



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC NO. 375 OF 2013

JOSEPH CHEGE GATUA.....1ST PLAINTIFF

ZAKARIA KARIMI GATUA.....2ND PLAINTIFF

VERSUS

CHARLES MWANGI MATHENGE..... DEFENDANT

JUDGEMENT

1. The plaintiffs herein, **Joseph Chege Gatua** and **Zakaria Karimi Gatua**, brought the suit herein against the defendant, **Charles Mwangi Mathenge**, seeking judgment against the defendant for:-

- a) **A declaration that the Ngarua Division Land Dispute Tribunal's Decision and Award in Tribunal case No.9 of 2006 as well as the adoption thereof as the judgment and decree of the Nanyuki Senior Principal Magistrate's Court in land case No.37/2006 are null and void abinitio or nullities;**
- b) **A declaration that the plaintiffs are joint owners and the registered absolute proprietors of Title No. Laikipia/Kinamba Mwenje Block 1/1235 to the exclusion of all others;**
- c) **.....(spent);**
- d) **Costs of the suit together with interest at court rates.**
- e) **Any other or better or further relief the court may deem fit and just to grant.**

2. After the defendant was served with summons to enter appearance, he filed a statement of defence and a counter-claim. In the statement of defence, the defendant contends that the suit is *res judicata* Laikipia Land Disputes Tribunal Claim No. 9 of 2006; Nanyuki SRMC's Land Case No.9 of 2006; Nanyuki SRMC's Land Case No.37 of 2006; Nyeri High Court Misc. Application No.14 of 2009 and Nyeri High Court Misc. Application No.232 of 2010; that in view of the foregoing, the suit is incompetent, frivolous, bad in law and an abuse of the process of the court. Further that the plaintiffs' registration as the proprietors of the suit property was obtained by fraud as no valid contract of sale was executed between the plaintiffs and the defendant, no consent for transfer was applied for or obtained by the parties to the alleged sale agreement as required by the Land Control Act, that the purported transfer to the plaintiffs offends the law and in particular the provisions of the Registered Land Act and the Companies Act.

3. The defendant contends that he never received any consideration from the plaintiffs or any other person concerning the purchase of the suit property. He explains that he only allowed the plaintiffs to

cultivate on the suit land as his nephews who had nowhere else to settle.

4. Concerning the registration of the plaintiffs as the absolute proprietors of the suit property, the defendant contends that the plaintiffs did so without his consent or authority and without following due process of the law.

5. The decision of Laikipia Land Disputes Tribunal in Claim No.9 of 2006 and the adoption thereof by the Nanyuki SRMC in Land Case No.37 of 2006 is said to have been final and incapable of being challenged through the current proceedings.

6. With respect to the plaintiffs' entitlement to the suit property, the defendant contends that the plaintiffs have always occupied and worked the suit property under his licence hence have never acquired any interest in respect thereof.

7. It is the defendant's case, that his relationship with the plaintiffs had being cordial until 2006 when he realized that the plaintiffs had fraudulently registered themselves as the proprietors of the suit property.

8. This court is said to lack jurisdiction to re-open the issues raised in this suit on the ground that the issues raised were heard and concluded in the suits and applications cited herein above.

9. In the counter-claim, the defendant has reiterated that he only allowed the plaintiffs to occupy and use the suit property under his licence which he cancelled after the plaintiffs fraudulently registered themselves as owners thereof. The defendant has also reiterated his contention that this court lacks jurisdiction to entertain the dispute herein for the reasons stated herein above.

10. Should the court find that it has jurisdiction to entertain the dispute herein, the defendant urges it to enter judgment in his favour and against the plaintiffs for:-

a) A declaration that the registration of the plaintiffs as the joint absolute proprietors of the suit property was illegal abinitio;

b) An order for cancellation of the title issued to the plaintiffs;

c) A declaration that the defendant is the lawful absolute owner of the suit property;

d) An order for registration of the defendant as the owner of the suit property;

e) An order directing the plaintiffs to unconditionally deliver vacant possession of the suit property to himself and in default directing that the plaintiffs be evicted from the suit property at their own cost.

f) In alternative to the foregoing prayers, a declaration that the award of Laikipia Land Disputes Tribunal in Claim No.9 of 2006, its adoption vide Nanyuki SRMC's Land Case No.37 of 2007 and the decree in respect thereof given on 27th April 2007 are all valid and should be effected.

g) Costs of the Counter-claim and interest;

h) Any other or better relief that this court may deem fit and just to grant.

11. Upon being served with the defendant's statement of defence and counter-claim, the plaintiffs filed their reply to defence and a defence to the counter-claim dated **28th January, 2013**.

12. In the reply to the defence, the plaintiffs have denied the contention that their suit is bad in law, frivolous, incompetent and/or *res judicata* the suits and applications listed in paragraph 2 herein above. In

this regard, the plaintiffs contend that the issues raised in their suit have never been conclusively settled, adjudicated upon or conclusively determined. With regard to the fact that it is the plaintiffs who moved the court for adoption of the award by the tribunal, the plaintiffs' have explained the circumstances that made them to do so and argued that the said actions did not preclude, estopp or otherwise prejudice their right to seek an appeal against the award herein.

13. With regard to the award of the Land Disputes Tribunal which was later adopted as judgment of the lower court, the plaintiffs have maintained that the tribunal did not have power to distribute the suit property because at the time it got seized of the dispute, the property was registered in their names; that the dispute presented to the tribunal was beyond its legal mandate under **Section 3(1)** of the Land Disputes Tribunals Act (repealed). It is reiterated that the Tribunal did not have power to order cancellation of their title deed or deal with issues touching on title to land or ownership of registered land as it purported to do.

14. As concerns the issue that the suit is *res judicata* Nairobi HC Misc. Civil Application No. 710 of 2007 (which was later transferred to Nyeri and registered as Nyeri HC Misc. Application No.14 of 2009 as well as Nyeri HC Misc. Civil Application No.232 of 2010, the plaintiffs contend that those cases (applications) were not conclusively handled or heard. It is pointed out that the applications were merely struck out on technicality (they had been filed out of time).

15. With regard to the contention that the plaintiffs occupy the suit property on account of permission or licence from the defendant, the plaintiffs deny that contention and explain that they have been in continuous, exclusive, quiet and peaceful enjoyment of the suit property since 1979.

16. The plaintiffs have also argued that the defendant has failed to prove his entitlement to the suit property.

17. As for the issue that there is no proof of sale of the suit property or passing of consideration, the plaintiffs have explained that they gave the defendant money to buy the land for them.

18. With regard to this court's lack of jurisdiction to entertain the issues raised in this suit, the plaintiffs have maintained that the court has jurisdiction to hear and determine the issues raised in this suit and issue the orders sought as the orders being challenged have never been enforced.

19. As for the counter-claim, the plaintiffs have stated that it is bad in law having been brought out of time. In this regard, the plaintiffs contend that they have been in quiet enjoyment of the suit property for over 12 years and that being the case, the defendant's right thereto were long extinguished. In this regard reference is made to Section 17 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

20. Terming the defendants' allegations of fraud against them false and malicious, the plaintiffs maintain that they lawfully and procedurally obtained title to the suit property.

21. Vide his reply to the plaintiff's defence to counter-claim the defendant joined issues with all averments contained in the plaintiffs' reply to defence and defence to counter-claim and urged the court to dismiss the defence to the counter-claim and enter judgment for him as sought in the counter-claim.

22. On **30th June, 2014** when the matter came up for pre-trial, advocates for the respective parties, with the concurrence of the court, agreed to have the suit disposed off by way of written submissions. Consequently, counsel for the plaintiffs filed submissions on behalf the plaintiffs on **7th October, 2014**. On the part of the defendant, at the time of writing this judgment, no submissions had been filed.

23. In the submissions filed on behalf of the plaintiffs a brief background of the dispute herein is given. In this regard it is explained that the defendant who was a shareholder at **Laikipia West Farmers Company Limited** (hereinafter referred to as "the company") sold or disposed off his share comprising what was **Plot No.B 132 Mwenje** at the time to the plaintiffs. The plaintiffs are said to have paid Kshs. 1000/= each to facilitate the transaction.

24. On or about **2nd May, 1989** the defendant is said to have signed a transfer agreement transferring his interest in Plot No. B132 Mwenje to the plaintiffs (Who are like his sons-close relatives). The agreement for transfer of the defendant's interest in that parcel of land (Plot No.B 132 Mwenje) is said to have been witnessed by the District Officer Rumuruti Division.
25. It is submitted that since that time (2nd May, 1989), and even before that time) the plaintiffs had been in actual, physical, quiet, uninterrupted possession and occupation of the said portion as the beneficial owners of the same. As the beneficial owners of the suit property, the plaintiffs are said to have effected massive developments on the said parcel of land.
26. Although the plaintiffs have not given an account of the circumstances under which the defendant's shares in the Company changed hands, they claim that the transfer must have been effected by the Board of Directors of the Company.
27. It is explained that after the plaintiffs were registered as the new shareholders of the company in place of the defendant, on or about **6th June, 2006** they were issued with a clearance certificate for what is now **Title No.Laikipia/Kinamba Mwenje Block 1/1235** (the suit property).
28. Upon being issued with the clearance certificate, they took the same to the land's registry and the suit property was transferred to them by the Government of Kenya on **6th June, 2006**.
29. On whether the plaintiffs obtained consent for transfer of the suit property to them, it is submitted that the transfer having been effected by the Government, did not require the consent anticipated under the Land Control Act, Chapter 302 Laws of Kenya or at all.
30. With respect to the proceedings at the tribunal, it is submitted that the defendant impliedly admitted having executed transfer documents in favour of the plaintiffs. This is said to be so despite the tribunal having found that the defendant did not know whether he was signing transfer documents. The tribunal's findings in as far as they related to the transfer effected between 1985 or 1989 or in 2006 is said to have been time barred and ultra vires the tribunal powers under **Section 3(1)** of the Land Disputes Tribunals Act.
31. The award of the tribunal which is dated **27th September, 2006** was admitted as a judgment of the lower court and the decree in respect thereof issued on **27th April, 2007**.
32. Aggrieved by the judgment and the decree of the lower court, the plaintiffs filed an application for judicial review in Nairobi High Court being Misc. Application No.710 of 2007 (which became Nyeri HC Misc. Civil Application No.14 of 2007 upon transfer of the matter to Nyeri High Court). The application for judicial review was, unfortunately, dismissed on the ground that it had been filed out of time and on the ground that the order for prohibition against the Commissioner of Lands and/or the District Land Registrar was untenable.
33. The plaintiffs' application for leave to file an appeal against the decision of the tribunal and its award vide Nyeri High Court Misc. Civil Application 232 of 2010 was also dismissed on the ground that the court lacked jurisdiction to extend the time for appeal fixed by Parliament under the Land Dispute Tribunals Act.
- 34.The plaintiffs' resolve to challenge the decision of the tribunal having hit a snag, it is submitted that they are entitled to pursue the option they are pursuing through this suit, a declaratory suit, which is said to be an alternative to judicial review.
35. Fourteen issues are framed for the courts determination in the plaintiffs submissions. The issues can be summarized as follows:-

a) Whether the decision of the Land Disputes Tribunal in claim No.9 of 2006 and the adoption thereof by the Nanyuki SRMC in Land Case No.37 of 2006 can be

Challenged through the current proceedings?

- b) Whether the registration of the Plaintiffs as the absolute proprietors of the suit property was legal, regular, valid and tenable in law?**
- c) Whether this court has jurisdiction to hear and determine this matter?**
- d) Whether the defendant has *locus standi* to counter-claim against the plaintiffs when the Company which transferred his shares to them and the Commissioner of Lands have not been enjoined as parties to the suit?**
- e) Whether consent to transfer the suit property was required before the suit property could be lawfully transferred to the plaintiffs?**
- f) Whether any of the parties to this suit has proved their case on a balance of probabilities against the other? If yes which party?**
- g) Whether issues relating to the alleged transfer of the suit property to the plaintiffs in 1989 are time barred?**
- h) Whether in a declaratory suit arising from the decision of the tribunal and the entry of judgment by the magistrate's court, a counter-claim of the nature proposed by the defendant can stand or must be rejected as being far removed from the claim?**

i) What orders should the court make?

36. As the issue of this court's jurisdiction to hear and determine this suit has the potential of determining this suit preliminarily, I will consider it first. As pointed out herein above, the jurisdiction of this court to entertain the suit herein is challenged on the grounds that the issues raised therein are *res judicata* the suits and applications listed in paragraph 2 herein above.

37. Under **Section 7** of the Civil Procedure Act, Chapter 21 Laws of Kenya, courts are prohibited from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

38. Are the issues raised in this suit or any of them *res judicata* the issues in the matters listed in paragraph 2 herein above?

39. In answering this question, it is necessary to review the issues raised in this suit and those raised in the previous suits and/or applications.

40. The issues raised in the current suit are basically those listed in paragraph 35 herein above.

41. The issue in the Land Disputes Tribunal was whether the defendant willingly and/or knowingly transferred the suit property to the plaintiffs?

42. The issue at the lower court was merely adoption of the decision of the Tribunal, the decision was not of the court but that of the tribunal. In this regard see the Ruling of **J.K Sergon** in Nyeri HC Misc. Civil Application No.14 of 2009 *supra*.

43. The issue raised in Nyeri HC Misc. Civil Application No.14 of 2009 was whether the plaintiffs were entitled to an order of certiorari to remove to that court and quash the judgment and/or decree made by the SPMC's Court Nakuru in Land Case No.37 of 2006 on 27th April, 2007, arising from the award of

Ng'arua Land Disputes Tribunal Case No.9 of 2006 in relation to the suit property herein. The other issue in that application was whether the plaintiffs were entitled to an order of prohibition to prohibit the Commissioner of Lands and/or the District Land Registrar, Laikipia from rectifying the register hence nullifying the title to the suit property, transferring and/or conferring proprietorship in the said parcel of land or processing further intended conferment of proprietorship interest of the said parcel of land to the defendant herein.

44. As pointed out above, the plaintiffs' application herein was dismissed without the court considering the merits of the issues raised therein after the trial judge upheld a preliminary objection raised by counsel for the respondents to the effect that the application for leave to apply for certiorari was filed out of time.

45. Having found leave to apply for certiorari to have been issued out of the six months stipulated under the Law Reform Act, the judge set aside the entire leave without considering the second prayer, prohibition.

46. As for Nyeri HC No. 232 of 2010, the issue raised therein was whether the plaintiffs were entitled to leave to file an appeal against the decision of the Tribunal at Ng'arua in award dated 27th September 2006 in Award Case No.9 of 2006 out of time. The application was dismissed on the ground that there is no law providing for extension of time.

47. The question to be answered from a survey of the issues raised in the various applications and/or cases herein is whether the applications/cases or any of them raised issues that are similar or substantially similar to the issues raised in the suit herein, if yes whether the issue(s) were heard and finally determined by a court of competent jurisdiction as contemplated under **Section 7** of the Civil Procedure Act.

48. From the survey of the various claims and applications herein, it is clear that the only applications/claims which were heard and finally determined on their merits is the claim lodged before the Ng'arua Land Dispute Tribunal and the application for leave to appeal against the decision and award of the said Tribunal out of time.

49. On whether the issues raised in the current suit are *res judicata* those raised in those applications/claims it is noteworthy, that whereas the claim raised in the Tribunal implicitly relates to the parties entitlement to the suit property, which issue is also in issue in the current suit, the Tribunal had no jurisdiction to determine the propriety or otherwise of the plaintiffs' registration as the absolute owner's of the suit property. It equally lacked jurisdiction to order the cancellation of the title issued to the plaintiffs.

50. The issue raised in Nyeri HC No. 232 of 2010 are not related in any way to the issues raised in the current suit as it concerned the plaintiffs' right to lodge an appeal against the decision of the Tribunal out of time.

51. From the foregoing, it is clear that the issues raised in the current suit are not *res judicata* those raised in the previous suit and/or applications. The decision of the Tribunal having been a nullity in law, it could and cannot confer any rights to any of the parties to the dispute.

52. Although under the Land Dispute Tribunal Act, the right procedure of challenging the unlawful award of the Tribunal was by following the appellate procedure provided therein, nothing, in law, prevents the plaintiffs from moving the court for a declaration that the award was a nullity in law, as they have done in this case. However, this determination should not be taken to be sanctioning the trial and error procedure used by the plaintiffs' in the current dispute.

53. Turning to the first issue namely, Whether the decision of the Land Disputes Tribunal in claim No.9 of 2006 and the adoption thereof by the Nanyuki SRMC in Land Case No.37 of 2006 can be challenged through the current proceedings, I will reiterate my finding that nothing in law prevents the plaintiffs from moving the court for a declaration that the award was a nullity in law. However, given the fact that it is the plaintiffs who moved the court for adoption of the award as an order of the court, their belated

decision to challenge an order they embraced and even ratified by their deed, is in my view an abuse of the process of the court. Be that as it may, having found the decision of the Tribunal and its subsequent adoption by the lower court to have been a nullity in law, I find and hold that the said decision is incapable of forming any basis of claim of the suit property by the defendant.

54. With regard to the defendant's contention that the plaintiffs obtained title to the suit property fraudulently, upon reviewing the evidence adduced in support of that claim, I find it to be insufficient to prove the said allegation to the standard of proof required by our laws, which standard is higher than proof on a balance of probabilities. I say this because other than raising a number of omissions and/or non-compliances with the law in the process leading to the registration of the suit property in favour of the plaintiffs, the defendant never adduced any evidence to prove the alleged fraud on the part of the plaintiffs.

55. The defendant also failed to enjoin the company which transferred his shares to the plaintiff as a party to the suit. In my view, since the company which transferred the defendant's shares to the plaintiffs is not a party to this suit, it would be difficult to establish the alleged fraud on the part of the plaintiffs.

56. The plaintiffs, on the other hand produced a transfer agreement which appears to have been executed between the parties herein before the District Officer Rumuruti division. They also produced an official receipt in respect of the transfer of the defendant's shares from Ngarua.

57. For this court to interfere with the plaintiffs' registration as the absolute proprietors of the suit property, the defendant needed to satisfy it, by way of evidence, that the registration of the plaintiffs as the absolute proprietors of the suit property was obtained or made by fraud or mistake. As pointed above, the defendant has failed to discharge that duty.

58. This, therefore, means that the orders sought in the defendant's counter-claim are unmaintainable in the circumstances of this case.

59. The upshot of the foregoing is that the plaintiffs' case has merit and is allowed in terms of prayers 1, 2 and 3.

60. As the plaintiffs are to blame for the direction the dispute concerning the suit property took, I condemn them to pay the costs of the suit.

Dated and signed at Nyeri this 16th day of February 2015.

L N WAITHKA

JUDGE

Dated, signed and delivered at Nakuru this 25th day of February 2015.

A. MSHILA

JUDGE