



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 38 OF 2003

SIMON WAINAINA
GATWIKU.....PLAINTIFF

VERSUS

EVANSON WAMBUGU GACHUGI.....1ST
DEFENDANT
THE LAND REGISTRAR NYERI DISTRICT.....2ND
DEFENDANT
THE ATTORNEY GENERAL.....3RD
DEFENDANT

JUDGMENT

In the amended Complaint dated 6th March 2008, **Simon Wainaina Gatwiku**, the Plaintiff herein, prayed for judgment against **Evanson Wambugu Gachugu**, the District Land Registrar, Nyeri, and the Attorney General being the 1st, 2nd and 3rd Defendants respectively, in the following terms:

- (a) The 1st Defendant and his agents, servants, or anybody claiming right through the 1st Defendant be restrained from entering, cultivating, digging, building, alienating, selling, charging, licensing or otherwise dealing with the land parcel No. Chinga/Gikigie/800 until the determination of this suit.**
- (b) A declaration that the land parcel No. Chinga/Gikigie/800 was illegally and fraudulently transferred into the 1st Defendant's name and that its rightful owner is the said Josiah Gichau Gatwiku (deceased).**
- (c) An order directing the 2nd and 3rd Defendants herein to rectify the official records on**

Chinga/Gikigie/800 to cancel the title deed issued to the 1st Defendant and to issue a new title for Chinga/Gikigie/800 in the name of the Plaintiff.

(d) Costs of this suit plus interest and any other order that the Honourable Court may deem just to grant.

The Defendants each filed a defence to deny the Plaintiff's claim.

When the suit came up for hearing, the Plaintiff testified alone without summoning the evidence of independent witnesses. **Simon Wainaina Gatwiku** (P.W.1), told this court that he filed this suit in his capacity as the legal representative of the Estate of Josiah Gichau Gatwiku, deceased, to recover the parcel of land known as L.R. NO. CHINGA/GIKIGIE/800 from Evanson Wambugu Gachui the 1st Defendant herein. He produced in evidence as an exhibit the grant of letters of administration issued to him on 16th April 2003. P.W. 1 said that the family was restrained from burying the late Josiah Gichau Gatwiku on **L.R. NO. CHINGA/GIKIGIE/800** by an order obtained by the 1st Defendant. After the deceased's burial, P.W. 1 said he did a search at the lands office whereupon he discovered that the Defendant had caused the land transferred to himself on 25th July 2007. P.W.1 alleged that he was surprised because he was in possession of the original title deed which he produced before this court as an exhibit in evidence. P.W. 1 accused the office of the Nyeri District Land registrar for issuing a title to the 1st Defendant despite the fact that he was in possession of the original title. He further accused the 1st Defendant of transferring the title to himself in collusion with the lands office while he knew that the deceased was dead. P.W.1 claimed that the agreement between the 1st Defendant and the late Josiah Gichau Gatwiku was drawn by the firm of Nyawira Gitonga & Co. Advocates a firm owned by Gitonga Grace Nyawira Ibrahim advocate who did not have a practising Certificate. He produced a copy of a letter from the Law Society of Kenya showing the learned advocate had no Practising certificate at the time of drawing up the agreement. The Plaintiff said that the 1st Defendant started picking tea from the farm in 2003 before taking possession of the suit land. On being cross-examined P.W.1 said that he came to learn on 29th July 2002 that the land had been transferred to the 1st Defendant. He said the land was sold without the family being consulted. P.W.1 denied knowledge of the fact that his late brother had published that the title to the land in dispute was lost.

The Defendant tendered the evidence of two witnesses to support the defence. **Evanson Wambugu Gachuhi** (D.W.1) told this court that he bought the land in dispute from the late Josiah Gichau Gatwiku. He produced the sale agreement made on 27th February 2002 signed before an advocate. D.W. 1 also produced in evidence the acknowledgment receipts duly signed by the late Josiah Gichau Gatwiku and the resultant title deed issued to him. D.W. 1 said he and the deceased attended Othaya Land Control board meeting on 12th May 2002 where they obtained the Land Control Board consent which he produced in evidence as an exhibit. D.W. 1 further produced an affidavit deposed by Josiah Gitau Gatwiku on 20th May 2002 confirming that the land was sold to D.W. 1. The 1st Defendant admitted that he caused the title transferred to him after the death of Josiah Gitau Gatwiku. D.W. 1 expressly stated that he had no claim against the 2nd and 3rd Defendants. The 1st Defendant said he hurriedly registered himself as the owner of the land in dispute when he realized that the family of the vendor did not approve the transaction. The 2nd and 3rd Defendants tendered the evidence of Agnes Wangu Kuria (D.W.2), the District Land Registrar, Nyeri. D.W. 2 stated that the Lands Office received the necessary consents and transfers which were recorded in the presentation book on 5th July 2002. That presentation book was produced as an exhibit in evidence. D.W. 2 also produced the copy of the green card which shows that the property was transferred to the 1st Defendant on 25th July 2002. D.W. 2 denied the allegation that the Lands office colluded with the 1st Defendant to fraudulently transfer the land.

At the close of the evidence, learned counsels were allowed to file written submissions. At the time of writing this judgment, this court had only received the submissions of the 1st Defendant. I have considered the evidence and the available submissions. Though the parties did not file the agreed issues, I think the following issues arose for my determination.

- (i) Whether or not the Defendants colluded to fraudulently transfer **L.R. NO. CHINGA/GIKIGIE/800** to the 1st Defendant.
- (ii) Whether or not the aforesaid parcel was properly transferred.
- (iii) Whether or not the claim against the 2nd and 3rd Defendants is maintainable?

Let me start by dealing with the first issue that is to say whether or not there was collusion between the Defendants to fraudulently transfer the land in dispute to the 1st Defendant. It is the evidence of the Plaintiff that the court should infer collusion on the part of the offices of the Land Registrar with the 1st Defendant to fraudulently transfer the land to the 1st Defendant because the transfer was done without the original title. The Plaintiff claimed that the original title deed was in his possession yet the transfers were effected. It is also the Plaintiff's evidence that the transfer was effected when the owner of the land was dead. The 1st Defendant produced an agreement dated 27th February 2002 which he duly executed with the late Josiah Gichau Gatwiku. The agreement shows the land was sold for Ksh.425,000/=. The agreement was drawn and witnessed by Nyawira Gitonga practising as Nyawira Gitonga & Co. Advocates. The 1st Defendant also produced an acknowledgement dated 28th March 2002 which shows that the deceased received a sum of Ksh. 360,000/= being the final payment of the purchase price. He also produced two other acknowledgement receipts acknowledging receipt of Ksh.15,000/=. Clause 2 of the agreement clearly indicates that the consideration should be paid in a single installment. The evidence tendered by the 1st Defendant shows that he only paid Ksh.375000 in three installments i.e. Ksh.360,000 on 28th March 2002, Ksh.10,000/= on 14th March 2002 and Ksh.5,000 on 13th March 2002. The Land Control Board consent indicates that the consideration was Ksh.200,000/=. One issue which was not answered by the Defence is how was the land transferred without the surrender of the original title deed? There was no evidence that the loss of title was published in the Kenya Gazette. I expected the Land Registrar to explain how the lands office effected the transfers without the surrender of the original title deed for destruction. In my view, I am convinced there was clear evidence of collusion on the part of the Lands Office and the 1st Defendant. To begin with, none of them explained how the land was transferred without the surrender of the original title deed. The 1st Defendant has not also explained how the transfer was effected even before he settled the consideration in full. By the time of hearing this suit, the 1st Defendant had only paid Kshs. 375,000/= out of Kshs. 425,000/=. The aforesaid sum was paid in installments contrary to clause 2 of the agreement which expressly stated that the amount would be paid in one installment. There was also no explanation as to why the parties decided to indicate the consideration to be Kshs. 200,000/= yet the agreement talks of Kshs. 425,000/=. I can only infer that the figure was calculated to avoid payment of stamp duty. The evidence of such litigants cannot be trusted by this court. The letter dated 26th July 2010 produced as an exhibit by the District Land Registrar is a clear indication that certain documents were either lost or deliberately concealed from court. It is alleged that the Lands Office was broken into and documents related to the land in dispute were lost. In my view that is another method of cover-up. The above analysis clearly shows that there was a collusion between the Lands Office and the 1st Defendant to unlawfully transfer the land in question to the 1st Defendant.

Having disposed of the first issue, let me now turn my attention to the second issue as to whether or not the land in question was properly transferred to the 1st Defendant. The evidence tendered include *inter alia*, the agreement dated 27th February 2002, the transfer dated 13th March 2002, the letter of consent dated 12th March 2002, the title deed issued on 25th July 2002 and three acknowledgment receipts. The Plaintiff has specifically stated that the primary documents were prepared and witnessed by an advocate who did not have a practising certificate. I have carefully examined those documents and it is clear that the agreement, the acknowledgement receipts and the transfer were drawn and witnessed by

Nyawira Gitonga practising in the name and style of Nyawira Gitonga & Co. Advocates. The Plaintiff managed to produce in evidence as an exhibit the letter dated 24th September 2002 from the Law Society of Kenya. In the aforesaid letter, the Law Society of Kenya stated that Gitonga Grace Nyawira Ibrahim who practised in the name and style of M/S Nyawira Gitonga & Co. Advocates did not pay for the practising certificates from 1988 upto the date of that letter. In short, she did not have a practising certificate at the time of drawing up and witnessing the execution of those documents. The Court of Appeal was faced with a near similar situation in the case of **National Bank of Kenya Ltd =vs= Wilson Ndolo Ayah C.A. no. 119 of 2002 (unreported) at page 14 – 15.** It held *interlia* as follows:

“It is public policy that courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such advocates we come to the conclusion that will discourage excuses being given for justifying the illegality.

A failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal act. For those reasons alone the charge and instruments of guarantee in this matter are invalid and we so hold.”

With respect, I am convinced that the documents which led to the 1st Defendant gaining proprietorship of **L.R. No.Chinga/Gikigie/800** were drawn and their execution witnessed by an unqualified advocate. Such documents are invalid and could not pass any interest to property to anybody.

The final issue is whether the case against the 2nd and 3rd Defendants is maintainable? It is obvious from the pleadings and the evidence that the plaintiff did not comply with the provision of the Government Proceedings Act. The plaintiff did not give the 30 days notice. On this ground alone the suit against them could have been dismissed. The other ground raised is that the suit is time-barred in that those defendants were enjoined to these proceedings in 2008 yet the suit was filed in 2003. There is no dispute that the Plaintiff did not issue the 30 days notice under *Section 13 A* of the Government Proceedings Act. I think the above provision applies to a situation where a party directly sues the Government. In my view the requirement for the 30 days notice does not apply when the Government is brought on board by an amendment on an already existing suit. For this reason the suit against the 2nd and 3rd Defendant is maintainable. It has also been said that the suit is time-barred. This suit was filed on 5th May 2003. The cause of action is said to have taken place on 25th July 2002. Of course the law states that a suit against the Government based on tort cannot be filed after the lapse of 12 months from the date of the cause of action under *Section 3 (1)* of the Public Authorities Limitation Act. When the 2nd and 3rd Defendants were enjoined to the suit, the date of the cause action will obviously be the date of filing of suit which is 6th May 2003. By then only 10 months had lapsed from 27th July 2002. In the end I find the action against the 2nd and 3rd Defendants to be properly before court.

In the end I am convinced the Plaintiff has proved his case to the required standards in civil case. Judgment is entered in terms of the amended plaint dated 6th March 2008.

Dated and delivered at Nyeri this 27th day of May 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Ng'ang'a holding brief Karweru for the 1st Defendant, Muhoho holding brief Miss Mwai for Plaintiff and Mr. Wairoma for 2nd and 3rd Defendants.