



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 758 OF 2013

HARRISON MACHARIA GATUTHU APPLICANT

VERSUS

COUNTY LAND REGISTRAR, MURANGA 1ST DEFENDANT

COLONEL DANSON MACHARIA 2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

By his plaint filed herein on 15th October 2013, the plaintiff sought judgment against the defendants jointly and severally in the following terms:-

- a. *Special damages Ksh. 453,500*
- b. *Future rental expenses until judgment and payment*
- c. *A declaration that the Estate of GEOFFREY GATUTHU NJUGUNA and the plaintiff are the bonafide legal owners and/or beneficial owners of land parcel number LOC 2/KINYONA/148*
- d. *A declaration that the title deed held by the 2nd defendant in respect of the land parcel number LOC 2/KINYONA/148 was obtained fraudulently, unlawfully and irregularly and is therefore invalid, null and void and that this Honourable Court do order that the same be cancelled forthwith*
- e. *A permanent injunction restraining the 2nd defendant, his servants and/or agents from alienating, dealing, disposing of, entering on or interfering in any manner whatsoever with land parcel number LOC 2/KINYONA/148*
- f. *Costs of the suit and interest.*

The plaint was filed on the basis that at all material time, the late GEOFFREY GATUTHU NJUGUNA was the registered owner of the parcel of land number LOC 2/KINYONA/148 (hereinafter the suit property) and the plaintiff as the administrator of his Estate to whom the said suit property had been bequeathed, put up a house on the same but the 2nd defendant unlawfully and illegally demolished the same which was valued at Ksh. 300,000/=. As a result of the said demolition, the plaintiff was forced to seek rental accommodation at a monthly rate of Ksh. 2,000/= with effect from October 2009 until December 2009 when it was increased to Ksh. 3,000/= and thereafter Ksh. 3,5000/= with effect from January 2013 and he has therefore paid Ksh. 145,500/= upto September 2013 which he claims and which he continues to incur. That on or about 22nd July 2013 when he conducted a search, he found that the suit property had fraudulently been transferred to the 2nd defendant on 10th January 2005 and a title deed issued to him on 19th January 2005 yet there was never any sale agreement between the deceased and 2nd

defendant. The transaction was therefore fraudulent and particulars of fraud as against the both the 1st and 2nd defendant have been pleaded in paragraph 12 of the plaint.

The 1st and 3rd defendants entered appearance through the Senior Deputy Solicitor General on 10th March 2014 and filed a defence on the same day (although the same is headed as 2nd and 3rd defendants' statements of defence which must be an error). In the same defence, the 1st and 3rd defendants denied the plaintiff's averments putting him to strict proof thereof. The 2nd defendant did not enter appearance or file any defence and on 20th June 2014, interlocutory judgment was entered against him.

The case came up for hearing on 25th September 2014 and though served, the Hon. Attorney General did not appear on behalf of the 1st and 3rd defendant and the matter therefore proceeded for hearing ex-parte.

I have considered the plaintiff's un-controverted evidence together with the documentary exhibits that he has produced in support of his case.

The plaintiff is a son to the deceased GEOFFREY GATUTHU NJUGUNA and obtained a limited grant of letters of Administration ad litem prior to filing this suit (Exhibit 1). Prior to his death on 19th January 1988 (see death certificate Exhibit 2), the deceased was the registered proprietor of the suit property as per the green card (Exhibit 3). The plaintiff testified that neither he nor his deceased father sold the suit property to the 2nd defendant and there was no evidence of any consent by the Land Board. It is the plaintiff's case that since his late father died on 19th January 1988, he could not have sold the suit property to the 2nd defendant yet, when a search was conducted at the Lands Registry, the official search (Exhibit 5) revealed that the suit property had been transferred to the 2nd defendant on 10th January 2005 and a title deed issued to him on 19th January 2005 and that is clear evidence of fraud. This Court agrees with the plaintiff. The plaintiff has himself denied selling the suit property to the 2nd defendant and it is unlikely that the deceased who was the registered proprietor of the suit property could have transferred the same to the 2nd defendant in 2005 having died some seventeen (17) years earlier. That is also clear evidence of fraud on the part of both the 1st and 2nd defendants herein. On the un-controverted evidence of the plaintiff herein, I am satisfied that he has proved that the registration of the suit property in the names of the 2nd defendant was obtained through fraudulent means of which the 2nd defendant must have had knowledge. The registration of the suit property in the names of the 2nd defendant having been obtained through fraudulent means, this Court must declare it null and void and cancel it and also declare that the Estate of the deceased GEOFFREY GATUTHU NJUGUNA and the plaintiff are the bona fide owners of the same. The Court also finds that the order of a permanent injunction restraining the 2nd defendant, his servants and/or agents from alienating, dealing, disposing of, entering or interfering in any manner with the suit property is well merited and must be granted. The Usual notice was issued to both the 2nd defendant and the 1st and 3rd defendants as required under the Government proceedings Act. The plaintiff is therefore entitled to judgment in terms of prayers (c) (d) and (e) of his plaint.

The plaintiff further claims a sum of Ksh. 453,500 being the costs of his house which the 2nd defendant damaged and the costs incurred in renting alternative accommodation. Evidence was adduced by ZACHARIA MACKENZIE (PW2) a valuer who visited the suit property and took photographs of the damaged house whose value he put at Ksh. 300,000 as per his report (Exhibit 12 A) and for which the plaintiff paid a fee of Ksh. 8,000 (Exhibit 12 B). The plaintiff himself produced receipts showing that as at the time of the trial, he had spent Ksh. 145,000 as rent following the demolition of his house. Those sums add upto Ksh. 453,500 as special damages which were specifically pleaded and proved. The plaintiff is therefore entitled to prayer (a) of his plaint.

With regard to prayer (b) which is a claim for future rental expenses until judgment and payment, this claim is not available to the plaintiff because the Court cannot presume that the plaintiff will in fact continue renting premises and if so, at what rent. This is a special damage claim which must not only be specifically pleaded but also proved. It cannot be left to speculation. That claim must be rejected.

Ultimately therefore having considered the evidence herein and believing the plaintiff's un-controverted evidence as I do, I enter judgment for him as prayed in paragraphs (a) (c) (d) (e) and (f) of his plaint.

The 2nd defendant who has the title to the suit property did not enter appearance nor file defence and therefore this Court is not in a position to make orders in terms of **Order 21 Rule 6 of the Civil Procedure Rules** with regard to the production of the title. Nonetheless, this Court having found that the registration of the suit property in the names of the 2nd defendant was fraudulent, the Registrar is ordered to rectify that registration accordingly in terms that will give effect to this judgment.

It is so ordered.

B.N. OLAO

JUDGE

13TH MARCH, 2015

17/3/2015

Before

B.N. Olao – Judge

Gichia – CC

Plaintiff – present

Defendant – absent

COURT: Judgment delivered in open Court this 17th day of March 2015

Plaintiff present

Defendant absent.

B.N. OLAO

JUDGE

17TH MARCH. 2015