



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL MISC. NO. 105 OF 2013

HENRY MSAKU NGEI.....1ST PLAINTIFF

PATRICK MUTINDA NGEI..... 2ND PLAINTIFF

VICTOR NGEI (Suing on their own behalf as

Administrators of the Estate of the late PAUL JOSEPH NGEI.....3RD PLAINTIFF

VERSUS

GATATHA FARMERS COMPANY LTD.....1ST DEFENDANT

RULING

The Defendant's application dated 3rd April 2013 is the subject of this ruling. The application is brought under sections 1A and 1B of the Civil Procedure Act, Order 2 Rule 15(1) (b)(c) and (d) of the Civil Procedure Rules and seeks the following orders:-

- a. That the plaint dated 21st January 2013 be struck out for being scandalous, frivolous, vexatious and otherwise an abuse of the process of the court.
- b. The costs of this application and the entire suit be borne by the plaintiffs/Respondents.

The application is supported on the grounds that appear on the face of the application and on the grounds on the annexed affidavit of **Peter Mburu Gakwa** the Chairman of the Defendant Company sworn on 3rd April 2013. The Defendant inter alia avers that:-

1. That the plaintiffs have absolutely no interest in the suit property **L.R.NO.1848/3** the same having been acquired by the Defendant for valuable consideration from the then registered proprietor **Mr. Peter Kamau Kibera**.
2. That the suit land is now registered in the name of the Defendant and cannot form part of the estate of the late **Paul Joseph Ngei**.
3. That the plaintiffs have tendered no evidence whatsoever to show or demonstrate that the suit property belongs to their late father.
4. That the Defendant have since purchasing the suit property been in occupation and have effected

developments thereon including erecting buildings that are occupied by its staff.

The Defendant vide the supporting affidavit by its Chairman deposes that the Defendant is the registered proprietor of **L.R. NO. 1848/3** situate in **Matungulu Machakos County** as per the copy of the duly registered indenture of assignment dated 8th June 2011 annexed and marked **“PMG-1”** and a copy of certificate of postal search dated 4th June 2012 also annexed and marked **“PMG-2”**. The Defendant deposes that it purchased the said suit property from the previous registered proprietor **Mr. Peter Kamuru Kibera** who had purchased the suit property through the Deposit protection fund (DPF) who were acting as the **Liquidation Agents of Pan African Credit and Finance Limited (in liquidation)** who were the mortgagees of the suit property. The copy of the indenture of Assignment to the said **Peter Kamuru Kibera** from the Deposit protection fund (DPF) was registered in volume N. 91 Folio 168/9 file 14112 on 14th December 2010 and a certificate of postal search dated 4th January 2011 issued by the Registrar of Government Lands confirms this. The copy of the Assignment and the postal search are annexed to the Defendants affidavit and marked **“PMG-9”** and **“PMG-12”** respectively.

The Defendant avers that the father of the plaintiffs, the late **Mr. Paul Joseph Ngei**, had offered the suit property as security to secure moneys advanced to him by Pan African Credit and Finance Ltd and after he failed to pay the mortgage debt and other debts he was declared bankrupt and upon the deceased application to be discharged from the Bankruptcy being heard, the **Hon. Justice A.I. Hayanga** (as he then was) made the following order in **H.C Bankruptcy cause NO. 14 of 1988** on 20/1/1997.

“I have heard the parties to this bankruptcy application for discharge. I have taken into consideration the report of the official Receiver and the consent by all the creditors concerned with the bankrupt’s application to be discharged. I confirm that the bankrupt has complied with the conditions imposed by the creditors and there being no objection I am happy to give an order discharging Paul Joseph Ngei from the order of bankruptcy issued earlier by this court. It will be a condition of this discharge order that the same Paul Joseph Ngei will not in any way interfere or in anyway obstruct the two secured creditors herein from realizing their securities now secured to them in respect of their credit to the bankrupt. That is the order of the court”

The Defendant aver that they purchased the suit property from **Mr. Peter Kamuru Kibera** for the total consideration of **Kshs.201,880,000/-** and have annexed two agreements for sale dated 16th August 2010 and 30th March 2011 marked **“PMG-3”** and **PMG-4”** respectively. That upon payment of the purchase price the suit property was transferred to the Defendant vide the Indenture of Assignment dated 8th June 2011 registered at the Government Lands Registry in volume **N. 91 Folio 168/10 file 14112** after due process of obtaining the appropriate consent of the Land Control Board and paying stamp duty had been done. The Defendant therefore contends they are the rightful owners of the property and the plaintiffs suit against the defendant has no basis and the same ought to be struck out.

The plaintiff filed grounds of objection dated 3rd October 2013 and a replying affidavit dated 3/10/2013 through **Henry Masaku Ngei** in opposition to the Defendant’s application. The plaintiffs state the suit property belongs to their deceased father and contend that ownership has never changed. The plaintiffs state that various correspondences from the Ministry of Lands indicate the property to be still registered in their late father’s name and attach a copy of a letter from the former Minister **James Orengo** addressed to **Hon. Johnson Muthama**, MP dated 3rd January 2013 in which the Minister stated that **L.R. NO. 1848/3** was registered in the name of Late **Hon. Joseph Paul Ngei**. The plaintiffs allege that the existence of such correspondence from Senior officials at the Ministry of Lands indicate there is a dispute as to the ownership of the suit land that can only be resolved at the trial through evidence.

The plaintiffs further raise issue with the manner the realization of the security over the suit land was carried out arguing due process was not followed and contends that entry of the Defendant into the suit property constitutes trespass and claims that the documents the Defendant relies on as evidencing its ownership are forgeries and do not reflect the position at the Lands Registry. The plaintiffs contend the Defendants have no basis to be on the suit property without the sanction of the administrators of the deceased estate. The plaintiffs urge the court to find the Defendant’s application to be in abuse of the

court process and without merit and to dismiss the same with costs.

The parties filed written submissions on the court's directions. The Defendant/Applicant filed its submissions on 14th October 2013 and the plaintiff/Respondents submissions were filed on 13th February 2014. The plaintiff/Respondents submissions are headlined as submissions to the Defendant/Applicant's Notice of Motion dated 31st January 2013. With respect to the plaintiff the application by the Defendant/applicant that the court had directed to be heard and in respect of which submissions had been directed to be filed was the application dated 3rd April 2013. The record of the court clearly attests to this. On 15/4/2013 when the Defendant's application dated 31/1/2013 was scheduled to be heard the plaintiff/Respondent was not represented in court. **Mr. Kiura Advocate** for the Defendant on the date conceded that the said application had been overtaken by events, the court having set aside and vacated the earlier *ex parte* interim orders granted on 24/1/2013 in favour of the plaintiff. The Defendants application of 31st January 2013 had sought a stay of the injunctive orders of 24th January 2013 and the setting aside of the same. The court on 13/2/2013 declined to extend the orders issued on 24/1/2013 and vacated the orders. The plaintiff was represented in court on 13/2/2013. The court on 15/4/2013 directed that the application by the Defendant dated 3/4/2013 be fixed for hearing at the court registry and on 16/4/2013 the Defendant's/application dated 3/4/2013 was fixed for hearing on 4/7/2013. As the plaintiff had not filed a response to the application the same was adjourned with leave to the plaintiff to file their response to the application within 14 days. The application was refixed for hearing on 23rd September 2013 when yet again the plaintiff had not filed a response to the application.

The court on 23/9/2013 specifically granted the plaintiff leave of 10 days to file their response to the Defendants application dated 3rd April 2013 and directed the parties to file written submissions on the application. The plaintiffs ultimately filed their replying affidavit on 4th October 2013. I have taken the liberty to set out the chronology of events to illustrate that the application dated 31/1/2013 in respect of which the plaintiff has addressed in their submissions did not fall to be determined since it in fact had been overtaken by events the court having already set aside and vacated the orders it issued on 24/1/2013.

The court record is clear as to which application is the subject of this ruling and thus on behalf of the plaintiff the court has to consider the grounds of opposition dated 3rd October 2013 and filed on 4th October 2013 and the replying affidavit dated 3rd October 2013 and filed in court on 4th October 2013. The grounds of objection the plaintiff set out are as follows:-

1. The plaintiffs is in possession of evidence which establishes conclusively that the deceased **MR. PAUL JOSEPH NGEI** was the legal owner of suit property and continues to be the owner to date.
2. The plaintiffs have conclusive proof that the suit property was part of the properties of the estate of the late **PAUL JOSEPH NGEI** which they were and are still under legal duty to administer as per the law.
3. The allegation that the suit property was conveyed to the Pan African Credit Finance Ltd following orders in the Bankruptcy proceedings is questionable and has no reliability in law.
4. There are numerous triable issues herein which ought to be admitted for hearing on merits.

The Defendant's in their submissions assert that the plaintiffs claim to ownership of the suit property is unfounded and specifically point to the correspondence from the permanent Secretary Ministry of Lands and the former Minister for Lands as being of no consequence. The letter from the Permanent Secretary dated 26th July 2012 was based on an official search dated 2nd September 2008 which the PS acknowledged was not current. The former Minister's letter dated 3rd January 2013 does not indicate the source of the information contained therein. With respect the said correspondences not being based on the current status of the Land Registry records as at the time they were authored are worthless in showing what the status of the suit land was at the time they were authored. Land Registry records are public records and are accessible by any person upon payment of a nominal fee. It is illustrative that the plaintiffs did not seek to obtain an official search of the suit property before coming to court.

The Defendant's have in their submissions asserted that they are the registered owners of the suit property

and have demonstrated how they came to acquire interest in the suit property. There is no dispute that the suit property was indeed owned by the late **Paul Joseph Ngei** who mortgaged it to Pan African Credit and Finance Ltd who went into liquidation. There is also no dispute that the late **Paul Joseph Ngei** was adjudged bankrupt and that though his bankruptcy was discharged it was on the condition that he would not interfere in anyway or obstruct the realization of the securities that were held by the secured creditors (see order by **Hayanga, Judge** in Bankruptcy cause NO. 14 of 1988 -*supra*).

The Defendant's have submitted evidence that the (DPF) who were the Liquidation Agents for Pan African Credit and Finance Limited sold the suit property to **Peter Kamuru Kibera** in 2003 and an Indenture of Assignment was registered in his favour at the Lands Office on 14th December 2010. The record shows the transaction in favour of **Peter Kamuru Kibera** was accorded consent of the Land Control Board and a search on the property made on 4th January 2011 at the Lands office confirms the said **Mr. Kibera** was the registered proprietor of the property as at that date. The suit property was sold to the Defendant by the said **Peter Kamuru Kibera** pursuant to the agreements for sale dated 16th August 2010 and 30th March 2011. The indenture of conveyance in favour of the Defendant was registered on 11th July 2011 at the Land Registry in Volume **N0 91 Folio 168/10 file 14112** and an official postal search conducted on 4/6/2012 at the Land Registry by the Registrar of Government Lands confirms that the Defendant was the registered proprietor of **L.R.NO.1848/3** measuring 1263 acres less 10 acres road reserve (the suit property) for a term of 999 years from 1/9/1913.

The Defendant thus submits it holds an absolute and indefeasible title under the provisions of section 26(1) of the Land Registration Act NO. 3 of 2012 and that the plaintiff has not shown and/or demonstrated they have any proprietary interest in the suit property to entitle them to proceed with the suit against the Defendant. The Defendant therefore seeks the prayers sought in its Notice of Motion dated 3rd April 2013.

I have reviewed the pleadings and the Defendant's application dated 3rd April 2013 together with the affidavit in support and in opposition and the annexures thereto and the parties submissions and the issue for the court to determine is whether the plaintiffs' claim raises any triable issue and/or a cause of action against the Defendant and/or is frivolous and vexatious and otherwise an abuse of the process of the court.

The plaintiffs were on 21st June 2012 issued with temporary letters of administration of the estate of **Paul Joseph Ngei** (deceased) and there is no record that these letters of administration have been confirmed and neither has any inventory of the assets of the deceased been disclosed except that the plaintiffs by the plaint filed herein claim the suit property is still registered in the name of the deceased and thereof devolves to his estate and liable to be administered by the plaintiffs. The plaintiffs by their plaint claim that the Defendant has illegally and without any colour of right claimed ownership of the suit property and allege that the Defendant's claim is fraudulent and illegal and has no legal foundation. Of note however is the fact that no particulars of the alleged fraud against the Defendant has been given and/or pleaded. Fraud has to be specifically pleaded and proved and the standard proof in civil cases is higher than on a balance of probabilities though lower than beyond a reasonable doubt.

The Defendant in my view has tendered incontrovertible evidence that they are the registered owners of the suit property. The Defendant have explained and illustrated how they came to be the registered owners. The Defendants were purchasers for value from the previous registered proprietor, **Mr. Peter Kamuru Kibera** and equally there is clear evidence as to how the said **Peter Kamuru Kibera** came to be registered as the owner of the suit premises following a purchase of the property from the liquidation Agent of Pan African Credit and Finance Ltd. The deceased **Paul Joseph Ngei**, had bound himself not to interfere with the realization of the security held by the secured creditors as a condition for him being discharged from the Bankruptcy he had been consigned to.

The plaintiffs at the time they filed the instant suit claiming they were entitled to the suit parcel of land as beneficiaries of the estate of the late **Paul Joseph Ngei** and further asserting that the suit land was still registered in the name of the deceased were definitely misleading the court as this was not the correct

state of affairs. The correspondence from the Ministry of Lands attributed to the Permanent Secretary and the former Minister for Lands was outdated and the plaintiffs would have by exercise of due diligence have obtained records from the lands office and would have discovered that the suit land had been conveyed to the Defendant and that the Defendant was the registered proprietor.

Having regard to all the facts I am not satisfied that the plaintiffs have tendered any material or evidence to show that there was any fraud in the registration of the Defendant as the owner of the suit premises. To the contrary the Defendant has shown that they were regularly and procedurally registered as the owner of the suit property. Under the provisions of sections 24, 25 and 26 of Land Registration Act NO. 3 of 2012 the Defendant was by virtue of registration as owner of the suit property vested with absolute ownership and their rights of proprietorship are not liable to be defeated except as provided under the Act. Section 26(1) of the Act provides that the certificate of title held by a proprietor is conclusive evidence of proprietorship and can only be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party and/or that it is shown the title has been acquired illegally unprocedurally or through a corrupt scheme.

Section 26(1) of the 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 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.

I have made a finding that the plaintiffs have not shown or established any fraud and/or misrepresentation on the part of the Defendant in obtaining their title. Indeed no particulars of fraud/misrepresentation against the Defendant have been given and/or pleaded. There is no basis upon which the plaintiffs can challenge the defendant's title to the suit property. The Court of Appeal in considering the effect of section 23 (1) of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) which was a replica of the current section 26(1) of the Land Registration Act, 2012 in the case of **DR. JOSEPH N.K. ARAP NGO'K –vs- JUSTICE MOIJO OLE KEIWA & 5 OTHERS C.A NO. 60 OF 1997** observed thus:-

“Section 23(1) of the Act gives absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. Infact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.

In the present matter the deceased title to the suit property was extinguished once the creditors realized their security and the administrators cannot revive that interest through any succession proceedings. There is evidence that the creditors sold the suit property to the proprietor who subsequently sold and transferred the suit property to the Defendant. Following the realization of the security the deceased ceased to have any interest in the suit property. The Defendant on their part were innocent purchasers for value without any notice of any defect in the title and they are entitled to all the rights conferred on a proprietor under section 25 of the Land Registration Act. The legal ownership of the Defendant of the suit property is in terms of section 26(1) of the Land Registration Act conclusive in the face of their being

registered owners and in the absence of any evidence of fraud or misrepresentation in procuring the registration. The Registrar of Government Lands has through the certificate of official search dated 4/6/2012 certified the Defendant to be the registered proprietor.

I am satisfied that the plaintiffs grounds of opposition and the replying affidavit do not counter the application by the Defendant. Having regard to the material and evidence placed before the court I am satisfied the suit by the plaintiffs do not raise any triable issue that would merit to have the suit go to full trial. There cannot be a cause of action against the Defendant as the fact of its ownership of the suit property cannot be challenged otherwise than under the grounds set out under section 26(1) of the Land Registration Act which I have held not to be available to the plaintiffs. The plaintiffs definitely know or ought to have known the deceased parcel of land was sold pursuant to the compromise entered in the Bankruptcy cause referred to earlier in this ruling. Litigation has to somehow come to a close and litigants ought to respect that and in the present case the family of the deceased ought to have appreciated that the effect of the settlement in the Bankruptcy cause was to effectively remove the suit property from the schedule of the deceased assets and therefore could not be available to the beneficiaries after the deceased death.

In the premises and for all the reasons canvassed in this ruling I find and hold that the suit by the plaintiffs against the Defendant is frivolous and vexatious and is otherwise an abuse of the process of the court and I order that the same be struck out.

The costs of the application and the struck out suit are awarded to the Defendant.

Orders accordingly.

Ruling dated, signed and delivered this...30th.....day of.....July.....2014.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiffs

.....For the Defendant