



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1382 OF 2005

DAVID MWENDA NGANGA.....PLAINTIFF

VERSUS

MUTUNGU GICHURE.....DEFENDANT

JUDGMENT

The Pleadings

This suit was filed by way of Plaint dated 15th November 2005 and filed on 16th November 2005 whereby the Plaintiff stated that on 19th May 1998, he entered into a contractual agreement with the Defendant to purchase the parcel of land known as Loc 16/Ndunyu Chege/1495 measuring 0.202 Ha located within Thika Municipality (hereinafter referred to as the “suit property”) for a consideration of Kshs. 80,000/-. The Plaintiff made the case that though he paid the full purchase price, the Defendant never granted him vacant possession over the suit property leading him to file this suit seeking for a declaration that the suit property belonged to him as well as the costs of this suit.

In response, the Defendant filed a Defence and Counterclaim dated and filed on 9th January 2006 in which he conceded having entered into a contractual agreement with the Plaintiff for the purchase of the suit property but denied that the Plaintiff paid him the agreed purchase price. He added that without his knowledge, the Plaintiff transferred the suit property to himself. He listed the following particulars of fraud:

- a. Forging a letter of consent of subdivision of parcel Loc 16/Ndunyu Chege/1232.
- b. Forging a letter of consent for transfer of the suit property.
- c. Altering false documents namely transfer documents.
- d. Fraudulently procuring the issue and registration of a title deed of the suit property in his name.

In the Counterclaim, the Defendant laid claim to the suit property and requested the court to cancel the Plaintiff’s title deed thereto and order that the suit property be registered in his name.

Thereafter, the Plaintiff filed a Notice of Withdrawal dated and filed on 27th August 2008 withdrawing

the entire suit against the Defendant. This was adopted as an order of the court on 29th August 2008. That left only the Defendant's Counterclaim for prosecution. As the Plaintiff failed to file a Defence to the Counterclaim, interlocutory judgment was entered against him in the Counterclaim and the same proceeded for formal proof.

It should also be mentioned that the Defendant passed away and was substituted with Willie Nduati Mutungu who is the administrator of his estate.

The Evidence

The Defence called only one witness, Willy Nduati Mutungu, who stated that the suit property was part of a larger parcel of land known as Loc 16/Ndunyu Chege/1232 belonging to his late father, Mutungu Gichure. His testimony is that the Plaintiff fraudulently had the said parcel of land subdivided into two parcels namely the suit property which was registered in the Plaintiff's name and Loc 16/Ndunyu Chege/1496, which was registered in the name of his late father. He produced the mutation form as exhibit no. 7 and the transfer form as exhibit no. 8 and stated that none of the two were signed by his late father. He produced two letters of consent from the Gatanga Land Control Board dated 23rd February 1999 in respect of the subdivision and dated 29th September 1999 in relation to the transfer to the Plaintiff. He faulted those two letters of consent on the ground that his father was not involved in obtaining them. It was his evidence that the Plaintiff was refunded the sum of Kshs. 80,000/- which he had paid for the suit property in the presence of the chief. He stated that he has lived on the suit property for his whole life, yet he has never seen a surveyor come to subdivide that land. He accused the Plaintiff of fraudulently subdividing the larger parcel of land without the participation of his late father or himself. He denied that any Land Control Board consent was obtained to authorize the subdivision, which he stated took place on 2nd November 1999. He produced a copy of the title in the Plaintiff's name and requested the court to cancel it. He further testified that the Plaintiff was charged with forgery in Thika Chief Magistrates Case No. 2382 of 2000 and was convicted and sentenced to imprisonment for a term of 3 years with the alternative of a fine of Kshs. 50,000/-. He produced a copy of the proceedings of that case. He requested the court to cancel the Plaintiff's title deed and revert it to the name of his late father Mutungu Gichure.

Issue and Determination

There is only one issue arising herein for determination and this is whether or not to cancel the title deed to the suit property which is in the Plaintiff's name and order that a fresh title deed be issued in the name of Mutungu Gichure, who is now deceased.

It is conceded that the Plaintiff is the registered proprietor of the suit property and a copy of his title deed was produced in this court as exhibit no. 3. A copy of the official search on the suit property produced in this court as exhibit no. 2 also indicated that the Plaintiff is registered as the proprietor of the suit property. The law is very clear as regards the position of a title holder of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... 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.”

In this particular case, the Defendant has alleged that the title deed in the name of the Plaintiff was

acquired through fraud and illegally as his late father, Mutungu Gichure, did not participate in the subdivision of the larger parcel of land Loc 16/Ndunyu Chege/1232 into the suit property and Loc 16/Ndunyu Chege/1496. The Defendant denied that any surveyor was sighted at the land subdividing the land. The Defendant further alleged that the subdivision and transfer was done without land control board consent. The Defendant further denied that his late father ever signed the transfer document used to register the suit property to the Plaintiff. He further alleged that the Plaintiff was refunded the entire purchase price of Kshs. 80,000/- in the presence of the chief which he paid for the suit property.

In a Supporting Affidavit dated 10th March 2015 sworn by Willie Nduati Mutungu in support of his Notice of Motion of the same date, Mr. Willie Nduati Mutungu averred that his father, Mutungu Gichure died on 16th January 2009. He was therefore alive when the larger parcel of land was subdivided and the transfer of the suit property to the Plaintiff occurred. If I may start with the letters of consent produced by the Defendant, the first one dated 23rd February 1999 which authorized the subdivision of the larger parcel into the suit property and the other parcel, it is duly signed by the District Officer of the Gatanga Division. The second letter of consent authorizing the transfer of the suit property to the Plaintiff was also duly signed by the District Officer of Gatanga Division. I do not detect any impropriety in those two letters of consent. Further to that, the mutation form produced by the Defendant which he asserted was not signed by his late father, does in fact bear the signature of Mutungu Gicure and his ID Number was also written thereon being 5155812. The Transfer form used to transfer the suit property to the Plaintiff dated 5th November 1999 also bears the signature of Mutungu Gicure. Further to the above, there is no evidence that has been produced to prove the assertion by the Defendant that he refunded to the Plaintiff the purchase monies amounting to Kshs. 80,000/-. The chief in whose presence the funds were purportedly refunded was not called as a witness. The only conclusion I can arrive at is that the Plaintiff was not refunded the purchase price and he was not involved in any impropriety in the subdivision of the larger parcel of land known as Loc. 16/Ndunyu Chege/1232 and further that the suit property was duly transferred to him by the late Mutungu Gichure according to the law. With this finding, the title deed held by the Plaintiff over the suit property is a valid title deed which has not been challenged successfully by the Defendant.

The upshot of this is that the Counterclaim is hereby dismissed. Each party to bear their own costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16TH

DAY OF SEPTEMBER 2016.

MARY M. GITUMBI

JUDGE