



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Environmental & Land Case 266 of 2008

EPHRAHIM WAITHAKA RUTHA.....1ST PLAINTIFF

GRACE WANGUI WAITHAKA.....2ND PLAINTIFF

ESLINE INVESTMENTS LIMITED.....3RD PLAINTIFF

-VERSUS-

NADIS SERVICES LIMITED.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

RULING

The plaintiff by a Notice of Motion dated 6th July 2012 brought under Sections 1A, 1B and 3A of the Civil Procedure Acts and Order L Rule 1 and Order 13 Rule 2 of the Civil Procedure Rules and all enabling provisions of the law. The application seeks orders that:-

1. Judgment be entered as against the Defendants on admissions contained in the 2nd Defendants defence dated 20th September, 2012 in the following terms:-

- a) It is hereby found and declared that Ephraim Naithaka Ruitha and Grace Wangui Waithaka are the registered proprietors as joint tenants of all that land known as land reference 209/10999 by virtue of the grant registered in the register of title as I.R. No. 59315/5.
- b) It is hereby found and declared that the grant No. 110337 issued by the 2nd Defendant to the 1st Defendant is null and void and the 1st Defendant's title to all that land known as land reference 209/10999 be and is hereby cancelled.
- c) The 2nd Defendant be and is hereby directed to cancel, delete and expunge all entries in the land register purporting to grant title and ownership of all that land known as land reference 209/10999 to the 1st Defendant .

2. That costs of this application be in the cause.

The application is supported on the grounds set out on the face of the application set out as follows:-

1. That the 2nd Defendant is the commissioner of lands who at all material times was the custodian of the registers of titles to land in the republic of Kenya.
2. That in the statement of defence the 2nd Defendant has admitted that the 1st and 2nd plaintiffs hold the only proper title to all that land known as I.R. No. 59315/5;
3. The 2nd Defendant has admitted in the statement of defence that it has established that he grant number 110337 in favour of the 1st Defendant was issued as a result of fraud and that the 1st Defendant has agreed to surrender the title issued to it pursuant to the said grant for cancellation;
4. The 2nd Defendant having admitted that he suit property was properly alienated to the 1st and 2nd plaintiffs under the registration of Titles Act Cap 281 of the laws of Kenya the subsequent alienation to the 1st Defendant is null and void by virtue of Section 20 and 23(1) of the said Act.
5. It is in the interest of justice and expedient disposal of this matter that this application be granted.

Additionally the plaintiffs application is supported on the grounds set out in the supporting affidavit sworn by Elias Ngugi Mwenda Counsel for the plaintiffs on 6th July 2012. The 1st Defendant and the 2nd defendant did not file any responses to the application. Indeed Mr. Nyaberi counsel for the 1st Defendant on 19th November, 2012 is recorded by Honourable Justice G. K. Kimondo as indicating that the 1st Defendant would be conceding to the application by the plaintiff. Mr. Terer appearing on behalf of the 2nd Defendant on 6th may, 2013 informed the court that the 2nd defendant would not oppose the application by the plaintiffs. Consequently, the plaintiff's application is unopposed and the court is now left to evaluate the application to determine whether the plaintiffs are entitled to the orders sought in the application.

That I have perused the 2nd Defendant's statement defence filed herein on 20th September, 2010 and note paragraphs 4, 5, 6, 7 and 8 outline how the suit property came into existence and was initially registered in favour of Francis Kahure Kimathi who subsequently transferred the same to M/s Kenya Fire Appliances Company Ltd and ultimately was transferred to the 1st and 2nd plaintiffs on 20th December, 2000. The 2nd defendant's statement of defence paragraphs 9, 10, 11, 12 & 13 acknowledge having been misled by the 1st defendant to create a second title in respect of the suit property. The 2nd defendant however, under the defence paragraphs 14, 15 & 16 states that when the anomaly was noted the 2nd defendant immediately wrote to the 1st Defendant to surrender the title in their custody and did expunge the records for the second title in favour of the 1st defendant.

Paragraph 16 of the defence states that he 1st defendant agreed to surrender the title and the 2nd defendant urges the court to cancel the title issued in favour of the 1st defendant.

Having regard to the foregoing I am satisfied that there is clear admission on the part of the 2nd defendant that there was misrepresentation that led to the creation of the second title in favour of the 1st Defendant. The 2nd defendant acknowledges that the plaintiffs were the properly registered owners of the suit property and the persons entitled to it. I find and hold that the plaintiffs Notice of Motion application has merit and I enter judgment for the plaintiffs in terms of prayers sought in the Notice of Motion dated 6th July 2012 under 1(a) (b) & (c). The costs of the application will be in the cause.

The plaintiffs will be at liberty to fix the remainder of the claim for hearing at the court registry.

Orders accordingly

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the 1st Defendant

..... for the 2nd Defendant