



REPUBLIC OF KENYA

High Court at Meru

Civil Suit 153 of 2010

WILFRED KINYUA NJOKA.....1ST PLAINTIFF

ESTHER MAKANDI KINYUA.....2ND PLAINTIFF

VERSUS

NJOKA NGERETHA1ST DEFENDANT

LYDIA KAGUNA.....2ND DEFENDANT

J U D G M E N T

The plaintiffs sued the defendants seeking an order directing the defendants jointly and with their family members to vacate from the plaintiffs land parcel No.Karingani/Mugirirwa/1650 and in default the OCS Chuka police station be empowered to forcefully evict the defendants and their family members from the suit land L.R.Karingani/Mugirirwa/1650 with costs of the suit and interest. The defendants filed defence denying the plaintiffs claim on various grounds and prayed that the suit be dismissed with costs.

The parties filed list of documents, list of witnesses and witnesses' statements. When the matter came up for hearing the plaintiffs gave evidence and called two(2) witnesses, whereas the defendants gave evidence and called three(3) witnesses in support of their respective opposing positions. The parties agreed to put in written submissions. This court received written submissions from both parties. This court has considered the said submissions and authorities attached thereto in respect of the opposing respective positions.

The facts of this suit are not in dispute. The facts of the suit as this court understood the same is as follows: On 13th May,2009 by a sale agreement in writing between the plaintiffs and James Gitonga(PW3) the plaintiffs purchased all that parcel of land situated and known as Karingani/Mugirirwa/1650 measuring 0.36 hectares at an agreed purchase price of Kshs.630,000/= . That after obtaining the consent of the relevant land control board the plaintiffs were registered on 14th May,2009 as proprietors of the said parcel of land. That when James Gitonga Nthambara sold the land to the plaintiffs he was the only person in sole occupation of the land. He had only one timber house and was farming on the land. The plaintiffs before purchasing the land they confirmed with the Chuka Land Registrar that there were no encumbrances over the said land. That in June,2009 James Gitonga Nthambara vacated from the suit land. That in July,2009 when the plaintiffs proceeded to fence the land they found some temporary structures made of iron sheet and others of mud. That plaintiffs approached the seller who told them the structures belonged to 1st defendant's son and the other belonged to the 2nd defendant. The plaintiffs were told Njoka Ngeretha had built the two structures. The defendants on being approached by the plaintiffs they admitted that the structures were theirs. The plaintiffs filed a case before Land Disputes Tribunal at Chuka which made a decision on 8/10/2009 in favour of the plaintiffs. The

tribunal ordered the defendant be evicted through a court's decision. The defendants filed an appeal before Provincial Appeals Committee at Embu. The parties were then advised to seek resolution of the matter before the High Court. The plaintiffs subsequently filed the present suit seeking the orders earlier on stated.

The issues for determination in this suit can be summarized as follows:-

- 1. Whether or not the plaintiffs are the lawful proprietors of the suit land Karingani/Mugirwa/1650.**
- 2. Whether or not the defendants encroached into and occupied the suit land Karingani/Mugirwa/1650.**
- 3. Whether the plaintiffs committed any fraud in being registered as proprietors of the suit land Karingani/Mugirwa/1650.**

In the instant case the plaintiffs gave evidence and called two witnesses. PW1 and PW2 in the sale agreement exhibit (P4) are indicated as the purchasers of Karingani/Mugirwa/1650 from the proprietor James Gitonga Nthambara. The agreement is in writing and is signed by both the purchasers and seller. The agreement was duly witnessed by Alfred Murithi Nyamu. The plaintiffs produced original title deed and copy of the same as exhibit (No.P1) and copy of green card as exhibit (No.P2.) The said documents show that the plaintiffs are the proprietors of Karingani/Mugirwa/1650. The official search produced as exhibit (No.P3) show that Karingani/Mugirwa/1650 was registered in the name of James Gitonga Nthambara, the seller of the land to the plaintiffs as early as on 7th May,2009. Exhibit P5 and P6 being Land Dispute Tribunal proceedings and Provincial Lands Disputes Appeals Committee proceedings respectively were over the same parcel of land, in which parties were advised to file suit to the High Court for determination as Tribunal lacked jurisdiction.

The plaintiffs before purchase of the land from the registered proprietor James Gitonga Nthambara they conducted search and ascertained that the land belonged to the proprietor and that there were no encumbrances at all. The plaintiffs also proceeded to the site and confirmed that the suit land was solely occupied by the seller. The evidence of the plaintiffs were corroborated by PW3, the seller of the land and PW4 mother to the PW3. PW3 averred that Karingani/Mugirwa/1650 was given to him by his father as his share and that when he sold the land he was the one in occupation. That the 1st defendant was in occupation of Karingani/Mugirwa/1651 being his share which he had been given by his father whereas 2nd defendant was in occupation of Karingani/Mugirwa/1648 with her co-wife Agnes Ciombaka Ngeretha. PW3 averred that he sold his land openly and with knowledge of all his family members and none objected as each of his family members had their own lands. PW4 confirmed that Karingani/Mugirwa/1650 was given to James Gitonga Nthambara by his father. That the deceased during his life time he gave all his children(sons) their own parcel of lands. That when PW3 sold his land to the plaintiffs the defendant were not in occupation of the plaintiffs land. PW4 averred that the 2nd defendant is supposed to stay at Karingani/Mungirwa/1648 with PW4. DW1 averred that the land Karingani/Mugirwa/1650 was sold to the plaintiffs without their knowledge. He averred the land was registered in the name of the deceased. He averred the land was sold after the decision of the Land Disputes Tribunal. DW1 produced exhibit (D1), green card which showed PW3 as the registered proprietor after removal of caution followed by the registration of the plaintiffs. DW1 wrote letter to anti-corruption exhibit (D2) and was through Exhibit (D3) advised to seek redress in court of law. He produced deceased death certificate (D4) showing that Ngeretha M'Muribia died on 9/5/2006. DW1 averred that they have to date not petitioned for grant of letters of administration in respect of the deceased estate. DW1 concluded by stating that he was settled at the suit land. In cross-examination DW1 admitted that the deceased subdivided his land Karingani/Mugirwa/411 and the title thereto closed on 14/8/2001. He denied that his father gave land to PW3, but he admitted PW3 had right to get shamba from his father. He denied the land was in the name of PW3 when he effected transfer. DW2 admitted the deceased gave portions of lands to his children before he died. DW2 admitted that according to custom her husband was supposed to be buried at the home of first wife but the deceased was buried where 2nd

wife's home is. DW2 admitted her house was built by 1st defendant and is less than 3 years old and that 1st defendant has also put a house for one of his children on the suit land.

DW2 confirmed that elders met and confirmed PW3 had been given a portion of land by his father and that he had right to continue using it. DW4 did not know whether the deceased had shared his land before his death. DW4 averred that he attended the meeting called by the deceased but he did not hear the deceased state the suit land belonged to the 2nd defendant. He said he knew PW3 used to live and cultivate on plot No.1650.

In the instant suit there is no dispute that the plaintiffs are the registered proprietors of Karingani/Mugirirwa/1650. Once a party produces a title to a parcel of land in evidence, unless otherwise established, the title is a prima facie proof that such a party is the owner of the said parcel of land.

Section 26(1) (a) and (b) of the Land Registration Act 2012(No.3 of 2012) provides:

“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.”***

In the instant case I am persuaded by the evidence of PW3, and PW4 who this court found to be truthful witnesses and worthy believing that the late Ngeretha M'Muribia, as proprietor of the suit land in, exercise of his rights as a proprietor he distributed his property amongst his sons during his life time and parcel No.Karingani/Mugirirwa/1650 was availed to James Gitonga Nthambara. The plaintiffs' counsel referred me to the case of:- **JOSEPH KABURU-V-M'ITHINJI M'MBURUGU(2005)** eKLR in which it was held:-

“On the defendants counterclaim for eviction of the defendant from portion 445 of the suit land, Mr. Mithega submitted that this should succeed as there is evidence on record to support the same. That as registered owner the defendant is at liberty to distribute his property during his lifetime as he wishes and that parcel number Nkuene/Ukuu/53 is available for the plaintiff's taking. In this regard, he cited the persuasive High Court authority(Ringera J as he then was) in Bungoma HCCC NO.40/98-Morris Wanjala-v-Richard Wandera & 2 others, where the learned judge held that once land is registered, all customary law rights are extinguished and the land ceases to be family land . Section 27 of the Registered Land Act(RLA) provides as follows:-

“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 rights and privileges belonging or appurtenant therefore.

(b).....”

The rights of proprietor are not subject to be defeated except as provided for under the Land Registration Act. Section 25(1) (a) (b) and (2) of the Land Registration Act provides:-

“25. (1) The rights of a proprietor, whether acquired on first registration or 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, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

I therefore find from the evidence on record, the plaintiffs are lawful owners of land Karingani/Mugirirwa/1650. That the defendants have no justifiable interest in the suit land. The land was registered in the name of PW3 when the plaintiffs purchased the same from PW3 and not in the name of the deceased as claimed by the defendants.

That the defendants did not file any counterclaim challenging the plaintiffs' registration over the suit land on ground of fraud, misrepresentation, illegally or corruption as specifically spelled under Section 26(a) and (b) of the Land Registration Act, 2012 (No.3 of 2012). The first defendant has his share of the parcel of land from land No. Karingani/Mugirirwa/165 and 2nd defendant from Karingani/Mugirirwa/1648 where her co-wife is leaving. Further a quick look at the pleadings would reveal that the alleged illegality against PW3 James Gitonga Nthambara, the seller of the suit land is not particularized in the defence as per provisions of Order 2 Rule 10 of Civil Procedure Rules 2010. The said PW3 has not been sued separately or sought to be enjoined in this suit. The alleged illegality, if any, at the same time was not to the best of my knowledge and understanding proved in this suit, and such cannot be visited on the plaintiffs who are innocent purchasers for value consideration. I note no fraud has been alleged against the plaintiffs and/or attributed to them and/or in the manner in which they bought and acquired registration over the suit land.

PW1 and PW2 testified after they purchased the suit land the seller PW3 vacated promptly to enable plaintiffs take actual possession. That when plaintiffs came to fence the land in July, 2009 they found two freshly constructed structures of the defendants which had been put therein without the knowledge and the consent of the plaintiffs and PW3. The plaintiffs filed a suit before Land Dispute Tribunal which ruled in their favour. On appeal to provincial Land Disputes Appeals Committee the Tribunal declared that it lacked jurisdiction. The defendants did not deny that when the suit land was sold by PW3 he was the only one in occupation and entitled to the same. The defendants did not controvert the plaintiffs evidence and that of their witnesses that when the suit land was being sold the defendants were not in occupation of the same. The 1st defendant's land as allocated by his deceased father was not plot 1651 and the 2nd defendant's land is No.1648 as per plaintiffs witness evidence. In view of the foregoing I find that the defendants wrongfully and unlawfully encroached into and occupied the plaintiff's parcel of land Karingani/Mugirirwa/No.1650.

The defendants in their statement of defence alleged that title to the suit land was acquired fraudulently. The defendants did not clarify whether it is the seller(PW3) or plaintiffs' title or both which were acquired fraudulently. This is because no particulars are attributed to either the seller or the plaintiffs as required under Order 2 Rule 10(1) of the Civil Procedure Rules 2010 were pleaded. No counterclaim was filed in this case or any other case against the seller or the plaintiffs based on the alleged fraud. The defendants in their evidence did not give any particulars of fraud against the plaintiffs or produced the alleged will in an attempt to show the transfer of suit land to the seller was fraudulently done.

The burden of proof that the land was fraudulently transferred to either the seller or the plaintiffs lay on the defendants. The defendants failed to discharge the burden of proof as required by law. The court noted from the evidence on record the transfer of the suit land to either the seller or the plaintiff's was not fraudulent. There is evidence that upon subdivision of the parcel land Karingani/Mugirirwa/411 the late Ngeretha M'Muribia during his lifetime, he signed the transfer form in respect of suit land in favour of PW3, unfortunately he died before change of the registration, after the 1st defendant land illegally cautioned the land on 4/4/2004 as per exhibit (P2) entry NO.2 which was not removed till on 3.7.2009.

The caution was lifted by the court's order which has never been challenged by way of suit or appeal or judicial review. The land was after removal of the caution validly and lawfully transferred to PW3 the

seller. The seller had a valid title which he lawfully transferred to the plaintiffs after obtaining the necessary consent.

In the case of **JACKSON KANYANYI KABURUNGO –V-WAICHINGA KABURUNGO HCCA NO.138 OF 1995** Hon. Justice M. S. A. Makhandia stated:-

“The appellant contends that the transfer in respect of Iriaini/Kiaguthu/569 having not been registered, the suit premises effectively remains in the name of the deceased available to be shared equally by the appellant and the respondent. This submission holds no water. There is ample evidence on record to support the wish of the deceased that the respondent should get a larger share of the land than the appellant. Further even though the transfer of the parcel No.569 had not been effected I would imagine that the gift was complete as it was made in contemplation of death. In the case of The registered trustees, Anglican Church of Kenya Mbeere Diocese V Te Rev. David Waweru Njoroge, C.A. No.108 of 2002 (unreported) the court of appeal stated as follows on gifts inter vivos:

“.....Generally speaking, the moment in time when a gift takes effect is dependent on nature of the gift, the statutory provisions governing the type of gift and steps taken by the donor to effectuate the gift.....”

There is no denying that in the instant case, the deceased had done all he could to effectuate his desires but encountered road blocks mounted along the way by the appellant. He passed on however before he could register the transfer. However the appellant cannot be allowed to get away with and or benefit from his own mischief. Accordingly the holding by the learned Magistrate reproduced at the commencement of this judgment cannot be faulted.”

There is sufficient evidence in the instant case that the deceased had intention to transfer the suit land to PW3 and he had done all that was necessary and expected of him to effectuate his desires but encountered resistance mounted along the path by the 1st defendant who had lodged caution to block transfer of the suit land to PW3. The deceased unfortunately passed on before registration of the transfer. The 1st defendant cannot then be heard to say that the PW3 could not pursue and complete registration because his father had died before the transfer. The 1st defendant cannot be allowed to benefit from his own mischievous activities. He is not objecting and challenging the other transfers which had been effected arising out of the same subdivision and arising out of transfer by the same deceased person.

The delay herein which was caused by the 1st defendant cannot be allowed to deprive the transferee of his gift which was complete.

In addition to the above in the case of **The REGISTERED TRUSTEES ANGLICAN CHURCH OF KENYA MBEERE DIOCESE THE REV.DAVID WAWERU NJOROGE C.A. 108 OF 2002 COURT OF APPEAL NO. 138 OF 1995**

“It is true as Mr. Njagi submitted that the transfer of land registered under RLA is not completed until registration by the Land Registrar. Section 85(2) of RLA so provides. Indeed, as provided by Section 27 RLA. It is the registration of a person as proprietor which vests in the person absolute ownership of the land. However, an unregistered transfer can operate as a contract between the parties(section 38(2) RLA) with the result that beneficial interest in the property as opposed to legal title is passed to the transferee. The Macedo’s case (supra) can be distinguished from this case. In that case, there was a mere execution of transfer which the donor did not hand over to the donee and which he instructed his solicitors not to register. In the instant case, something more than in Mascall’s case(supra) has been done. The application for registration of the transfer was executed and the transfer and accompanying documents lodged at the District Lands Registry for registration. In this case, therefore, the respondent has done all in his power to divest himself of and transfer to the church trustees all his legal and equitable interest in the land. There is nothing that remains to be done by the appellant to complete the transaction. The registration of the land is not within the power of the appellant and the transferee does not need any assistance from the court. The transferee of course has a right to take any appropriate action against third parties, including the son of the appellant who has lodged a

caution, to facilitate the registration of the transfer. Although the land is still registered in the name of the respondent, he is in the circumstances of this case, a bare trustee for the transferee having transferred the whole of his beneficial interest in the land. The documents relating to the land which the appellant was ordered to return to the respondent were lodged at the land registry and accepted by the land registrar. They are in the custody of the Land Registrar by virtue of section 112(1) of the RLA. The order for return of the documents directed at the appellants is thus, ineffectual. “

The first authority is of a decision of the High Court which is not binding on me. I nevertheless find it to be a good law and I agree with the same.

The 2nd authority being a decision of the Court of Appeal binds this court.

Under Section 36(1) and (2) and (4) the Land Registration Act 2012 No.3 of 2012 provides on dispositions and dealings affecting land as follows:-

“36. (1) A lease, charge or interest in land shall not be disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with this Act or any other law, shall not, extinguish, transfer, vary or affect any right or interest in that land, or in the land, lease or charge.

(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract.

(3) The Cabinet Secretary may prescribe terms and conditions of sale, which—

(a) shall apply to contracts by correspondence, subject to any modification or any stipulation or any intention to the contrary expressed in the correspondence; and

(b) may be made to apply to any other cases for which the terms and conditions are made available, where express reference is made to those terms and conditions.

(4) Subject to Article 67(2)(c) of the Constitution, the Cabinet Secretary shall make regulations prescribing the time within which instruments presented for registration must be registered and providing for the supervision of the registration process to achieve the objectives of efficiency, transparency and good governance.”

In the circumstances of this case and on the evidence on record I find that the plaintiffs did not commit any fraud in being registered as proprietors of Karingani/Mugirirwa/1650.

The upshot is that the plaintiffs have established that they are the owners of the suit land. That the plaintiffs are entitled to all rights that go with ownership of land. The plaintiffs are entitled to quiet occupation and possession of the suit land. I therefore proceed to make the following orders:-

1. The plaintiffs are sole proprietors and entitled to possession and occupation of Karingani/Mugirirwa/1650 and the defendants jointly with their family members do deliver vacant possession of Karingani/Mugirirwa/1650 to the plaintiffs within the next 60 days from today in default court bailiff of this court do demolish the structures and remove all crops of the defendants on Karingani/Mugirirwa/1650 at the defendants costs.

2. The OCS Chuka Police Station do provide security at the time of eviction of the defendants by court bailiffs.

3. Costs of the suit to the plaintiffs.

DATED AT MERU THIS 20TH DAY OF NOVEMBER, 2012.

**J. A. MAKAU
JUDGE**

Delivered in open court in presence of:-

1. ***Mr. C. Kariuki h/b for Mr. C. Mbaabu for the plaintiff.***
2. ***1st defendant in person – present***
3. ***2nd defendant in person – absent***

J. A. MAKAU

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