



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
ELC CIVIL SUIT NO. 207 OF 2012

MBUGUA KAMAU MUGWE & 3 OTHERS.....PLAINTIFFS

VERSUS

JOSEPH KIMANI KANGETHE & 4 OTHERS.....DEFENDANTS

JUDGMENT

Background

1. Vide the plaint dated **1st August, 2012** and amended on **13th September, 2012** the plaintiffs, **Mbugua Kamau Mugwe, Peter Njuguna Kamande** and **Joseph Kimani Njuguna** instituted the suit herein against the defendants **Joseph Kimani Kangethe, Benard Mbugua Njenga, Kitur Arap Chuma** and the **District Land Registrar**, Nakuru (hereinafter referred to as the 1st, 2nd, 3rd and 4th defendants respectively) seeking to cancel the titles issued to the 1st, 2nd and 3rd defendants in respect of titles **No.Njoro/Njoro Blocks 1/265; 1/266; 1/51 and 1/52** (hereinafter called the suit properties) issued to the defendants and to vest the said properties in them. The plaintiffs also seek an order of permanent injunction to restrain the defendants by themselves, their agents, representatives and/or through any other person acting under their authority from dealing, disposing or any other way interfering with the suit properties and ordering the defendants to vacate the suit properties forthwith.

2. It is the plaintiffs' case that the 1st defendant obtained the suit property fraudulently by:-

- a) applying to be registered as the owner of the suit properties while he knew that the properties belonged to **Kimiri Munanda Children Education Society;**
- b) transferring the suit properties to his name;
- c) participating in fraudulent activities aimed at depriving the beneficiaries of the society of their land;
- d) holding out to be the legal and rightful owner of the suit properties;
- e) misrepresenting facts concerning the ownership of the suit properties to Government and land registries in Nakuru;
- f) fraudulently transferring the suit properties to third parties.

3. The plaintiffs contend that they got to know of the 1st defendant's unlawful dealings with the suit properties sometime in June 2011 when they applied to be registered as owners of the suit properties, being trustees of **Kimiri and Munanda Children Education Society** (hereinafter called “the society”).
4. The plaintiffs' contend that the suit properties had been left in the care of the 1st defendant by the former trustees of the society. The 1st defendant is accused of having transferred the suit properties to himself against the interest of the society thereon.
5. In his statement of defence, the 1st defendant explains that he bought two shares belonging to the society which entitled him to acquire the society's pieces of land at Mukungugu Farmers Society Limited (hereinafter called Mukungugu Society) whereat he was a member. He further claims that the society's shares were sold to him by its officials at the time namely, **Kariuki Gathimbu**-the then Chairman (now deceased); **Leo Kihura**-the then treasurer (now deceased) and **James Gathairu**- the then secretary. The alleged sale is said to have been sanctioned by the directors of Mukungugu Society who upon subdivision of the land received the fees for registration of the relevant parcels to the members.
6. The 1st defendant alleges that upon paying the transfer fees, Mukungugu society applied for the title deeds from the land Registrar on his behalf, as it did for all members. The titles were thereafter issued to the rightful owners, himself included.
7. Concerning the contention that he obtained the suit properties fraudulently, the 1st defendant explains that he acquired the society's shares as an innocent purchaser and upon obtaining the title documents for the suit properties sold titles **No. Njoro/Njoro Block 1/265** to the 2nd and 3rd defendants in good faith.
8. The plaintiffs' contention that the 1st defendant carried out the impugned transactions well aware of the society's interests on the suit property is said to be false. Besides, the 1st defendant has denied the allegation that the suit properties were left to him as a trustee/caretaker. In this regard, it is contended that the 1st defendant was neither a member nor an official of the society to warrant such an assignment.

EVIDENCE

The plaintiff's case

9. When the matter came up for hearing, **P.W.1, Peter Njuguna Kamau**, testified that his father was a member of the society and that the society was formed with the aim of educating its members' children and for purposes of investing. He explained that the society brought the suit properties in order to benefit its members and their children. He produced the Certificate of registration of the society as **Pexbt 1**. The court heard that the society had been dormant for over twenty years. On or about **12th March, 2012** the members of the society wrote to the Registrar of Societies seeking to revive the society. He produced the letter to the Registrar of Societies dated **12th March, 2012** as **Pexbt 2**.
10. Upon revival of the society, they filed a notification of change of office bearers of the society on **12th March, 2012**. He produced the notification of change of the society's office bearers as **Pexbt 3** and the letter confirming the new office bearers as **Pexbt 5**.
11. He further testified that he knew that the society had land in Mukungugu Society. In 2010, the 1st defendant informed them that the society was paying out dividends to its members. When they went to Mukungugu to collect their dividends, they were denied the dividends on the grounds that they had already sold their land. Consequently, the members of the society held a meeting on **18th May, 2011** and resolved that the office bearers should follow up the issue with the society. He produced the resolution to that effect (minutes) as **Pexbt 6**.
12. Later on, they went to the lands office whereat they were advised to apply for registration of titles for plots No. 265 and 266. He produced the form applying for registration of plots No.265 and 266 and transfer forms for plot No.265 as **Pexbt 7** and **8** respectively. However, when they went to collect the titles, the Registrar informed them that the titles had been picked by the 1st defendant. With that

information, they requested for a joint meeting through the letter dated **20th June, 2011** which he produced as **Pexbt 9**.

13. Their efforts to have a joint meeting with the 1st defendant through the office of the District Land Registrar, Nakuru, were in vain. To prove this fact he produced the various invitation letters sent to the 1st defendant by the Registrar as **Pexbt 10 (a) (b) and (c)**. After the Registrar was unable to facilitate the joint meeting with the 1st defendant, he dismissed them saying they had already sold their land. Following this turn of events, the members of the society met and passed a resolution that the current suit be filed.

14. Regarding the procedure the society should follow when disposing off the society's land, P.W.1 explained that members must pass a resolution to that effect, thereafter a sale agreement must be executed by the secretary, chairman and the treasurer of the society. The court heard that the Registrar of societies must be notified to give his response or authority. To prove that the Registrar was involved and that he gave his response, P.W.1 produced a letter to the Registrar seeking his authority to sale shares dated **26th March, 2013**. He testified that in the alleged sale of the suit properties to the 1st defendant, the said procedure was not followed.

15. Concerning the proprietorship of the suit properties, PW1 stated that they conducted searches which revealed that the 1st defendant was registered as the owner of plots No.265 and 266 and that the 2nd and 3rd defendants are registered as the proprietors of plots No. 1/51 and 1/52. He produced the search in respect of the suit properties as **Pexbt 13 (a) to (d)**.

16. **P.W.2, Michael Kimani Kigochi**, testified that he was the Society's secretary at the material time (1986-2000) but he not know the 1st defendant. He stated that he met the 1st defendant when he came to Ndumberi Dairy Farmers and informed him (PW2) to go and collect the society's dividends at Mukungugu farmers. He denied having been introduced to the 1st defendant as a person who would assist the society pay its debts by **Ngendo Kahanya** (one of the society's members). He further denied any knowledge of the society having sold the suit properties to the 1st defendant and of the meeting held at Thuo's home in 1987 for thanks giving of the concluded sale transaction between members of the society and the 1st defendant. He equally denied having been sent by the group to go and buy goats for the thanks giving ceremony but admitted that whenever the society sold land, they slaughtered goats for their members and shared the money.

17. He further testified that as secretary to the society, he kept the society's rubber stamp. He acknowledged signing the sale agreement listed as No.7 in the plaintiffs' list of documents but denied any knowledge of the document dubbed No. 5 (general meeting dated 31st December, 1987) although he admitted that the society's stamp impression thereon was genuine. He informed the court that receipt No. 5 in the plaintiffs list of documents was members contribution of Kshs. 11, 193.35 to pay for arrears in respect of plot No.51 after some members misappropriated the society's funds.

The Defence Case

18. On his part, the 1st defendant who testified as **D.W.1** informed the court that he obtained the impugned titles after he bought two shares from the officials of the Mukungugu society. He explained that the society had fallen into financial problems over a debt of Kshs.13,660/=. As a result, the society, through its treasurer (Leo Kihura) approached him to lend the society the said amount which he duly advanced to them and a date for repayment of the said monies was agreed upon.

19. When the society was unable to repay him the money advanced, it passed a resolution to sell to him the suit properties for Kshs.100,000/=. They entered into an oral agreement to that effect and he paid the purchase price in three installments of Kshs.40,000/=: 22,000/= and 38,000/=. Upon completion of payment of the purchase price, the members of the society demanded a goat, a lamb and traditional beer to seal the deal, which he provided.

20. After getting the blessing of the society, he paid the transfer fees to Mukungugu society which

processed the title deeds on his behalf. He produced title deeds for plot No.266, plot 51, 52 as **Dexbt 1a - c**. He acknowledged that the agreement he entered into with the officials of the society was not written but was based on mutual trust which was later sealed through the traditional ceremony referred herein above. According to D.W.1, the traditional ceremony was meant to conclude the sale transaction and pass ownership rights to him.

21. **James Gathairu Njoroge D.W.2**, who allegedly was the society's secretary at the time the society is said to have sold the suit properties to the 1st defendant, informed the court that after the society ran into financial problems, the treasurer introduced them (the officials) to the 1st defendant who lent them Kshs. 13,660/= to meet their financial obligations. He testified that after they were unable to repay the said amount, members of the society (about 45) resolved to sell the suit properties to the 1st defendant. Like D.W.1, D.W.2 testified that the society sold the suit properties for Kshs.100,000/= which the 1st defendant paid in three installments as noted herein above. He however, explained that the payment did not include the Kshs. 13,660/= that the 1st defendant had lent to the society. The 1st defendant is said to have forgotten to claim that amount!

22. D.W.2 confirmed that after completion of payment for the suit properties, the 1st defendant donated two goats to the members of the society as thanks giving and to mark the conclusion of the transaction.

23. Contrary to the 1st defendant's testimony that the transfer was handled by Mukungugu society, D.W.2 stated that four members of the society, himself included, were appointed to accompany the 1st defendant to the lands office for the purpose of processing the transfer. However, he retracted that testimony and instead stated that he collected the identity cards of the other elders who did not accompany them to the Lands Office. The court heard that although the land was transferred to the 1st defendant, Mukungugu society did not update their records to reflect the 1st defendant as the new owner.

24. Concerning the list of office bearers of the society for the period 1996 to 1988 which the plaintiffs produced in their supplementary list of documents, showing that the office bearers were different from those the 1st defendant allegedly dealt with, D.W.2 contended that the list was false. He however, admitted that the procedure followed by the official bearers in transferring the suit properties to the 1st defendant was irregular.

The Law applicable

25. Although the transaction allegedly entered into between the plaintiffs' predecessors in title and the 1st defendant was oral, the 1st defendant is a holder of a title issued under the Registered Land Act, Cap 300 Laws of Kenya. The only way the plaintiffs' can be able to defeat the 1st defendant's registration as the absolute proprietor of the suit property, is if they can demonstrate to the court that his registration was procured by fraud or mistake in consequence of which, the rectification is sought, or that he caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. Even in those circumstances, the plaintiffs' must demonstrate that the registration of the 1st defendant was not first registration. In this regard see **Section 143** of Cap 300 which by dint of the provisions of **Section 107** of the Land Registration Act, 2012 applies to the defendants' registration as the proprietors of the suit property.

Section 143(1) provides:-

“Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

Section 107 of the Land Registration Act, 2012 on the other hand provides as follows:-

“107. (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

Analysis and Determination:

26. From the evidence on record, it appears that the registration of the 1st defendant as the proprietor of the suit properties was first registration under the Cap 300 Laws of Kenya. I say so because the evidence on record shows that Mukungugu Society held the suit properties as unregistered parcels.

27. Under **Sections 27 and 28** of the registered Land Act, Cap 300 as read with **Section 143(1)** thereof, registration of the 1st defendant as the proprietor of the suit properties conferred on him an interest incapable of been defeated, for whatever reason.

Section 27 and 28 aforementioned provides as follows:-

“Subject to this Act -

27. (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”

“28. The rights of a proprietor, whether acquired on first registration or whether acquired 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, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

28. Although the plaintiffs' claimed that the 1st defendant held the suit properties in trust for the society, unfortunately no evidence was led to prove that fact.

Conclusion:

29. In view of my finding that the registration of the 1st defendant as the proprietor of the suit properties is incapable of been defeated for whatever reason, and there being evidence that the 2nd and 3rd defendant obtained their interest in the suit property through purchase from the 1st defendant, who was the registered proprietor thereof, I find and hold that they acquired good titles to their respective parcels. To defeat their interest in the properties registered in their names, the plaintiffs required to prove that the 2nd and 3rd defendants were not innocent purchasers for value of their respective properties, which they failed to do on a balance of probabilities and at all.

30. The upshot of the foregoing is that the plaintiffs' suit has no merit and is dismissed with costs to the defendants.

Dated, signed and delivered at Nakuru this 30th day of January, 2015

L. N. WAITHAKA

JUDGE

In the absence of:

The plaintiff and the defendant.

Court Clerk – Emmanuel Maello