS HOUSING CO-OPERATIVE SOCIETY LIMITEDINTERESTED PARTY

JUDGMENT

1. This suit was instituted by way of a Plaint dated 14th May 2018 in which the Plaintiff sought for the following orders:

a. An order restraining the 1st and 2nd Defendants from entering, sub-dividing and or transferring land known as Mavoko Town Block 3/55640 to any other person.

b. An order cancelling the 2nd Defendant's title and directing the 3rd Defendant to rectify the register to reflect the name of Mary Ngonyo Kiume as the registered owner of Mavoko Town Block 3/55640.

c. Costs of the suit and interests.

2. In her Plaint, the Plaintiff pleaded that she was the registered owner of parcel of land known as Mavoko Town Block 3/2051 as at 24th March, 2016; that in November 2016, she engaged the 1st Defendant, a surveyor, to subdivide the land into two portions, which gave rise to title numbers Mavoko Town Block 3/55640 and Mavoko Town Block 3/55641, all registered in her name and that the 1st Defendant only delivered to her the title deed for Mavoko Town Block 3/55641 and not Mavoko Town Block 3/55640 (the suit property).

3. The Plaintiff averred in the Plaint that she was informed by a neighbour in September 2017 that strangers were inspecting and checking on the beacons of the suit property; that she requested her son to carry out a search which revealed the land to be intact and that when she conducted another search on 12th April 2018 at the Machakos Lands Registry, it showed that the land had been transferred to the 2nd Defendant on 24th April 2017.

4. The Plaintiff averred that the 1st Defendant colluded with the 2nd and 3rd Defendants to defraud her, including presenting and accepting unlawfully obtained papers to transfer the land without her consent and authorization as well as secretly transferring to the 2nd Defendant the suit property with the full knowledge that she was unaware of the transfer.

5. The 2nd Defendant filed a Defence and Counterclaim in which she stated that she is the registered proprietor of Mavoko Town Block 3/55640 (the suit property) which she purchased for valuable consideration from the Plaintiff in 2015 and that she attended the Land Control Board meeting and was granted the necessary consent to transfer the suit property on 9th April 2017 which was formally issued on 24th April 2017.

The Plaintiff's Case

6. PW1, the Plaintiff, relied on her statement sworn on 14th May 2018 in which she stated that she was the registered owner of land title number Mavoko Town Block 3/2051, which she subdivided into two equal portions; that she engaged the 1st Defendant who sub-divided the land into Title Numbers Mavoko Town Block 3/55640 and 55641 and that the 1st Defendant did not give her the title deed for Mavoko Town Block 55640 (the suit property) which he claimed had not been processed.

7. PW1 informed the court that she requested her son to conduct an official search on 12th April 2018 which showed that the suit land had been transferred to the 2nd Defendant on 24th April 2017; that she did know the 2nd Defendant and that she never sold the suit property to the 2nd Defendant.

8. In cross-examination, PW1 stated that Mavoko Block 3/2051 was initially 20 acres, which she subdivided into two parcels of 10 acres each; that it was her advocates, Kamende Advocates, who facilitated the sub-division of the land by recommending the 1st Defendant as a surveyor and that she never attended the Land Control Board meeting to sell the suit property.

9. PW2 also adopted his statement in which he stated that the Plaintiff is his mother; that he is the one who introduced his mother to the 1st Defendant who subdivided the property and availed to the Plaintiff the title deed for Mavoko Town Block 3/55641 and that the 1st Defendant did not avail the title for Mavoko Town Block 3/55640 to the Plaintiff,

10. It was the evidence of PW2 that upon hearing that strangers were on the suit property in September 2017, he conducted a search which showed that the land was still in the name of the Plaintiff and that his mother later requested him to carry out another search on 12th April 2018 which showed that the land had been transferred to the 2nd Defendant on 24th April 2017.

11. In cross-examination, PW2 stated that he did not know the 2nd Defendant; that he was not aware of the consent that was issued by the Land Control Board to transfer the land to the 2nd Defendant and that his mother, PW1, only attended the Land Control Board to obtain consent for subdivision of the land into two parcels and not for transfer of the land to the 2nd Defendant. PW2 reiterated that the 2nd Defendant acquired the suit property fraudulently.

The 2nd Defendant's Case

12. DW1 informed the court that in 2016, she decided to buy a farm near her residential home to engage in the business of cattle rearing and horticulture; that a broker named Anthony Mutinda Muthembwa promised to introduce her to the Plaintiff who would sell her a piece of the land she was sub-dividing and that she was introduced to an elderly woman in April 2016 near the District Commissioner's office in Athi River, who agreed to sale the land for Kshs. 5,000,000.

13. It was the evidence of DW1 that on the day she identified the land, she paid to the seller Kshs. 800,000; that she paid the balance of the purchase price by installments and that on 5th April 2017, her, together with the broker and her husband appeared before the Land Control Board which granted them consent to transfer the land.

14. In cross-examination, DW1 testified that when Anthony gave her the plot number, she conducted a search which showed that the land was owned by Joseph Kiume, who she was informed was the late husband of the Plaintiff; that when she met the Plaintiff, she was in the company of her son Josephat, and that she paid the Plaintiff Kshs. 800,000 in the presence of her son, PW2.

15. DW1 stated that she made the last instalment in April 2017; that the Plaintiff and PW2 appeared with her, her husband and the broker before the Land Control Board and that it is Manyeki advocate who acted for both parties in the transaction. According to DW1, it is Manyeki advocate who filled the application form for the Land Control Board consent, drafted the transfer documents and agreements and remained with the same and that the Plaintiff gave her photo and PIN to the advocate.

The Interested Party's Case

16. DW2 informed the court that he is the Chairman of the Interested Party, the Exams Housing Cooperative Society Limited; that the Interested Party was interested in purchasing the suit property from the 2nd Defendant; that they conducted an official search and that the 3rd Defendant issued them with an official search dated 3rd May 2017 which confirmed that the land was registered in favour of the 2nd Defendant.

17. DW2 informed the court that the Interested Party thereafter entered into a sale agreement with the 2nd Defendant dated 24th August 2017 for purchase of the suit property for Kshs. 24,700,000 and that in 2018, the Plaintiff obtained interim orders of injunction prohibiting any further dealing with the suit property.

18. DW2 stated that the Society stands to suffer irreparably having already parted with Kshs. 7,000,000 as deposit for the land and that the Interested Party was willing to pay the balance of the purchase price.

Submissions

19. The Plaintiff's counsel submitted that DW1 failed to produce the sale agreement relating to the sale of the land as well as a bank transaction receipt or an acknowledgement receipt for payment of the purchase price; that the Plaintiff testified that she did not sale the land and that the burden thus fell on the 2nd Defendant to explain the root of her title. The Plaintiff relied on the case of ***Propwa Company Ltd vs Justus Nyamo Gatondo & another (2020) eKLR*** where the court held that:

“It is trite that when Certificate of Title granted to someone has been called to question, then it becomes the burden of that person to explain the root of the title...”

20. Counsel submitted that the 1st Defendant’s failure to give the Plaintiff her title deed for the suit property is evidenced by the search certificates produced by the Plaintiff, which does not indicate that the title deed to the suit land was ever issued to her; that the 2nd Defendant’s pleadings and oral evidence was contradictory and that the application for consent of the Land Control Board produced by the 2nd Defendant did not indicate the nature of the transaction nor the date when the application was made.

21. It was submitted that despite the involvement of many people in the transaction, the 2nd Defendant failed to call such persons to tender evidence or to produce documentary evidence demonstrating that she legally purchased the suit land. Counsel relied on the case of *Benson Wandera Okuku vs Israel Were Wakho [2020] eKLR*, where the court stated that:

“Though it is clear under Section 143 of the Evidence Act (cap 80) that no particular number of witnesses is required to prove a fact, it is also clear from experience that adequacy of evidence in some kinds of cases may require the evidence of more than one witness. What readily comes to mind are cases where the law itself requires corroboration of evidence. Who would corroborate if not another witness? There are also cases involving transactions. Transactions, by their very nature, require two or more persons for completion. Where a wrong arises, from such transactions, it is more often than not that the sufficiency of evidence to demonstrate such wrong would require some or all the people involved to give evidence. Yet another category would involve cases involving processes where various persons are involved in effectuating the process to completion.”

22. Counsel argued that the 2nd Defendant failed to tender evidence of the sale agreement, without which she is barred by **Section 3 (3) of the Law of Contract Act** from claiming an interest in land. Counsel relied on the cases of *Patrick Tarzan Matu & Another vs Nassim Shariff Nassir Abdulla & 2 Others [2009] eKLR* and *Silverbird Kenya Ltd vs Junction Ltd & 3 others [2013] eKLR*.

23. Counsel for the Plaintiff submitted that the evidence presented by the Interested Party should be treated with suspicion and that the signature on the alleged sale agreement has not been attested by a witness.

24. The 2nd Defendant’s advocate submitted that the Plaintiff had failed to establish the existence of fraud. Counsel relied on the case of *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia [2020] eKLR* wherein the Court of Appeal cited with approval *Urmila w/o Mahendra Shah vs Barclays Bank International Ltd & another [1979] eKLR*, where it took the view that the onus to prove fraud in a matter is on the party who alleges it.

25. Counsel argued that the particulars of fraud by the Plaintiff are not clear as they do not indicate how the papers were fraudulently obtained; that the Plaintiff failed to report any allegations of fraud to the police; that the Plaintiff has not disputed the Land Control Board consents and that the authenticity of the title has been confirmed by the Registrar of Lands.

26. Counsel submitted that the 2nd Defendant has title to the land and is in possession of the same; that the law firm that oversaw the transactions, Manyeki & Associates, was closed down following the passing on of Mr. Manyeki and that the documents could not be traced.

27. The Interested Party’s advocate submitted that the 2nd Defendant is the registered owner of the suit property; that the Interested Party exhausted all avenues available to it in conducting due diligence by conducting a search and obtaining written confirmation of ownership of the land from the lands office and that the Plaintiff failed to prove fraud as against the Interested Party.

28. It was submitted that the requirement of a sale agreement is not mandatory because the 2nd Defendant is not seeking to recover land from the Plaintiff because the land is in her name. According to counsel, the **Law of Contract Act** is thus not applicable.

Analysis and Determination

29. The only issues for determination in this matter is as follows:

a. Whether the 2nd Defendant fraudulently obtained title to Mavoko Town Block 3/55640.

30. The Kenya’s land system operates under the Torrens System, where the certificate of title is prima facie conclusive and indefeasible proof of ownership of land. This principle is set out in **Section 26** of the **Land Registration Act**. **Subsection 1 (a) and (b) of Section 26** however provide exemptions to this rule, which is that a title can be challenged 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 under a corrupt scheme.

31. The Court of Appeal in *Embakasi Properties Limited & another vs Commissioner of Lands & another [2019] eKLR* quoted with approval the three principles of the Torrens System as prescribed by the Canadian Court of Appeal in *Regal Constellation Hotel Ltd Re 2004 Can LII 2006 Ontario C.A.) Page 13 para 42* as follows:

“42. The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy.”

32. The Court in *David Peterson Kiengo & 2 Others vs Kariuki Thuo [2012] eKLR* considered the implication of the principle of indefeasibility of title:

“Practically, the principle of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu’s fraud, their titles will be secure and guaranteed by the State. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring an action against the State for recovery of damages but not for possession or ownership of the property.”

33. In *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others [2015] eKLR* Munyao J considered the operation of Section 26(1)(b) of the Land Registration Act in respect to an innocent purchaser:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012* where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.” I stand by the above words and I am unable to put it better than I did in the said dictum.”

34. The position that a title fraudulently obtained cannot be allowed to stand has been affirmed in a number of other cases. The point was clearly made in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR*, where the Court of Appeal upheld the decision of the Environment and Land Court to cancel the titles of land to which crooks had fraudulently acquired titles and later sold the same to other parties.

35. The courts have held that allegations of fraud must be pleaded and proved. This position was well articulated by Tunoi JA in *Vijay Morjaria vs Nansing Madhusingh Darbar & Others [2000] eKLR (Civil Appeal No 106 of 2000)* as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

36. In this case, it is not disputed that the Plaintiff was the registered owner of Mavoko Town Block 3/2051 which was sub divided to create parcels of land known as Mavoko Town Block 3/55640 and 55641. It was the evidence of the Plaintiff that while she received the title deed for Parcel No. 55641, she did not receive the title deed for Parcel No. 55640.

37. The Plaintiff produced in evidence the search showing that indeed parcel of land number Mavoko Town Block 3/2051 was registered in her favour on 24th March, 2016. A title deed was issued to her on the same day. The search dated 5th October, 2017 shows that the said land was sub divided on 24th November, 2016 to create parcel numbers Mavoko Town Block 3/55640 and 55641. The two parcels of land were registered in favour of the Plaintiff on 24th November, 2017.

38. Although parcel of land known as Mavoko Town Block 3/55640 was registered in favour of the 2nd Defendant on 24th April, 2017, the Plaintiff has denied that she sold the suit property to the 2nd Defendant.

39. The 2nd Defendant informed the court that she purchased the suit property from the Plaintiff for valuable consideration of KShs. 5,000,000. In her statement of Defence, she stated that she purchased the suit property in the year 2015, but in her witness statement of even date and her oral testimony in court, she stated that she met the owner and entered into an agreement in April 2016.

40. Despite the contradiction on the exact dates and years that the 2nd Defendant purportedly purchased the suit property from the Plaintiff, the 2nd Defendant failed to avail the sale agreement which would have clarified the date on which she purchased the land, if at all.

41. Section 3(3) of the Law of Contract Act provides that a suit cannot be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing; is signed by all the parties thereto; and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party. Having failed to adduce a written agreement of sale as required by law, the claim by the 2nd Defendant that she purchased the suit property from the Plaintiff fails.

42. While the 2nd Defendant has alleged that she paid the purchase price fully in installments, she failed to avail any proof of such payments or receipt of the same. The 2nd Plaintiff attributed the failure to adduce these pieces of evidence to the death of the advocate, Mr. Manyeki, who, according to the 2nd Defendant, conducted the transaction on behalf of both parties.

43. If indeed the Plaintiff made payments to the Plaintiff to the tune of Kshs. 5,000,000 in instalments, it is her who should have the evidence of such payments and not her advocate. It is inconceivable that the 2nd Defendant could make such payments to the Plaintiff without any kind of acknowledgement of the payments, especially if the said payments were made in cash.

44. It is trite that when the Certificate of Title granted to someone has been called to question, then it becomes the burden of that person to explain the root of the title (*Propwa Company Ltd vs Justus Nyamo Gatondo & another (2020) eKLR*). Further, the Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina [2013] eKLR* held that where an instrument of title is challenged, such proprietor must go beyond the instrument to prove legality:

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to 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.”

45. This is the same position that was taken by the Court of Appeal in *Kenya National Highway Authority vs Shalien Masood Mughal & 5 others [2017] eKLR* cited with approval by the Court of Appeal in the case of *Chemei Investments Limited vs The Attorney General & Others Nairobi Petition No. 94 of 2005(unreported)* where it was held as follows:

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be sidestepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the Court in the case of Milan Kumar Shah & 2 Others vs City Council of Nairobi & Another (supra) where the Court stated as follows, “ we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principal has not himself or itself been part of a cartel which schemed to disregard the applicable law ...”

46. The burden to prove that the Certificate of Title in respect of land known as Mavoko Town Block 3/55640 was procured legally was on the 2nd Defendant. The 2nd Defendant failed to show that she entered into a valid agreement for sale of parcel of land known as Mavoko Town Block 3/55640. The 2nd Defendant also failed to show that she indeed paid for the said land.

47. That being so, it is the finding of this court that the 2nd Defendant has failed to prove to the required standards the root of her title. There is no evidence before this court to show that the 2nd Defendant purchased the suit property from the Plaintiff or at all. That being so, the said title could only have been procured illegally, or through a corrupt scheme.

48. Upon finding that the suit property was fraudulently transferred to the 2nd Defendant by the 1st Defendant, the court needs to determine whether it should rectify the register as sought by the Plaintiff. It is not in doubt that the Plaintiff's right to property has been infringed, as the real title holder to the suit property.

49. Having found that the suit property was registered in favour of the 2nd Defendant illegally and or through a corrupt scheme, the 2nd Defendant did not have any property to pass to the Interested Party. The reading of **section 26 (1) (b)** of the **Land Registration Act** shows that where the certificate of title is procured illegally or through a corrupt, it does not matter if the subsequent purchaser of the same land acquired it innocently or not.

50. In the circumstances, I find that the Plaintiff has proved her case on a balance of probabilities. The Plaintiff's suit is allowed in the following terms:

a. An order be and is hereby issued for rectification of the land register by cancellation of the Title Deed issued to the 2nd Defendant over Mavoko Town Block 3/55640 and a certificate of title to be issued to the Plaintiff.

b. An order of permanent injunction be and is hereby issued against the 2nd and 3rd Defendants, their agents, servants or assigns restraining them from leasing, transferring, charging, taking possession, developing or in any other manner howsoever from dealing with parcel of land known as Mavoko Town Block 3/55640.

c. Costs of the suit to be paid by the 2nd Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 20TH DAY OF JANUARY, 2022

O. A. ANGOTE

JUDGE

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendants