



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 1780 of 2007

WAIRIMU KINYANJUI

MARY WAMBUKU KAMAU

WANGUI KINYANJUI

EDWIN GICHO KINYANJUI..... PLAINTIFF

-VERSUS-

JOSEPH MOINAMIA MWANGI1ST DEFENDANT

HON. THE ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

The plaintiffs instituted this suit by way of plaint dated 15th February 2006 filed in court the same day seeking the following orders:-

- (i) A declaration that the plaintiffs are the rightful owners of land parcel No. Ruiru East/Block 1/4.
- (ii) An order that the Thika land Registrar do rectify the Land register by deleting the name of the 1st defendant and/or any other name and in their entering the name of the plaintiff as the proprietors.
- (iii) An order that the 1st Defendant pays the costs of the suit and interest thereon.
- (iv) Any other or such further relief the Honourable court may deem fit to grant in favour of the plaintiffs against the defendants.

Simultaneously with the plaint the plaintiffs filed a notice of motion application grounded on sections 128(1) of the Registered land Act and Order XXXIX Rules 3(2) and section 3A of the Civil Procedure Rules seeking inter alia an order for injunction restraining the 1st Defendant from selling or transferring Land Reference Number Ruiru East/Block 1/4 pending the hearing of the application and further seeking an order inhibiting all dealings relating to the subject parcel of land.

The application for injunction came up for hearing on 18th May 2006 when the 1st Defendant did not attend in spite of having been served with the application. The plaintiff and the 2nd Defendant consented to an order of inhibition, being issued restraining all dealings in relation to the title number Ruiru East/Block 1/4 until the suit is heard and determined.

Briefly the facts of the case are that the plaintiffs were on 9th December 1987 registered joint proprietors of Land title number Ruiru East/Block 1/4 at the Kiambu Land Registry and issued with a land certificate for the said parcel of land under the provisions of the Registered Land Act (Cap 300) Laws of Kenya (now repealed). A search at the Thika Lands Registry conducted on 17th May 2005 confirmed that plaintiffs were the registered owners of the subject parcel of land. Incredibly another search conducted at the Lands Registry by the Plaintiffs on 26th January 2006 showed the 1st Defendant as the registered owner of the parcel of land and a title deed purporting to have been issued on 29th September 1995 was issued to the 1st Defendant.

The plaintiffs state they never had any dealings with the 1st Defendant respecting the subject land and suspected foul play and fraudulent dealings as they never sold this property to the 1st Defendant or any other person. Following this discovery the plaintiffs attempted to lodge a caution to protect their interest on the land but their application for registration of a caution was declined by the land registrar. In the meantime the plaintiffs received reports from their neighbours of the subject land that there were potential buyers who were being shown the land for purchase. The plaintiffs had not put up the property for sale and therefore the plaintiffs were convinced there must have been some fraud being perpetrated by persons unknown to them and possibly with collusion of staff at the Thika Lands Registry.

These happenings drove the plaintiffs to institute the present proceedings.

The Hon. Attorney General was sued for and on behalf of the Thika land Registrar. The 1st Defendant did not enter any appearance after he was served and neither did he file any defence. The 2nd defendant appeared and participated in the proceedings but did not file any defence.

Wairimu Kinyanjui and David Kinyanjui filed written statements of evidence in support of the plaintiffs case which set out the facts as outlined above and clearly pointed to fraud having been perpetrated in regard to the transfer of the parcel land to the 1st Defendant.

On 7th February 2012 when the suit was scheduled for hearing the 1st Defendant was absent though served with the hearing notice. The 2nd Defendant indicated they would offer no evidence. The plaintiffs Advocate and the 2nd Defendant consented to the matter proceeding on the basis of written submissions and the witnesses filed witness statements and the court directed that the plaintiff's advocate and the 2nd Defendant file written submissions.

The submissions were filed by the Plaintiff's Advocate and the 2nd Defendant and came for highlighting before me on 15th November 2012 when the plaintiffs Advocate attended and there was no attendance on the part of the 2nd Defendant.

The court has reviewed the plaint, the plaintiffs 2 witnesses statements and the submission presented by the plaintiffs Advocate and the 2nd Defendant and on the basis of the material evidence availed finds that:

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- (i) The Plaintiffs were lawfully registered as the joint proprietors of Title Number RUIRU EAST/BLOCK 1/4 and issued with a land Certificate on 9th December 1987.
- (ii) The Plaintiffs have not executed any instrument of transfer of the subject land to the 1st Defendant or any other person.
- (iii) The 1st Defendant has not tendered any evidence to demonstrate how he came to be registered as the proprietor of the Title Number RUIRU EAST/BLOCK 1/4.
- (iv) That if the plaintiffs are not the ones who transferred the subject property to the 1st Defendant then

the registration of the 1st Defendant as the proprietor can only have been obtained fraudulently.

Under section 38 of the repealed Registered Land Act (Cap 300) any disposition of land was required to be in accordance with the provisions of the Act to be effectual. Section 108 of the Act provided that all dispositions of any interest in land shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in particular case approve.

Section 109 of the Registered Land Act provided that:

“Every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all parties to the instrument”

No evidence has been availed to show that the registration of the 1st Defendant as the proprietor of the suit land had complied with the aforesaid statutory provisions and the court accepts the plaintiffs averments that they never executed any instrument of transfer in favour of the 1st Defendant. Section 143 (1) of the Registered land Act provided for rectification of the Register by the court where any Registration is shown to have been obtained made or omitted by fraud.

The 2nd Defendant in his submission states:-

“It is apparent from the evidence produced that the 1st Defendant is now the registered owner of the suit property. The plaintiffs alleged that they never transferred the suit property to the 1st Defendant, and the 1st Defendant has not challenged the same, that being the position the 2nd Defendant cannot intervene and take sides in the issue. If the plaintiff did not transfer the suit property, to the 1st Defendant then the registration of the 1st Defendant as proprietor should be cancelled since the 1st Defendant could only obtain title from the plaintiffs who were the registered proprietors before him”

The court agrees fully with this proposition. It is indeed unfortunate that innocent persons are put through such time consuming and expensive exercises to reclaim their rights and interest that have been wantonly abused through acts of fraud and corruption. It is unlikely that such fraudulent acts as in the instant case can be executed without some officials at the Lands Registry being involved. It is sad that the officers who have been entrusted with the responsibility to safeguard the public interest become willing agents in fraudulent and corrupt deals.

The court having found that the registration of the 1st Defendant could only have been irregularly and fraudulently obtained it is mandated and empowered entitled under the provisions of Section 80(1) of the Land Registration Act No. 3 of 2012 to order the rectification of the register.

Section 80(1) of the Land Registration Act No. 3 of 2012 provides:

“Subject to subsection (2) the court may 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”.

The court is satisfied that fraud was perpetrated in the instant case.

Accordingly therefore, the court enters judgment in favour of the plaintiffs in the following terms:-

- (i) The plaintiffs are the rightful owners of Land Parcel Number RUIRU EAST/BLOCK 1/4.
- (ii) The Land Registrar rectifies the register by cancelling the registration of the 1st Defendant as the proprietor of Land Title Number RUIRU EAST/BLOCK 1/4 and reinstating the names of the Plaintiffs as the proprietors.

(iii) That the 1st Defendant do pay the costs of the suit together with interest thereon to the Plaintiffs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2012.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff
..... for the 1st Defendant
..... for the 2nd Defendant

J. M. MUTUNGI

JUDGE