



REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 418 OF 2015

NAFTAL MARY ONDARI.....PLAINTIFF

VERSUS

WYCLIFF NYAMAO ANCHINGA..... DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff instituted this suit vide a plaint dated 14th September, 2015 claiming that he is the sole registered owner of land parcel number **BASSI/BOGETAORIO/3980** (hereinafter referred to as the suit property). He claims that during the period when he was working in the USA, he sent money to the Defendant who is his father to buy the suit property together with other parcels of land on his behalf but the Defendant caused the suit property to be registered in his own name. When he came back from the USA in 2015, the Defendant voluntarily transferred the suit property to him. The suit property comprises a permanent house with 12 rooms where he currently resides.
2. After the suit property was transferred to the Plaintiff, the Defendant without any justifiable reason placed a caution against its title on 6th July, 2015 claiming an interest in it. The Plaintiff claims that the Defendant subsequently trespassed into the suit property with the intention of taking a few of the rooms without his authority or consent.
3. The Plaintiff therefore seeks a permanent injunction restraining the Defendant from interfering with the Plaintiff's use and occupation of the suit property.
4. The Defendant filed a Defence dated 4th October, 2015 which was amended on 4th March 2016 to include a Counterclaim. He denied all the allegations by the Plaintiff and claimed that the Defendant had fraudulently caused the suit property to be transferred to himself. He also claimed that he was the lawful owner of the suit property and prayed for cancellation of the Plaintiff's title so that the suit property could revert to him.
5. The matter proceeded for hearing and both parties testified and called their witnesses.

PLAINTIFF'S CASE

6. At the hearing of the plaintiff's case, the Plaintiff testified as PW1. He stated that the Defendant was his father. He told the court that he was the registered owner of the suit property. He produced a copy of a Certificate of Official Search as Plaintiff's exhibit 1.
7. He testified that he bought the suit property from one Ongiri Akama who was his mother's cousin in the year 1999. He claimed that he used to work as a clerk in the Judiciary and he later relocated to the USA. While he was in the USA he used to send money to the Defendant to purchase several properties on his behalf. He also sent the Defendant money to build a six-bedroom house but when he came back, he found his parents raring chicken in the said house.
8. It was his testimony that after he bought the suit property the same was not transferred to him immediately, but instead it was registered in the name of the Defendant to hold it in his trust because he was away in the USA.
9. He testified that when he came back to Kenya in 2015, his father willingly transferred the suit property to him. He produced a transfer form dated 31st March, 2015 bearing his father's passport photograph as Plaintiff's exhibit 2. He testified that before the transfer was effected by his father in his favour, he obtained the consent of the Land Control Board on 16th March, 2015. He produced the application for consent, the consent letter and the Defendant's National Identity card as Plaintiff's exhibits 3, 4 and 5 respectively.
10. He denied the allegations that he stole the suit property from the Defendant since it was the Defendant who transferred the same to him. He testified that his father had made a report at Ogembo Police Station that the Plaintiff had stolen the title deed to the suit property and the

Defendant's National identity card but he was let off the hook.

11. He stated that the suit property has a residential house where he stays with family. He has also constructed 12 rental rooms. He prayed that the Defendant be restrained from interfering with the suit property.

12. Upon cross examination the Plaintiff claimed that he bought three portions of land from Mary Akama Ongiri and Thomas Akama Ongiri which were later amalgamated to form the suit property. He however stated that he did not have any of three agreements to prove that he actually entered into sale agreements. He stated that the said sale agreements were witnessed by his mother, the Defendant, one Joseph Otuoma and Philip Nyabuto.

13. He stated that after entering into the said agreements, he left the same with his father when he moved to the USA. He conceded that the transfer form did not bear his National identity card number, nor did it have his father's ID and Pin Certificate numbers. He also confirmed that the consent form was not dated. He conceded that he had not produced any evidence that he had developed the suit property. The Plaintiff did not call any other witnesses

DEFENDANT'S CASE

14. The Defendant testified as DW1 and called one witness Mary Kemunto Akama who testified as DW2. In his testimony the Defendant testified that the Plaintiff stole the title deed to the suit property which was registered in his name in 1976. He produced a copy of the title deed to the suit property as Defendant's exhibit 1. He told the court that he bought the suit property in 1976 at a cost of Kshs. 5,000 from one Mary Kemunto Akama, (DW2) in the presence of Thomas Akama, Francis Mose and Andrea Oseri. After the purchase of the suit property, he took possession of the same and planted trees, maize and bananas.

15. He testified that he constructed his home on the suit property. It was his testimony that at the time he bought the suit property the Plaintiff was only four years old. He denied allegations that he transferred the suit property to the Plaintiff. He further stated that the transfer documents produced by the Plaintiff were fake since he did not sign any of them. It was his testimony that he came to learn of the Plaintiff's illegal actions in 2015 when he was arrested and charged with conning some woman. He stated that immediately he discovered the Plaintiff's illegal actions, he reported the matter at Ogembo Police Station.

16. He therefore pleaded with court to assist him get back his land especially the portion measuring 50 feet by 100 feet currently being occupied by the plaintiff as the Plaintiff had denied him access to the said parcel since 2015. He prayed for cancellation of the plaintiff's title so that the title could revert to his name to enable him share the same with his 6 children.

17. Upon cross-examination, the Defendant confirmed that the Plaintiff had constructed a residential house on the suit property in 1998. However, the Defendant stated that he was the one who constructed the rental houses on the suit property. He said he was registered as the owner of the suit property on 12th August, 2011 and he was issued with the title deed.

18. He denied that he had transferred the suit property to the Plaintiff and stated that the Plaintiff had stolen his title deed and Identity card which he used to fraudulently transfer the suit property to himself.

19. On her part, DW2 testified that the defendant entered into a land sale agreement with her late husband Thomas Akama in 1976. She refuted the Plaintiff's claim that she and her husband had entered into three agreements for the sale of three portions of land which were amalgamated to form the suit property.

20. During cross-examination she confirmed that Naftali was the defendant's son and that he stayed on the suit property. She stated that she did not know what transpired after her husband sold and transferred the suit property to the Defendant nor did she know how the plaintiff and the Defendant related. There being no other witness, the Defendant closed its case.

21. Thereafter the court directed the Plaintiff and the 1st Defendant to file their respective written submissions. The Plaintiff filed his submissions on 12th May, 2021 while the 1st Defendant filed his submissions on 6th October, 2021.

PLAINTIFF'S SUBMISSIONS

22. Learned counsel for the plaintiff submitted that plaintiff was the lawful owner of the suit property and that the allegations by the defendants that the plaintiff acquired the title to suit property were not proved during the hearing of the case. He submitted that the law demands that he who alleges must prove and the Defendant did not prove that he lawfully acquired the title to the suit property.

DEFENDANT'S SUBMISSIONS

23. Learned counsel for the Plaintiff submitted that when a party's title is challenged, such a party needs to prove the root to his title. He relied on the case of **Munyu Maina -VS- Hiram Gathiha Maina CA NO. 239 of 2009**. He contended that it was incumbent upon the Plaintiff to establish that the root of his title as acquired was beyond reproach and/or questionable. It was therefore his submission that the Plaintiff did not dispose of the said burden. Counsel particularly pointed out that the Plaintiff did not prove that he sent money to his parents for them to purchase the suit property on his behalf while he was in the USA. He pointed out that there was no single document produced by the Plaintiff to confirm that he sent money to his parents for purposes of purchasing the suit property.

24. Learned counsel submitted that it was essential for the court to look at the procedure through which the title was acquired. He submitted that the transfer documents produced in court to prove the transfer of the property from the Defendant to the Plaintiff were not executed by Defendant nor did they bear his PIN number. Furthermore, there was no consent to the transfer produced in court. He therefore contended

that the transfer must have been obtained through fraud and thus it did not deserve any protection of the law.

25. Counsel referred the court to the provisions of section 26 (1) (a) and (b) and submitted that the since Plaintiff produced incomplete transfer documents, his title must have been obtained through fraud and the same ought to be cancelled. Counsel therefore implored this Court to dismiss the Plaintiff's claim and prayed that the Defendant's counter claim be allowed.

ISSUES FOR DETERMINATION

26. Having considered the pleadings, oral and documentary evidence on record and the rival submissions I deduce the following as the main issues for determination;

- i. Whether the Plaintiff acquired the title to the property legally.
- ii. Whether the Plaintiff is entitled to the reliefs sought.
- iii. Whether the Defendant has proved his Counterclaim and if so, whether judgment should be entered for the Defendant on the same.

ANALYSIS AND DETERMINATION

27. The Plaintiff filed this suit claiming that he was the absolute proprietor of the suit property. He sought a permanent injunction restraining the Defendant who is his father from interfering with the suit property. However, the Defendant who also lays claim to the suit property strongly challenged the process through which the Plaintiff acquired the title to the same.

28. The Plaintiff admits that the suit property was initially registered in the Defendant's name to hold it in trust for the Plaintiff as he was away in the USA. He further claims that that upon his return to Kenya, the defendant willfully transferred the suit property to him. The Defendant on the other hand denies the said claims and instead counterclaims that the Plaintiff stole his title deed to the suit property and fraudulently transferred the same to himself.

29. Section 26 (1) of the Land Registration Act provides that the title of a registered proprietor is indefeasible unless it is shown the title was obtained through fraud or misrepresentation to which the title holder is proved to have been a party. Section 26 (1) of the Land Registration Act provides: -

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. (emphasis mine)

30. Although the Plaintiff produced a title deed in his name, the same was challenged by the defendant. It was therefore incumbent upon the Plaintiff to show that his title was not acquired fraudulently, illegally unprocedurally or through a corrupt scheme as outlined in Section 26 outlined hereinabove.

31. Since the root of the Plaintiff's title was in question, it was not sufficient for the Plaintiff to waive his title to the suit property as proof of ownership. In the case of **Munyu Maina v Hiram Gathiha, Nyeri C.A No. 239 of 2009 [2013] eKLR** the Court of Appeal stated that where a title is under challenge, a registered proprietor must go beyond the instrument of title and prove the legality of how he acquired the title.

32. As rightly submitted by counsel for the Defendant, the Plaintiff was under an obligation to demonstrate to this court that he legally acquired the suit property by producing sufficient evidence to show that the process through which the title deed was transferred from the Defendant to him was legal.

33. Although the Plaintiff produced several documents to prove the transfer of the suit property from the Defendant to himself, a keen look at the said documents reveals the same are not helpful to his case because they are incomplete. For instance, the Transfer form was not executed by the Defendant nor does it bear the ID number and PIN number of transferor who is the Defendant in this case.

34. Furthermore, the consent letter from the Land Control Board is not dated and signed as required. It is therefore obvious that the transfer was hurriedly done and the procedure was not strictly followed. The only inference that can be drawn from this is that the suit property must have been illegally and fraudulently transferred to the Plaintiff.

35. Additionally, the Plaintiff's claim that he sent money to the Defendant to purchase the suit property on his behalf is not backed by any evidence. The Plaintiff did not produce any sale agreement with the original owners nor did he call any of the three people he alleged to have been present during the execution of the agreement as witnesses. What is even more intriguing the fact that DW2 whom the Plaintiff claims to have bought part of the suit property from appeared as a witness before this court and testified that she did not enter into any sale agreement with the Plaintiff. It is therefore my finding that the Plaintiff's title was obtained fraudulently and it is therefore liable to be cancelled.

36. In light of the foregoing, it is incumbent upon this court to invoke the provisions of Section 80 of the Land Registration Act, 2012 and order for rectification the title to the suit property by cancelling the title issued to the Plaintiff in respect of the suit property so that the same can revert to the Defendant. Section 80 provides thus: -

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the 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 any act, neglect or default.

37. The upshot is that the Plaintiff has failed to prove his case on a balance of probabilities and is hereby dismissed. Conversely, the Defendant's Counterclaim succeeds and I enter judgment for the Defendant and make the following final orders:-

a) The Plaintiff's suit is dismissed.

b) The title in respect of L. R No. BASSI/BOGETAORIO/3980 in the name of Naftali M. Ondari is hereby cancelled.

c) The Land Registrar Kisii County is hereby directed to rectify the land register in respect of land parcel LR. No. BASSI/BOGETAORIO/3980 by reversing the entry made in favor of Naftali M. Ondari (Plaintiff) and reinstating the name of Wycliff Nyamao Anchinga (Defendant) as the registered owner.

d) Since the parties are father and son, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF FEBRUARY, 2022.

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J.M ONYANGO

JUDGE