



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 529 OF 2011 (O.S)

IN THE MATTER OF

AN APPLICATION FOR RECTIFICATION OF TITLE UNDER SECTION 149 CAP 300

AND

IN THE MATTER

OF KIKUYU/KIKUYU BLOCK 1/696

BETWEEN

MARIAM NJERI NJOROGE alias MILLIAM NJOROGE1ST PLAINTIFF

DAVID KINYANJUI WAINAINA2ND PLAINTIFF

VERSUS

JUNE WANJIKU NDEGWA 1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

JUDGMENT

Introduction

1. On 12th May 2010, the 1st and 2nd Plaintiff executed a sale agreement in respect to the property known as **Kikuyu/Kikuyu Block 1/696 (hereafter referred to as the suit property)**. According to the said agreement, the 2nd Plaintiff was to acquire the said property for a consideration of **Ksh 1,700,000/-** which payment had been made at time of the execution of the agreement. However, the registration of the said property in the names of the 2nd Plaintiff could not be finalised for the reasons that the title had been registered in the names of the 1st Defendant.

2. Vide an originating summons dated 26th September 2011 and subsequently amended on 21st October 2021, the Plaintiffs sought the following reliefs against the Defendants;

i) ***THAT a declaration be issued that the parcel known as KIKUYU/KIKUYU BLOCK 1/696 was fraudulently registered by the 2nd Defendant to the 1st Defendant instead of to the 1st Plaintiff and cancelled forthwith.***

ii) ***THAT a declaration do issue that the TITLE KIKUYU/KIKUYU BLOCK1/696 be rectified by the 2nd Defendant from the name of the 1st Defendant JUNE WANJIKU NDEGWA to read the 2nd Plaintiff DAVID KINYANJUI WAINAINA as purchaser from the 1st Plaintiff.***

iii) ***THAT costs be paid by the Defendants.***

3. The further amended originating summons was supported by the 1st Plaintiff's affidavit sworn on 21st October 2021.

4. The 1st Defendant did not file any response to the originating summons neither did they participate during the hearing. The 2nd Defendant

filed a replying affidavit sworn by **Edwin Wafula, a Land Registrar on 26th July 2013.**

5. Pursuant to directions issued by my brother **Justice S. Okongo** on 18th April 2018, the Court directed the Originating Motion to proceed by way of viva voce evidence. The matter was later set down for hearing before this court on 6th December 2021 and 19th January 2022. During the hearing of the suit only the 1st and 2nd Plaintiffs testified. The Defendants did not call any witness. Upon close of the hearing, parties were directed to file their written submissions. Save for the 1st Defendant, all parties complied and filed their respective written submissions which the court has had the opportunity to peruse and consider the same.

The Plaintiffs case

6. The 1st Plaintiff, **Miriam Njeri Njoroge alias Milliam Njoroge** testified as **PW1**. She adopted her witness statement dated 26th September 2011. She stated that she bought the suit property in 1977 from Kikuyu Division Farmers and Marketing Company Limited and she has been staying there until the year 2010 when she sold the same to the 2nd Plaintiff.

7. She further testified that for the entire period she was in occupation of the suit property, the 1st Defendant never set foot on the same and neither did she ever lay claim of any interest to the said land. She concluded her testimony by requesting the Court to allow the prayers sought so as to ensure that the registration of the suit property in the names of the 2nd Plaintiff is concluded.

8. The 2nd Plaintiff also testified and adopted his witness statement. He also confirmed having purchased the suit property from the 1st Plaintiff on 12th May 2010. He immediately took possession and has been using the property since then. It was also his testimony that the 1st Defendant has never visited the suit property and neither has she lodged any interest in respect to the same.

The case for the 1st Defendant

9. The 1st Defendant despite being served never filed any response, neither did she attend Court for the hearing of the Originating Summons.

The case for the 2nd Defendant

10. The 2nd Defendant never called any witness during the hearing of the suit but relied on a replying affidavit sworn on **26th July 2013 by Edwin Wafula a Land Registrar.** In the said affidavit, the 2nd Defendant denied any fraud in registration of the 1st Defendant as the owner of the suit property. He contended that the registration was based on the documents and information that was availed to the 2nd Defendant's office by the 1st Defendant and as such without any contrary information, they were bound to perform their public duty and effect the registration in the names of the 1st Defendant. They prayed for the dismissal of the suit as against them since no fraud had been demonstrated by the Plaintiffs.

Issues and Determination

11. This Court has now carefully considered the pleadings and the annexures attached thereto. The Court has also considered the adduced evidence and the exhibits produced in court. Further the Court has carefully read and considered the written submissions, the cited authorities and the relevant provisions of law and the court is of the opinion that the following key issues arises for determination herein:-

- i) Whether the Plaintiffs have made out a case for the grant of the orders sought?*
- ii) What orders should issue as to costs?*

Issue number 1

Whether the Plaintiffs have made out a case for the grant of the orders sought?

12. In their submissions, Counsel for the Plaintiffs reiterated the Plaintiffs evidence and further submitted that the 1st Plaintiff was a shareholder in Kikuyu Division Farmers and Marketing Company Limited vide a share certificate which was produced as part of the Plaintiffs exhibit in the suit. As a shareholder, she was allocated Land Parcel No. Kikuyu/Kikuyu Block 1/696. Before the titles could be processed, the property was sold to the 2nd Plaintiff vide an agreement dated 12th May 2010 for Ksh 1,700,000/-.

13. Counsel also submitted that the transaction was sanctioned by the company and that they also executed the required transfer form which was also produced as part of the Plaintiffs bundle.

14. It was further submitted that, when the 2nd Plaintiff presented the said documents for registration, he was shocked to find out that the land been registered in the names of the 1st Defendant. He brought the issue to the company who later wrote a letter dated 11th August 2010 to the Commissioner of Lands who never took any action and hence the present suit.

15. Counsel submitted that owing to this development, the court has powers under **Section 80 of the Land Registration Act of 2012** to order for the rectification of the register to reflect the correct ownership of the land.

16. It was also submitted that the Defendants had not tendered any evidence to controvert the testimony that was made by the Plaintiffs and hence they were entitled to the reliefs sought in the originating summons.

17. Counsel for the 2nd Defendant submitted that no fraud had been proved as against the 2nd Defendant and if indeed the court was to find that there was any, then the 2nd Defendant was not a party to the same.

18. It was also submitted that the 2nd Defendant registered the suit property without notice of any irregularity and pursuant to the provisions of **section 14 (5) of the Land Registration Act**, the 2nd Defendant could not be faulted for any liability arising from the registration of the 1st Defendant to the suit property. In support of the 2nd Defendant's case, Counsel also relied on the cases of Mutiria Karumbai Macaw v James Njagi Makembo & 3 Others [2018] eKLR, Urmila w/o Mahendra Shah v Barclays Bank International Limited & Another [1979], Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] and Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996].

19. From the evidence on record, it is clear that the 1st Plaintiff and the 2nd Plaintiff entered into sale agreement in respect to the suit property. The evidence further show that the suit property was sold to the 2nd Plaintiff. The evidence further shows that the 2nd Defendant mistakenly registered the land parcel number Kikuyu/Kikuyu Block 1/696 to the 1st Defendant as the purported owner. There is evidence to show that the Plaintiffs wrote to the 2nd Defendant seeking a rectification of the mistake but the same was not done.

20. Is such a mistake as observed hereinabove rectifiable? **Section 80(1) of the Land Registration Act No. 3 of 2012** provides: -

“Subject to subsection (2), the court may Order rectification of the registrar by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

21. At **Section 80(2) of the same Act**, it is provided as follows;

“The register shall not be rectified to effect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

22. From the evidence on record, it is clear that the 1st Defendant was registered as the proprietor of land procedurally and by mistake. It is also worth noting that despite having been registered as the proprietor of the suit property, she has never taken possession nor lived on the same. It was the 1st Plaintiff's evidence that she had stayed in the suit property from 1977 when she bought the land until the year 2010 when she sold it to the 1st Plaintiff.

23. In the case of Mary Ruguru Njoroge –Vs- Samuel Gachumu Mbugua & Others [2014] eKLR, the court held as follows:

“The court too has powers to order the rectification of the title or register in appropriate circumstances. The court will under Section 80(1) of the Land Registration Act order the cancellation or amendment of an entry or any registration when it is satisfied that the registration was obtained made or omitted by fraud or mistake. Registration under the said Section, in my view, refer to and includes a title or entry in the register or on the title itself. It is however upto the party seeking rectification to prove to the court's satisfaction that there has been fraud or a mistake in the registration. In my view, the mistake referred to under section 80(1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name. in equity, the court also has powers to rectify in suitable circumstances any written instrument to conform with the agreement between the parties, where the instrument, by mistake, does not express the agreement and the mistake justifies the intervention of the court.”

24. I fully associate myself with the authority and conclude that the title in respect of land parcel number Kikuyu/Kikuyu Block 1/696 ought to be cancelled and the same be registered in the names of David Kinyanjui Wainaina.

25. The Plaintiffs also pleaded that the 2nd Defendant fraudulently registered the suit property in the names of the 1st Defendant without the knowledge of the Plaintiffs.

26. On the issue of fraud, **Section 107 of the Evidence Act** provides that whoever alleges must prove, or shoulder the burden of proof. The evidential standard for proof of fraud is higher than a balance of probabilities but lower than the criminal standard of proof beyond reasonable doubt. Evidence of especially high quality and strength is required to discharge the high burden of proof in a case alleging fraud. See Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others Civil Appeal No. 45 of 1996 where the Court stated:

“Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary case.” (Emphasis added)

27. In Paragon Finance PLC v D B Thakerar & Co 1999 1 ALL ER 400, the Court stated of fraud as follows:-

“It is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. An allegation that the defendant ‘knew or ought to have known’ is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the court is satisfied that there was actual knowledge. An allegation that the defendant had actual knowledge of the existence of a fraud perpetrated by

others and failed to disclose the fact to the victim is consistent with an inadvertent failure to make disclosure and is not a charge of fraud. It will not support a finding of fraud even if the court is satisfied that the failure to disclose was deliberate and dishonest. Where it is expressly alleged that such failure was negligent and in breach of a contractual obligation of disclosure, but not that it was deliberate and dishonest, there is no room for treating it as an allegation of fraud.

28. In Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR Tunoi JA as he then was stated:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

29. In Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR the Court of Appeal stated:

“.....It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo (2008) 1 KLR (G&F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

In the particulars of fraud, the appellant alleged that he did not consent to the transfer of the property. We find this was not true; as pointed out by the courts below, the appellant had full knowledge of and consented to the transaction. The evidence of the chief (DW2) was instructive in this regard, as was a letter to the Land Registrar, Kiambu. This letter in particular shows that the appellant was fully aware of the transaction between the respondent and his deceased brother.

The evidence that was adduced by the Land Registrar seemed to indicate that there may have been some mischief in the manner that the title in favour of the respondent was procured. In his evidence, the Land Registrar indicated that the file in respect of the subject property could not be found, and as such, any transfer that may have been undertaken may have been fraudulent. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis added)

30. The standard of proof having been set as a very high standard in law, it is not open to this court to merely infer fraud from the facts alleged by the Plaintiffs. I have looked at the evidential materials presented by the Plaintiffs in support of the Originating Summons and I would agree with the submissions of the 2nd Defendant that indeed the Plaintiffs have not proved fraud as against the 2nd Defendant. It is therefore the finding of this court that while though the registration of the suit property in the names of the 1st Defendant was done without the knowledge of the Plaintiffs the same could have been possibly unprocedural but not necessarily fraudulent as stated in my earlier part of this judgment. In the circumstances, the 2nd Plaintiff is no doubt the rightful owner of the suit land and the land register should be rectified as such. **Section 80 (1) of the Land Registration Act, 2012** empowers the court to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake and I would not hesitate to grant the said orders.

Issue No. 2

What orders should issue as to costs?

31. On the issue of costs, **Section 27 of the Civil Procedure Act** gives the Court the discretion to grant costs. Ordinarily, costs usually follow the event, unless special circumstances are presented to Court. However, none has been presented herein and the Court therefore finds that the Plaintiffs are entitled to the costs of the suit which I would direct that they be met by the 1st Defendant.

Final orders

32. In the end, the Court makes the following orders:

i) **That the title of the 1st Defendant, JUNE WANJIKU NDEGWA, to the land parcel KIKUYU/KIKUYU/BLOCK 1/696, was improperly registered and the same is hereby cancelled.**

ii) **An order directing the Chief Land Registrar to rectify the register to reflect the name of DAVID KINYANJUI WAINAINA as the registered owner of Land Title No. KIKUYU/KIKUYU BLOCK 1/696.**

iii) **The 1st Defendant to bear the costs of this suit.**

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF ARIL 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kiarie Njuguna for the 1st and 2nd Plaintiffs.

N/A for the 1st Defendant.

Ms. Mwalosi for the 2nd Defendant.

Court Assistant; Caroline Nafuna.