



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

HCC NO. 67 OF 2011

JOHN WAFULA KHISA.....APPLICANT

VERSUS

1. JOHN KHAMEME WANYELA

2. THE HON. ATTORNEY GENERAL [suing on behalf of the

DISTRICT LAND REGISTRAR, BUNGOMA DISTRICT.....RESPONDENTS

JUDGMENT

1. In this suit, the plaintiff sued John Khameme Wanyela as 1st defendant and the Land Registrar, Bungoma District as the 2nd defendant. The plaintiff sought this court to issue the following orders;

- i. An order for cancellation of registration of the parcel of land and the title documents issued to 1st defendant in L.R. No. Kimilili/Kimilili/1661 to have it reverted back to the plaintiff.
- ii. Permanent injunction restraining the 1st defendant, his servants and authorized agents from interfering, alienating or wasting the plaintiffs land.
- iii. Cost of the suit.

2. The defendants were dully served and each of them filed their respective statements of defence. The 1st Defendant filed a statement through the law firm of Okile & Co. advocates while the 2nd defendant was represented by the Attorney General. The plaintiff then proceeded to fix this matter for hearing which dates were served on both defendants as per the affidavits of process server on record. However only the 2nd defendant participated in the hearing.

3. The plaintiff's case proceeded on 26th November 2013. He testified as PW1 and told court that he was a retired teacher, currently a farmer. He claims ownership to land parcel no. Kimilili/Kimilili/1661 and has a title deed to it which he produced as pex. 1. He bought the land from Philip Wanyonyi Sisenda – PW2 at a consideration of Kshs. 150,000/= . That he lost his original sale agreement but produced an addendum dated 2nd August 2013 as pex. 2. Later he processed title in his name using the laid down procedures. In 2005, he did a search which revealed the title was in his name (Pex. 3) but in 2007 when he carried another search (pex. 4), the records had the 1st defendant's name as the owner of the suit property.

4. PW1 denied having any dealings with the 1st defendant. The search revealed the 1st defendant was registered as owner on 20th June 2000 which time he had not bought the land in question. On learning about this, he reported the incident to the Bungoma District Land Registrar. The registrar summoned both of them to appear before him – Pex.

5. He went but the 1st defendant never turned up. He was advised to take up the matter with the Criminal Investigation Department which he did forthwith. The Land Registrar also restricted the title as per the green card – Pex. 8. From this card, it appears he transferred the land to the 1st defendant which fact he denies. In light of this evidence, he urged court to revoke the title of the 1st defendant and declare him as the legal owner of the land and costs of this suit awarded to him.

5. The plaintiff called his second witness Philip Wanyonyi Sisenda hereinafter refereed to as PW2. He introduced himself as a Catechist of Chepkaka Catholic Church and living in Kimalewa. He knew the plaintiff as they had an agreement with him over plot no. Kimilili/Kimilili/1661. The agreed purchase price was Kshs. 150,000/= which he confirmed he was paid in full. He has never sold the land to anyone else and has no complaint against the plaintiff. Cross examined by Ms. Maina for the 2nd defendant, he said he bought this plot from Jonathan Situma. The plaintiff closed his case.

6. The case was deferred to 26th May 2014 for defence hearing. The 1st defendant again failed to attend and the plaintiff applied to have his case closed which application the court granted. On the part of the 2nd defendant, they invoked paragraph 7 and 8 of their statement of defence which pleaded they did not oppose the plaintiff's claim but urged the court to direct the 1st defendant to bear the costs of this suit. The 2nd defendant closed his case without adducing any oral evidence. The parties did not submit and left it to court to reach a just determination.

7. Although the 2nd defendant has not opposed the plaintiffs claim and the 1st defendant failed to attend court, I will still consider the evidence adduced vis-a-vi the 1st defendant's statement of defence on record to establish if the plaintiff has proved his case within the set standards of the Law. In the statement of defence by the 1st defendant, he alleged to have bought the land from Shem Nalianya Sipitali. He also averred the plaintiff does not even know the location of the suit parcel.

8. The 1st defendant admitted in paragraph 12 that he was summoned by the CID where he recorded a statement on how he acquired the suit land and when he proved ownership of the suitland. He denied the allegations of fraud pleaded by the plaintiff in paragraph 8 of the plaint. He also wondered why the plaintiff delayed before filing this suit. The 1st defendant did not file a list of documents to his deferments. Therefore the issues raised in defence remains mere allegations that have not been proved contrary to the requirements of the Law that he who alleges must prove (section 107 & 108 of Evidence Act and order 18 rule 2 of the Civil Procedure Rules). The 2nd defendant pleaded in paragraph 5 thus;

(a). There is no transfer document in this registry traceable so far as to support the entry of ownership on the register.

(b). There is no evidence that any officer in lands registry was at any time involved in the transaction in favour of the 1st defendant.

(c). this was a direct transfer from the plaintiff to the 1st defendant as reflected in entry nos 9 & 10 which is not verifiable as there exist no transfer document in the registry.

9. In the register for Kimilili/Kimilili/1661 handwritten and by the 2nd defendant in their list of documents, Pex. 8 entry no. 7 shows the plaintiff was registered as owner of land on 15th May 2000 having acquired it from Philip Wanyonyi Sisenda – PW2. The document indicates the plaintiff transferred the land to the 1st defendant on 20th June 2000. The name of Shem Sipitali who sold the

land to the 1st defendant does not appear on the document. In pex. 9, also shows same details as pex. 8. The plaintiff has said he did not sell the land to the 1st defendant any time at all and further in the year 2000, he had not acquired the title to the property so he had no capacity to sell the suitland. The 1st defendant was summoned by the District Land Registrar to appear before him on 24th October 2007 (pex. 5) but he never did.

10. It appears therefore that the 1st defendant acquisition of the title to the property is questionable just because the person who sold to him the land was not the registered owner at any given time and secondly because the land records availed to court allege a direct transfer from plaintiff to himself yet in the year 2000, the plaintiff did not own the suitland. I am satisfied that in the given circumstances, the plaintiff has proved the 1st defendant acquired the title in a fraudulent manner and his title should therefore be canceled. The plaintiff has proved his case and I allow it with costs, by issuing the following orders.

(i). The 1st Defendant's ownership and/or claim to title Kimilili/Kimilili/1661 is fraudulent, illegal and unlawful and consequently his title deed be and is hereby canceled forthwith.

ii). The District Land Registrar Bungoma to forthwith delete the name of the 1st defendant John Khameme Wanyela from the register of title no. Kimilili/Kimilili/1661

iii). The 1st defendant be and is hereby permanently barred from interfering in any manner with the plaintiff's use and occupation of land L.R. Kimilili/Kimilili/1661.

v). Costs of this suit awarded to the plaintiff to be paid by the 1st defendant.

DATED and DELIVERED at Bungoma this 7th October 2014.

A. OMOLLO

JUDGE.