



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 33 OF 2017

JARED MOGOI CYRIL MOGENI.....PLAINTIFF

VERSUS

GEORGE ONTWEKA.....1ST DEFENDANT

LABAN ORINDI OMWENGA.....2ND DEFENDANT

THE LAND REGISTRAR, KISII.....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff filed suit against the Defendants seeking the following reliefs:

- a) A declaration that the transfer and registration of the L.R No. WANJARE/BOGIAKUMU/2278 in the name of the 1st Defendant on the 31st March, 2016 and the subsequent transfer thereof in favour of the 2nd Defendant were fraudulent, illegal, null and void.
- b) An order cancelling and nullifying the title in respect of L.R No. WANJARE/BOGIAKUMU/2278 in the name of the 2nd Defendant and restoration of the register in respect of L.R No. WANJARE/BOGIAKUMU/2278 to and in favour of the Plaintiff.
- c) An order of eviction against the 1st and 2nd Defendants, their agents and/or servants from L.R No. WANJARE/BOGIAKUMU/2278.
- d) A permanent injunction restraining the 1st and 2nd Defendants either by themselves, agents, servants and/or anyone claiming under the said Defendants from entering upon, re-entering, taking possession, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with L.R No. WANJARE/BOGIAKUMU/2278.
- e) General damages for trespass
- f) Costs of this suit.
- g) Such further or other relief as the Honourable court may deem fit and expedient to grant.

2. Upon being served with the Plaint and Summons to enter appearance, the Defendants entered appearance but did not file any Defences.

The suit was subsequently set down for hearing and the parties testified and called their witnesses.

PLAINTIFF'S CASE

3. The Plaintiff testified as PW1. He told the court that on the 12th day of January, 2012 he entered into a land sale agreement with one James Nunda Ongechi in respect of L.R No. WANJARE/BOGIAKUMU/2278. The vendor subsequently transferred the suit property to the Plaintiff's name. He then took possession of the suit property but he discovered that it had been partially fenced by an unknown person. He then conducted an official search at the Land Office whereupon he discovered that the suit property had been transferred to the 1st Defendant

who in turn transferred it to the 2nd Defendant even though the Plaintiff was still in possession of the title deed thereof.

4. He stated that he took up the issue with the Land Registrar who summoned the 1st and 2nd Defendants to his office. The 2nd Defendant appeared at the Land office and when he was informed that he was holding an illegal title, he became violent. The Land Registrar then wrote a letter to the 1st and 2nd Defendants informing them that the title they were holding was illegal. The Plaintiff produced the documents in his List and Bundle of Documents as his exhibits. He prayed that the court declares that the 1st and 2nd Defendants' title are illegal null and void. He also prayed for a permanent injunction restraining the 1st and 2nd Defendants from interfering with the suit property, an eviction order and general damages for trespass.

5. The Plaintiff called one witness James Nunda Ogechi who testified as PW2. He testified that he was initially registered as the owner of the suit property and that he had sold the same to the Plaintiff.

DEFENDANT'S CASE.

6. Laban Orindi Omwenga (2nd Defendant) testified as DW1. It was his testimony that he bought the suit property from George Ontweka, the 1st Defendant after conducting an official search and confirming that the said George Ontweka was the registered owner of the suit property. The 1st Defendant subsequently transferred the suit property to him and he was issued with a title deed which he produced as Defendant's exhibit 3.

7. He testified that after obtaining the title deed, he proceeded to fence the suit property but sometime in the year 2016, he discovered that his fence had been destroyed. He then reported the matter to Gesonso Police Station. He testified that he later met the Plaintiff on the suit property and the Plaintiff told him that he was the owner of the suit property. DW1 told him that he also had a title deed in respect of the suit property. He told the court that he was subsequently summoned by the Land Registrar but the Land Registrar was unable to determine who the lawful owner of the suit property was. He stated that the Land Registrar advised them to file a case in court so that the court could determine who the lawful owner of suit property was. He maintained that as far as he was concerned the suit property belonged to him.

8. Upon cross examination, he said the 1st Defendant who sold him the land assured him that the suit property was registered in his name and he showed him an original title deed. He stated that the 1st Defendant informed him that he had bought the suit property from the Plaintiff and showed him a sale agreement between him and the Plaintiff. He stated that after he discovered that the Plaintiff was laying claim to the suit property, he reported the matter to Gesonso Police Station but he did not file a case in court.

9. Steve Mokaya, the Land Registrar, Kisii County testified as DW2. He traced the history of the suit property according to the green card. He stated that the suit property was a sub-division of land parcel number L.R No. WANJARE/BOGIKUMU/2531. It was first registered in the name of Marita Atandi on 7.10.1996. On 7.7.1997 it was transferred to James Nunda Ogechi who in turn transferred it to Jared Cyril Mogeni on 10.2.2012. He told the court that he had information that even though Jared Cyril Mogeni left the Country with his original deed, there was an entry in the register showing that the said Jared Mogeni had transferred the suit property to one George Ontweka on 31.3.2016. There was a subsequent transfer from George Ontweka to Laban Orindi Omwenga on 8.9.2016.

10. Mr. Mokaya told the court that on 6.1.2017, he received a complaint from the Plaintiff to the effect that his property had been transferred illegally. He then summoned the 1st and 2nd Defendants to his office through the office of the Chief Bogiakumu Location but they did not show up.

11. He testified that he wrote a letter to Gesonso Police Station stating that the transfer of the suit property to George Ontweka was fraudulent as the documents used to effect the said transfer were forged. He stated the photograph attached to the Transfer form did not belong to the Plaintiff. The ID attached to the Transfer Form was fake and the consent form was a forgery. He stated that Laban may have been a bona fide purchaser for value as it was George who forged the transfer documents. He produced the Transfer documents as Defence exhibits 4, 5 and 6.

12. Upon cross-examination he confirmed that the transfer that was done by the Lands office from Jared Mogeni to George Ontweka and finally to Laban Orindi Omwenga was fraudulent as the signature and stamp on the green card were fake. He stated that their records indicated that the suit property was currently registered in the name of Laban Orindi Omwenga although he had since established that the suit property lawfully belonged to the Plaintiff. He stated that he would cancel the title of Laban Orindi Omwenga and the fraudulent entries in the register if the court so directed. He testified that the said entries were made by a clerk at the Lands office who forged the signature of the former Land Registrar. He stated that he had genuine transfer documents relating to the suit property from James Nunda Ogechi to Jared Mogoi Cyril Mogeni but the subsequent transfers were unlawful as they were based on forged documents.

13. After the testimony of the Land Registrar the parties were granted time to file their written submissions. The Plaintiff filed his submissions on 14th January, 2022 but the Defendants did not file any submissions.

ISSUES FOR DETERMINATION

14. Having considered the pleadings, evidence on record and the Plaintiff's submissions, the issues for determination are:

- i. Whether L.R No. WANJARE/BOGIKUMU/2278 was fraudulently registered in the names of the 1st and 2nd Defendants.
- ii. Whether the Plaintiff is the lawful owner of the suit property.

iii. Whether the Plaintiff is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

15. It is not in dispute that the Plaintiff and the 2nd Defendant both have title deeds in respect of the suit property. The Plaintiff adduced evidence to show how he acquired the suit property from one James Nunda Ogechi. He produced the sale agreement, Certificate of official search and title deed in respect of the suit property. He testified that he discovered that the 2nd Defendant was also laying claim to the suit property when he went to fence it. He and later conducted an official search at the Lands office and he was surprised to learn that the 2nd Defendant was issued with a title deed on 8.9.2016 after the suit property was transferred to him by the 1st Defendant.

16. In his testimony, the Land Registrar confirmed that the transfer of the suit property to the 1st and 2nd Defendants was fraudulent as the Transfer documents used by the Defendants were forged. He told the court that the photograph and ID cards attached to the Transfer forms purporting to transfer the suit property from the Plaintiff to the 1st Defendant did not belong to the Plaintiff and that the entries in the green card relating the said transfer were illegal as they signed by a clerk at the Lands office who forged the former Land Registrar's signature.

17. Furthermore, the Plaintiff was out the Country at the time of the purported transfer and he still holds the original title in respect the suit property. The Land Registrar did not mince his words as he categorically stated that the Defendant's title deed was fake and all that he was waiting for was for the court to declare it as such so that he could cancel the same and rectify the register accordingly. It is therefore my finding that L.R No. WANJARE/BOGIKUMU/2278 was fraudulently registered in the names of the 1st and 2nd Defendants.

18. Flowing from the above finding, the Plaintiff is the lawful registered owner of the suit property.

From the evidence on record, I am satisfied that the Plaintiff has proved his case of fraud against the 1st Defendant. It therefore follows that the 1st Defendant did not have a good title to transfer to the 2nd Defendant. The said title is therefore liable to cancelled under section 26(1) (b) of the Land Registration Act. The said section provides as follows:

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, 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)

19. In the Case of **Zacharia Wambugu Gathimu & Another V John Ndungu Maina [2019] eKLR** it was held that:

".....As it may be observed, the law is extremely protective of title but the protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

163. The import of Section 26 of the Land Registration Act was considered in the case of **Elijah Makeri Nyangwra _vs- Stephen Mungai Njuguna & Another [2013] eKLR** where Munyao J, answered the question as to whether title is impeachable under section 26 (1) (b) of the said Act as follows;

' First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.'

20. In view of the foregoing, I find and hold that the Plaintiff has proved his case on a balance of probabilities and he is thus entitled to the reliefs sought in the Plaintiff. Accordingly, I enter judgment for the Plaintiff and make the following final orders:

a) A declaration is hereby issued that the transfer and registration of the L.R No. WANJARE/BOGIKUMU/2278 in the name of the 1st Defendant on the 31st March, 2016 and the subsequent transfer thereof in favour of the 2nd Defendant were fraudulent, illegal, null and void.

b) The title in respect of L.R No. WANJARE/BOGIKUMU/2278 in the name of the 2nd Defendant is hereby cancelled. The Land Registrar, Kisii is hereby directed to rectify register in respect of L.R No. WANJARE/BOGIKUMU/2278 by restoring the name of the Jared Mogoi Cyril Mogeni as the registered proprietor of the suit property.

c) An order of eviction is hereby issued against the 1st and 2nd Defendants, their agents and/or servants from L.R No. WANJARE/BOGIAKUMU/2278.

d) A permanent injunction is hereby issued restraining the 1st and 2nd Defendants either by themselves, agents, servants and/or anyone claiming under the said defendants from entering upon, re-entering, taking possession, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with L.R No. WANJARE/BOGIAKUMU/2278.

e) The Plaintiff is awarded the sum of Kshs. 100,000 as General damages for trespass.

f) The costs of this suit shall be borne by the 1st and 2nd Defendants jointly and severally.

DATED, SIGNED AND DELIVERED AT KISII THIS 10TH DAY OF MARCH, 2022.

J.M ONYANGO

JUDGE