



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.93 OF 2005

BERNARD KAMAU THEURI PLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS 1ST DEFENDANT

THE ATTORNEY GENERAL 2ND DEFENDANT

CHERES ARAP BWOGO 3RD DEFENDANT

JUDGMENT

BERNARD KAMAU THEURI (the plaintiff filed this claim against the Commissioner of Lands (1st defendant), The Attorney General (2nd defendant) and Cheres arap Bwogo (3rd defendant). The plaintiff's claim is that he is the registered owner of parcel known as **Nakuru/Olenguruone/Kiptagich/684**, whose title was issued to him on 26th November 1990. In March 2000, the 1st defendant, through the District Land Registrar, and without the consent of the plaintiff, issued another title in respect of the same property to the 3rd defendant. It is the plaintiff's case that, this title was issued and obtained fraudulently.

The particulars of the fraud being that the 1st defendant issued the same while knowing that title to the same land had been issued to the plaintiff, yet he went ahead and issued a second title. The 3rd defendant is accused of causing the issuance while knowing that the plaintiff already had title, and he concealed this fact from the 1st defendant.

The plaintiff states that he has never sold or transferred the land to the 3rd defendant or any other person, and now he stands to suffer loss and damage.

Demand and notice issued to the defendants have been ignored and/or neglected thus rendering the filing of the suit. He now prays for judgment to be entered against the defendants jointly and severally for:-

- a. **Cancellation of the Title issued to the 3rd defendant.**
- b. **A declaration that the plaintiff is the rightful owner of parcel Number Nakuru/Olenguruone/Kiptagich/684**

- c. **A declaration that the Title Deed issued to the 3rd defendant in respect of the said property was illegal and fraudulent.**
- d. **A perpetual injunction restraining the 3rd defendant by himself, his servant and/or agents, from entering upon the plaintiff's aforesaid parcel.**
- e. **Eviction of the 3rd defendant from the said parcel.**
- f. **Mesne profits.**
- g. **Costs of the suit plus interest.**

In their joint amended defence, 1st and 2nd defendants deny the alleged fraud, saying that if the title was issued, then it was done in compliance with all the legal provisions affecting trespassers, and the documents presented could have convinced a cautious and prudent person that the same were genuine and valid.

They insist that if the 3rd defendant supplied plaintiff with title documents purporting to be registered in his name, then the same were forged and produced fraudulently. The particulars of fraud are pleaded as:-

1. ***Purporting that the plaintiff's land had been transferred to him without any legal basis and with intention to defraud.***
2. ***Being in possession of forged documents in respect of the suit property.***
3. ***Purporting that the property was transferred to him while there was a caution registered against it.***
4. ***Purporting to be issued with title documents before the presentation of transfer forms as required.***
5. ***Purporting to transfer the suit property using forged documents.***
6. ***Neglecting and refusing to avail the original copies of the alleged title documents to the 1st defendant.***
7. ***Failing, neglecting, and refusing to bring the said fraud and forgery to the attention of the 1st defendant.***
8. ***Uttering false documents in respect of the suit property.***
9. ***Failing to re-book the transfer documents in the presentation book as required.***

The defendants being aware of the said fraud and forgery at the material time, saying the said sale and transfer of the suit land to the 3rd defendant was illegal contrary to public policy and unenforceable.

The 3rd defendant neither entered appearance nor filed defence. The matter proceeded to hearing *ex parte*.

The plaintiff told this court that he acquired the suit property on 8th May 1987 after applying for and being allocated the same. He produced the letter of allotment as Exhibit 1. Thereafter, he was issued with a Title Deed for the parcel which measures 2.9 Hectares, the Title Deed is Exhibit 2 and was issued on 26/11/1990; evidence showing that he is the first registered owner is contained in Green card (Exhibit 3). In 1998, the Lands Registrar wrote to him (Exhibit 4), requesting for his appearance in a hearing regarding removal of a caution placed on the land. The caution had been lodged by **JOEL KIMNGETICH TONU** who claimed that the plaintiff had sold to him that parcel.

The plaintiff denied ever selling that land. Thereafter, the Land Registrar wrote to Tonui to show cause why the caution should not be removed (see **Exhibit 5(a)-(d)**) but he never showed up nor responded. Consequently on 13/02/2001, the District Land Registrar removed the caution. After Tunoi's claim had been disposed off, the plaintiff carried out a search on 26/06/2001 (Exhibit 6) and discovered that the same property was registered in the names of **CHERES BWOGO** who had a Title Deed for it. Since the plaintiff had not sold the land to anyone, he (through his advocate) wrote to the Chief Land Registrar protesting this development (see Exhibit 7). There was no response.

The plaintiff also wrote to the said Cheres Bwogo, (with a copy to the D.O. Olenguruone) a letter dated 29/05/2001 concerning his illegal claim to ownership and asking him to vacate the land.

On 27/7/2001, the plaintiff appeared before the Nakuru Lands Registrar with the certificate of search and Title document, protesting double allocation and requested that a caution be placed on the land. On 15/11/2001, Mr. AUGUSTINE KOROS, the Land Registrar, requested the plaintiff to go to his office with all his documents relating to the property. According to the witness, Koros looked at the documents and realised they were genuine and, what Charles Bwogo had were not proper documents. The Land Registrar decided to withdraw Bwogo's Title Deed and cancelled it. He wrote several letters (produced as Exhibit 9(a)-(c)) to Bwogo to surrender the Title documents.

The 3rd defendant did not surrender the Title nor did the Land Registrar Nakuru, take any other action.

Apparently, Bwogo claimed that the land was sold to him by some people in 1998, by an agreement produced as Exhibit 11. The agreement made on 27/08/1998 is between **BENN KAMAU THETHERE** and **CHERES ARAP BWOGO** in respect of 2.9 Hectares of **parcel Number Nakuru/Olenguruone/Kiptagich/684**, showing the purchase price as **Kshs.350,000/=**. Both parties have signed, but the plaintiff says he was not a party to the agreement and never signed that document. He disowned the signature appearing there, saying it is not his.

Incidentally there was even an application for consent sent to the Land Control Board (Exhibit 12) and showing that Benn Kamau Thethere was seeking consent to transact over the same property with 3rd defendant – again the plaintiff states that the signature on that application form is not his.

Later on Bwogo complained against the purported vendors and they were charged in **Criminal Case No.1493 of 2002 R V CHRISTOPHER CHESIRE CHEPYEGON, JANE NGONYO BOWEN and JOHN KIPRONO KETER**, who were charged with obtaining money by false pretences contrary to Section 313 Penal Code, and another count of obtaining registration by false pretence contrary to Section 320 Penal Code as per charge sheet Exhibit 13. The complainant in the criminal charges was Cheres Bwogo who meanwhile remains in occupation of the property to date without paying any rent.

The plaintiff has produced documents to confirm that the property was allocated to him way back in 1987 by the allotment letter dated 8/05/1987 signed by S.J. MWANGI, the Provincial Land Adjudication and Settlement Officer Rift Valley Province.

The property is registered in his name, as confirmed by the Title Deed, and the Green Card shows he was the first registered proprietor. He denied being involved in the sale transaction, and no evidence was tendered by the defence to controvert this. Indeed the purported vendors were subsequently charged in court with fraud in respect of the suit property. However, this court was not informed about the outcome of the criminal proceedings.

Mr. Kisila's contention is that by virtue of the 3rd defendant lodging a complaint against the vendors in the criminal proceedings, it is an admission that his title was acquired through fraud, and that 1st and 2nd defendants have admitted as much.

The registration of the 3rd defendant as the proprietor of the property is described as fraudulent and illegitimate – counsel urges court to pay regard to Section 143 of the Registered Land Act (Cap 300)

which provided that:-

“143(1) Subject to sub-section 2 of this Section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

The 3rd defendant has failed to attend court and demonstrate that he has a better title than the plaintiff, in any event he acquired title after the plaintiff, so the plaintiff is the first registered owner.

From the charge sheet presented in evidence it would appear that the 3rd defendant was misled by other persons into believing that they owned the land and could legally transfer it to him, and he probably parted with the Kshs.350,000/= referred to in the agreement. Obviously those purported “owners” could not transfer any title to the 3rd defendant because the common law doctrine of “*non dat qui non habet*” (no man can give better title than he had) has been echoed in Section 163 of the Registered Land Act which envisages the application of the Common Law as modified by equity.

I consider the decision in **Christopher Kiragu Ngibuini V Catherine Wamuyu Waithaka & Another Civil Suit No.1798 of 1999 (2204) e KLR** where the court ordered rectification of the register on the ground that the perpetrator of the fraud had no interest to pass to the 3rd party. I find that this is the situation here. I echo and paraphrase the very words of the court in **John Nganga Gathenji V Chief Land Registrar and Another HCCC No.1647 of 2002**, that the plaintiff has proved his ownership of the suit property. The fraud, consequence of which the 3rd defendant came to be registered as the proprietor of the plaintiff’s land is clearly demonstrated by the evidence presented before me.

I have no doubt in my mind that the process which led to the 3rd defendant being registered as proprietor of the suit property was marked with fraud. However it would seem that the 3rd defendant was not a party to the fraudulent intention and he simply acted in good faith. That would explain why he eventually went to court by way of criminal proceedings. The evidence tendered by the plaintiff demonstrates as much. Perhaps at most what I would fault the 3rd defendant with, is his lack of due diligence – if he had carried out a search, he would probably have realised that the property was already taken. However in my mind, that does not amount to fraud on the 3rd defendant’s part. Nonetheless, he is illegally in occupation, I sympathise with him, but I think, the moment he realised that he had been defrauded, and the plaintiff had requested him by a letter, to give an indication as to when he would move out of the land, he ought to have done so. Consequently, the plaintiff’s title and right of occupation must be restricted to him as that title is independent and cannot be defeated by a subsequent title.

Section 27 and Section 28 of the Registered Land Act provides that:-

27. Subject to this Act

- a. **The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto;**
- b. **The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease**

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.....

Those provisions speak favour and breathe life into the plaintiff's claim. As regards the claim for mesne profits, the plaintiff did not tender any evidence as to what he intended to use the land for – did he intend to grow? Did he intend to build and live on it as he claimed in a letter sent to the 3rd defendant? Mr. Kisila submits that the principle of ordinary letting the property should guide the court in attaching value as to the mesne profits to be paid. That is well proposed, but no evidence was presented to this court as regards the rates payable for land leased in the area.

The only merit in the matter is that from June, 2001, when the plaintiff wrote to the 3rd defendant to vacate the property, he has been dispossessed of it and been denied whatever use he would have put to it.

However it is also significant that even after realising that 3rd defendant was on the property, the plaintiff only filed suit in the year 2005 – so he did not any steps between 2001 – 2005 in trying to mitigate that loss of use. I think a modest global figure of Kshs.40,000/= (Forty thousand only) is sufficient, and I so award.

As for 1st and 2nd defendants, it does not help to now shift the blame on to the 3rd defendant. The 1st defendant is the custodian of all records relating to land in this county. To have issued another title document when the same office had earlier issued another one in respect of the same property, reflects very poorly in terms of organizational diligence and record keeping. It is not clear whether the 1st defendant's officers were just out rightly reckless and negligent, or whether they were part of perpetration of the fraud. Whatever the case, that subsequent title was illegally issued. The only remedy is to have it revoked and cancelled.

The plaintiff has adequately proved his case, and judgment is entered in his favour as against the defendants jointly and severally. Orders do issue that:-

1. The Title issued to Cheres arap Bwogo be and is hereby cancelled as it was fraudulently obtained.
2. The plaintiff is declared as the rightful owner of parcel No.Nakuru/Olenguruone/Kiptagich/684.
3. The 3rd defendant, by himself, his servants and/or agents be and are perpetually restrained from entering upon the plaintiff's aforesaid parcel of land.
4. The 3rd defendant do vacate the parcel within 60 days from the date of this judgment and an eviction notice to that effect do issue.
5. Mesne profits Kshs.40,000/=.
6. Costs of the suit shall be borne by the defendants, jointly and severally.

Delivered and dated this 10th day of December 2013 at Nakuru.

H.A. OMONDI

JUDGE

Mrs. Kairu holding brief Kisila for plaintiff