



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 609 (B) of 2012

Formerly HCC 47 of 2010

ELIJAH MAKERI NYANGW'RA.....PLAINTIFF

VS

STEPHEN MUNGAI NJUGUNA & ANOTHER.....DEFENDANT

*(Suit filed by plaintiff seeking to have title issued to 1st defendant cancelled and for suit property to revert back to plaintiff; plaintiff being previous owner of the suit land; suit land fraudulently transferred by 2nd defendant who alleged to have a power of attorney from plaintiff; power of attorney forged; transfer documents of suit land not executed by plaintiff the same being forgeries; 1st defendant innocent purchaser snared by scheme of the 2nd defendant; whether title of 1st defendant ought to be cancelled; Section 26 of the Land Registration Act; suit by plaintiff succeeds; title of 1st defendant ordered to be cancelled and plaintiff be duly restored as proprietor of suit land).*

### JUDGEMENT

This matter was commenced by way of Complaint filed on the 24 March 2010.

In his complaint the plaintiff has pleaded that he was at all material times the owner of the land parcel Eldoret Municipality Block 14/122. He has pleaded that he purchased the land on 1<sup>st</sup> July 1997. It is further pleaded that on or about 4<sup>th</sup> March 2010, the 2<sup>nd</sup> defendant caused the suit land to be fraudulently transferred to the 1<sup>st</sup> defendant. The particulars of fraud pleaded against the 2<sup>nd</sup> defendant inter alia include fraudulently transferring the suit land; tendering forged documents to the lands office; forging signatures and/or other authority of the plaintiff; fraudulently acquiring power of attorney; acquiring the said land by fraud; tendering a forged title to the lands office; colluding with imposters to effect a fraudulent transfer; presenting a forged and fraudulent power of attorney for registration; and purporting to transfer a parcel of land by one who has got no proprietary interest to the suit land. The plaintiff has also pleaded that the 1<sup>st</sup> defendant fraudulently caused the suit land to be transferred to himself. The allegations of fraud against the 1<sup>st</sup> defendant inter alia include, acquiring the suit land by fraud; tendering forged documents to the lands office; tendering a forged title deed to the lands office; transferring the suit land without conducting requisitions of title and colluding with imposters to effect a fraudulent transfer.

It is further averred that the 3<sup>rd</sup> defendant unlawfully and fraudulently conspired with the 1<sup>st</sup> and 2<sup>nd</sup> defendant to unlawfully transfer the suit land to the 1<sup>st</sup> defendant in complete disregard to the proprietary interest of the plaintiff. The particulars of fraud alleged against the 3<sup>rd</sup> defendant include, transferring the suit land fraudulently; accepting fraudulent and forged documents particularly the title deed to effect a fraudulent change of ownership; ignoring the rights of the legal owner; conspiring with the 1<sup>st</sup> and 2<sup>nd</sup>

defendant to defeat the legal rights of the plaintiff; and purporting to transfer a parcel of land by one who has got no proprietary interest in the suit land.

In this suit the plaintiff is claiming the following reliefs :-

*(a) A declaration against the three defendants that the plaintiff herein is the legal owner of all that piece and parcel of land known as Eldoret Municipality Block 14/122.*

*(b) A declaration that the sale and transfer of Eldoret Municipality Block 14/122 from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant is unlawful and fraudulent and order the cancellation of the 1<sup>st</sup> defendant's title deed.*

*(c) An order of eviction be issued against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.*

*(d) A permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendant from entering into, fencing, building, selling, transferring and or in any way interfering with the plaintiff's lawful use of Eldoret Municipality Block 14/122.*

*(e) Costs of this suit.*

*(f) Such other or further relief this Honorable court shall deem fit and proper to grant.*

This suit proceeded before me on the 29 January 2013. Only the plaintiff and his witness appeared. All the defendants opted not to attend the hearing despite being duly served. The evidence on record is only that availed by the plaintiff and his witness and the same is uncontroverted.

The plaintiff is a medical doctor based in Botswana. He stated that he is 50 years old. He testified that he is the owner of the land parcel Eldoret Municipality Block 14/122 and produced the Certificate of Lease as Exhibit No.1. The said certificate of lease reveals that the plaintiff is the registered owner of a lease of the suit land for a term of 99 years from 1.6.1987. He became so registered on the 2.7.1997. He testified that he acquired the said land by way of purchase from one Kiptoo Chesire. An agreement between the two dated 6 May 1997 was produced as plaintiff's Exhibit No.2. The purchase price was paid to the vendor and thereafter a conveyance of the suit land from the said vendor to the plaintiff was perfected after which the plaintiff became duly registered as the proprietor of the leasehold title comprised in the suit land.

The plaintiff recalled that on 12 March 2010 while in Botswana, he was called and informed that somebody had placed building materials on his land. He immediately travelled from Botswana and arrived the following day 13 March 2010. He then recorded a complaint of trespass to the police station at Eldoret. He alongside the police visited the site and managed to obtain the phone number of the person who had placed the building materials. It was then that he learnt that the 1<sup>st</sup> defendant was claiming the same land. When the 1<sup>st</sup> defendant appeared at the police station he could not identify the plaintiff and the 1<sup>st</sup> defendant was also a stranger to the plaintiff. This was not surprising to the plaintiff as they had never met. It emerged that the 1<sup>st</sup> defendant had purchased the suit land through a sale agreement dated 5<sup>th</sup> December 2009. The seller was one Stanley Kemboi Keter, the 2<sup>nd</sup> defendant herein, and the sale agreement was witnessed by K.B.O (initialized to protect his identity) an advocate based in Nakuru.

The agreement was produced as plaintiff's Exhibit No.9. The agreement is between the 2<sup>nd</sup> defendant who is the seller and the 1<sup>st</sup> defendant who is the buyer. It makes a note that the 2<sup>nd</sup> defendant is selling the suit land Eldoret Municipality Block 14/122 "on behalf and with the authority of the registered owner Elijah Makori Nyagwara" at an agreed consideration of kshs. One Million and Five Hundred Thousand. The said Keter, purported to hold a general power of attorney from the plaintiff dated 24/6/2009. The said power of attorney was produced as plaintiff's Exhibit No.10. The plaintiff has denied ever signing the power of attorney. There was executed a transfer of lease by the said Keter, the 2<sup>nd</sup> defendant, purporting

to transfer the suit land to the 1<sup>st</sup> defendant. The transfer of lease (exhibit 11) is dated 12/12/2009. It shows the transferor to be Elijah Makori Nyagwara Passport No. KA 28\*\*\* and the transferee to be Stephen Mungai Njuguna. The document is signed by the two parties and both signatures are attested to by the said K.B.O advocate of Nakuru. There is a photograph of the transferor and transferee.

The plaintiff testified that on the date of the purported transfer, he was not in Nakuru but in Eldoret on holiday. He denied ever signing the transfer instrument. He referred to the photograph of the vendor on the transfer instrument and pointed out that the same is not his photograph. The title deed used to transfer the land was produced as Exhibit 12. The plaintiff pointed out that the same is a forged title deed. He compared the same to Exhibit No.1 and noted that they were not the same. He also stated that the passport used to accompany the transfer documents was a forged passport. He produced the said passport as Exhibit No.7. The passport has the same photograph of the person in Exhibit No. 11, who is certainly not the plaintiff. The person is said to have been born on 8 October 1948 making him 65 years or so to date and not the 50 years that the plaintiff has clocked.

The plaintiff further pointed out that a criminal case was instituted in Eldoret being criminal case No.666 of 2011 in which the 2<sup>nd</sup> defendant and K.B.O advocate are charged with the offence of Obtaining Money by False Pretences contrary to Section 313 of the Penal Code , CAP 63, Laws of Kenya and an offence of Conspiracy to Defraud Contrary to Section 393 of the Penal Code. The complainant in the first count is the 1<sup>st</sup> defendant in this suit. The complainant in the second count is the plaintiff herein and the particulars of the 2<sup>nd</sup> count are that the two accused conspired to defraud the plaintiff off his plot Eldoret Municipality Block 14/122. The plaintiff beseeched this court to cancel the title of the 1<sup>st</sup> defendant and have the property revert back to him. He also reiterated his prayers in the plaint and asked for costs.

PW-2 Joel Kingorosh is a judicial assistant working at the Eldoret chief Magistrate's Court. He produced the proceedings in the said Criminal case No.666 of 2011 and stated that the proceedings are still ongoing.

I have considered the pleadings and the evidence on record. The defendants have not called forth any evidence to rebut the evidence of the plaintiff. I am not in doubt that the plaintiff never sold the suit land to the 1<sup>st</sup> defendant. I am convinced that he never gave the 2<sup>nd</sup> defendant any power of attorney to dispose of the suit land. The power of attorney is no doubt forged. The passport used to transfer the suit land is not the passport of the plaintiff. The transfer instrument used to convey the land to the 1<sup>st</sup> defendant was never executed by the plaintiff. Indeed the photograph in the transfer instrument purporting to be the photograph of the plaintiff is not his image; it is the image of another person. The said instrument being a forged instrument could not convey the property to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant who appears to have engineered the whole transaction has been charged with a criminal offence. The criminal trial is still ongoing and the less I say about it the better, for the accused in the said case are entitled to the constitutional right of being presumed innocent until proven guilty.

Nevertheless, the fact of the matter is that now the 1<sup>st</sup> defendant is the registered proprietor of the suit land. To enable me cancel his title as sought by the plaintiff, I have to be convinced that the provisions of Section 26 of the Land Registration Act, Act No.3 of 2012 have been met. Section 26 is drawn in the following terms.

*Section 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, 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.*

As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. 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.

For the first limb, it appears to me that the title of the 1<sup>st</sup> defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1<sup>st</sup> defendant was a party to the fraud or misrepresentation. Indeed, to me the 1<sup>st</sup> defendant was an innocent purchaser for value. He was probably conned of his money by the 2<sup>nd</sup> defendant and that is why he is the complainant in the first count of the criminal charges facing the 2<sup>nd</sup> defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He is a victim of the scheme employed by the 2<sup>nd</sup> defendant. I cannot therefore impeach his title by virtue of the provisions of Section 26 (1) (a).

Is the title impeachable by virtue of Section 26(1) (b) ? 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.

The evidence in this case puts no one in doubt that the title to the 1<sup>st</sup> defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1<sup>st</sup> defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1<sup>st</sup> defendant and his registration as proprietor of the suit land. The plaintiff should be registered as owner of the suit land. It is regretful that the 1<sup>st</sup> defendant was snared by the scheme perpetuated by the 2<sup>nd</sup> defendant. I sympathise with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land.

It is difficult to envision how all this may have happened if the 3<sup>rd</sup> defendant was vigilant. No evidence was however led that the 3<sup>rd</sup> defendant was also involved in the fraudulent scheme of the 2<sup>nd</sup> defendant. I will let them off the hook for want of direct evidence linking them to the fraud.

On the whole, the plaintiff's case succeeds and I make the following orders.

- (1) A declaration is hereby issued that the plaintiff is the legal owner of the leasehold title comprised in the land parcel Eldoret Municipality Block 14/122.
- (2) A declaration is hereby issued that the sale and transfer of Eldoret Municipality Block 14/122 from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was unprocedural and illegal.
- (3) The title of the 1<sup>st</sup> defendant is hereby cancelled and I direct that his name be removed as proprietor of the land parcel Eldoret Municipality Block 14/122 and further order that the plaintiff be reinstated as the registered proprietor of the leasehold title in the land parcel Eldoret Municipality Block 14/122 and be so registered as proprietor.
- (4) The 1<sup>st</sup> defendant do forthwith vacate the land parcel Eldoret Municipality Block 14/122 and if he fails to so vacate an order of eviction be issued against the 1<sup>st</sup> Defendant.
- (5) A permanent injunction is hereby issued restraining the 1<sup>st</sup> defendant from entering into, dealing or in any way interfering with the land parcel Eldoret Municipality Block 14/122.

As to costs, I think the same should be borne solely by the 2<sup>nd</sup> defendant. He shall bear the costs of the plaintiff and of the other defendants to this suit.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 21 FEBRUARY 2013.**

**JUSTICE SILA MUNYAO**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

*Delivered in the presence of:*

*Mrs. P.M. Omwansa Advocate of M/s Onyinkwa & Co. Advocates for the plaintiff.*

*No appearance for M/s Gitonga & Co. Advocates for the 1st defendant.*

*No appearance for M/s Omboto & Co. Advocates for the 2nd defendant.*

*No appearance for the State Law Office for the 3rd defendant.*