



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 92 OF 2014

GERALD WANJOHI WACHIURI.....PLAINTIFF

-VERSUS-

ESTON NDUNGU WANYOIKE.....1ST DEFENDANT

PATTERSON GICHOHI NDUNGU.....2ND DEFENDANT

JUDGMENT

Background

1. The suit herein is in respect of the parcel of land known as **Euaso Nyiro/Suguroi Block VI/ 135** measuring 1.13 hectares (hereinafter referred to as the suit property). The plaintiff's case is that he acquired the suit property by virtue of being a member of a land buying company called Gatarakwa Farmers Company Limited. In accordance with his shares in the company, the company allocated him the suit property to which he later obtained title.

2. Despite having taken possession of the suit property and fenced it, he recently discovered that the property had fraudulently been transferred first to the 1st defendant (in 1996) and later to the 2nd defendant (in 2000). He complained to the Land Registrar, Nanyuki who asked the defendants to hand over the titles deeds they had obtained in respect of the suit property for cancellation. The Land Registrar advised him (plaintiff) to obtain a court order for expulsion of the entries from the register.

3. Maintaining that registration of the suit property in favour of the defendants was effected fraudulently, the plaintiff prays for judgment and declaration against the defendants, jointly and severally, for orders that:-

1) The suit property belongs to him and all the transactions done by the defendants therein were fraudulent and illegal;

2) entries numbers 4, 5, 6, and 7 in the register of the suit property be expunged therefrom and his title and ownership of the suit land be restored.

3) The plaintiff also seeks costs of the suit and any other or better relief this court may deem fit to grant.

4. After attempts to effect personal service on the defendants failed to bear fruits, the plaintiff obtained leave to serve the defendants by way of substituted service (by advertisement). As ordered by the court, the respondent effected service on the defendants by advertisement of the summons in the Daily Nation Newspaper of Wednesday July, 2014.
5. Despite having been served in the manner identified above, the defendants failed to enter appearance within the time stipulated in law and at all. As a result, on application by the plaintiff, interlocutory judgment was entered against the defendants on 12th August, 2014.
6. Following entry of judgment against the defendants, the plaintiff fixed the suit for formal proof.
7. When the matter came up for hearing (formal proof) on 6th July, 2015 the plaintiff reiterated that he bought the suit property from the company mentioned herein above where he was a shareholder. He produced a receipt showing that he paid Kshs. 2200/= for Bellavue Estate; as Pexbt 1. He also produced a receipt showing that he paid Kshs. 1200/= as survey fees, as Pexbt 2. The receipts are dated 11th October, 1976 and 27th August, 1986 respectively.
8. The plaintiff explained that after balloting, he was initially given plot No. 65 measuring 4 acres but after the former President (His excellency Daniel Arap Moi) intervened and directed that balloting be repeated to accommodate shareholders who missed out on the allocation, his plot was reduced from 4 to 2 ½ acres. In that process his parcel of land changed from plot No. 65 to plot No. 135. Thereafter, boundaries were marked and the shareholders issued with title deeds. He took possession of his parcel and began cultivating one acre thereof. He produced the title issued to him in respect of the suit property as Pexbt 3.
9. After the 2nd defendant began claiming the suit property on grounds that he had purchased it from the 1st defendant, he went to the lands office to complain. Luckily, he found the defendants at the lands office. Upon presenting his documents to the Land Registrar, the Land Registrar cancelled entries number 4 to 7 in the land register and advised him to go to court and obtain an order for cancellation of the entries. He produced a copy of the green card in respect of the suit property as Pexbt 5.
10. Explaining that the defendants were served by substituted service because it was not possible to trace them using their physical addresses, the plaintiff urged the court to allow the claim as prayed.

Analysis and determination:

Entry of interlocutory judgment:

11. As pointed out herein above, after the defendants allegedly failed to enter appearance within the time stipulated in law, the plaintiff applied for and obtained interlocutory judgment against the defendants. The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff's claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment can only be entered in respect of a liquidated claim only. In this regard see **Order 10 Rule 2** of the Civil Procedure rules which provides as follows:-

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”

12. Also see the case of **Serraco Limited v. Attorney General (2009) eKLR** where it was observed:-

“a sum is said to be liquidated when it is fixed or ascertained. The term is usually employed

with reference to damages.” Whereas liquidated damages is defined as:- “The amount agreed upon by a party to a contract to be paid as compensation for the breach of it and intended to be recovered whether the actual damages sustained by the breach are more or less in contrary distinction to a penalty.”

13. In view of the foregoing, the plaintiff’s case being for recovery of land, I find and hold that the claim does not fall under the kind of claims for which interlocutory judgment could have been entered in favour of the plaintiff under order **10 Rule 2**.

14. The plaintiff ought to have proceeded under **Order 10 Rule 9** which provides as follows:-

“Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

15. The above notwithstanding, having perused the court record, I am satisfied that the defendants were pursuant to a court order made on 30th June, 2014 served by way of substituted service and despite having been served, they failed to enter appearance and to file their defence within the time stipulated in law and at all.

16. The evidence adduced in this court shows that the plaintiff was issued with a title deed in respect of the suit property way before the defendants obtained titles in respect thereof. There being no evidence to show that the registration in favour of the defendants was lawful or bona fide, I have no reason to disbelieve the allegation to the effect that the defendants obtained title documents to the suit property fraudulently.

17. Under **Section 143** of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) which by dint of the provisions of Section 107 of the Land Registration Act, 2012 applies to the suit property, this court has power to 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.

18. There being evidence that the plaintiff was the first to be registered as the proprietor of the suit property and there being no evidence that registration in favour of the defendants was lawful or bonafide, I find the plaintiff’s claim to have been proved on a balance of probabilities and allow it as prayed.

Dated, Signed and Delivered at Nyeri this 22nd day of October, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Kaanga h/b for Mr. Wachira for the plaintiff

N/A for the defendant

Court Assistant - Lydia