



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI Civil Appeal 48 of 2009

JAMES MWANGI KAMURU.....APPELLANT

VERSUS

JOEL NDIRANGU NJARAMBA.....RESPONDENT

(Being appeal from the judgment of Ndungu H. N. (Miss) Senior Principal Magistrate in Nanyuki Senior Resident Magistrate's Civil Case NO. 47 of 2004 delivered on 29th April 2009)

JUDGMENT

JOEL NDIRANGU NJARAMBA, the Respondent herein, sued JANE WANJIRU D/o Wangui and JAMES MWANGI KAMURU by the Complaint dated 22nd April 2004 praying for judgment in the following terms:

- (a) *A declaration that plot no. BLOCK 8/214 NANYUKI MUNICIPALITY was fraudulently transferred to the 1st defendant herein Jane Wanjiru Wangui and later to Elizabeth Wambui Kamuru.*
- (b) *An order of Mandatory injunction against the defendants, their agents, servants and or persons claiming under them to transfer and hand over vacant possession thereof of plot no. A4 also known as Plot No. BLOCK 8/214 Nanyuki Municipality to the plaintiff herein Joel Ndirangu Njaramba with all developments thereon.*
- (c) *Mesne Profits (as admitted by the 2nd defendant that he receives monthly rent of Kshs.1,100/= from the plot) from the date of filing suit until such time as the 2nd defendant will surrender vacant possession to the plaintiff.*
- (d) *Costs and interests also to the plaintiff.*

JAMES MWANGI KAMURU, filed a defence to deny the Plaintiff's claim. The suit was heard by Hon. Hannah Ndungu, learned Ag. Senior Principal Magistrate sitting at Nanyuki and in the end she found the case in favour of the Respondent. JAMES MWANGI KAMURU, the appellant, was dissatisfied with the aforesaid decision hence this appeal.

On appeal, the Appellant put forward the following grounds in his Memorandum of Appeal:

1. *That the learned Magistrate erred in fact in applying an inappropriate standard of proof in a suit premised upon alleged fraud thereby occasioning extreme prejudice to the Appellant.*

2. That the learned Magistrate erred in fact and in law in failing to uphold the principles of law as regards temporary occupation Licences (T.O.L) as enunciated in the several cases of inter alia RUNDA COFFEE ESTATES –VS- UJAGAR SINGH (1966) E.A. 564 AND FARAJ MAHARUS –VS- J.B. MARTIN Eklr.

3. That the learned Judge erred in law and in fact in holding that fraud had been proved against ELIZABETH WAMBUI KAMURU who was an innocent purchaser for value and without notice of any defect in the title/interest of the 1st defendant.

4. That the learned trial Magistrate misapprehended the effect of registration of the suit property as set out under section 23 of the Registration of Titles Act.

5. That the learned Magistrate erred in fact and in law in failing to appreciate the fact that the respondent's claim in the suit property was hopelessly statute barred.

6. That the findings by the learned Magistrate were against the right of the evidence adduced.

When the appeal came up for hearing, this Court gave directions to the effect that the appeal be disposed by written submissions. I have considered the written submissions filed by learned counsels from both sides plus the authorities cited. Before considering the appeal, let me set out in brief the case that was before the trial court.

The Plaintiff's (appellant's) case was supported by the evidence of three witnesses. **JOEL NDIRANGU NJARAMBA** (P. W. 1), told the trial court that his sister **JANE WANJIRU WANGUI** (1ST Defendant), sold Plot No. A4 to James Mwangi Kamuru (Appellant). He claimed that the plot belonged to his mother, Wangui Wambugu, deceased. At that time P. W. 1 said he was serving a jail term in prison. He said he was released in 1984. P. W. 1 produced a copy of a grant of Letters of Administration to show that he was legal representative of the Estate of Wangui Wambugu, deceased. P. W. 1 said plot No. A4 formed part of the assets of the deceased's Estate which he was entitled to inherit, but unfortunately his sister sold it. P. W. 1 went to search at the lands Office and found that the Plot was sold in 1979 vide a transfer purportedly signed by Wangui Wambugu yet she had passed on in 1977. He asked the Court to cancel the sale to the Appellant since the transfer was fraudulent. P. W. 1 confirmed that the Plot is developed and that the Appellant has been collecting rent since 1984. P. W. 1 demanded to be paid mesne profits in form of rent paid to the Appellant. P. W. 1 said that he was not informed by his advocate that his suit was time-barred. P. W. 1 admitted that the 1st Defendant (Jane Wanjiru Wangui) was issued with a lease certificate. Njaramba Njuguna (P. W. 2) told the trial court that his mother (Wangui Wambugu) told him to take care of the plot in dispute before she died in 1977. P. W. 2 further claimed that the deceased informed him that she had bequeath the plot to P. W. 1 who was by then serving a jail term in prison. P. W. 2 said he was later told by P. W. 1 that the Plot was sold by their sister, Jane Wanjiru Wangui. P. W. 2 said in cross-examination that he left for Kitale leaving the Plot under the care of his sister. P. W. 2 was forthright that he was never given any title documents over the plot by his late mother. **MWENDA KINYINGA MBOGORI** (P. W. 3), an officer from the lands office Nairobi, told the trial court that **Plot L. R. NO. 2787/692** is owned by one Wambui Kamaru. The registration was done on 4th March 1988. P. W. 3 also told the trial Magistrate that a temporary occupation licence was issued to one Wangui Wambugu on 1st January 1949 in respect of Plot A4. P. W. 3 said that the Lands Office received a letter dated 23rd January 1973 which informed the Lands Office that Wangui Wambugu had passed on. The letter further indicated that the deceased's documents were lost. P. W. 3 said that a letter of allotment was given to Mrs. Wambui Kamaru on 13th January 1983. P. W. 3 further pointed out that the Lands Office was in possession of a transfer form dated 7th May 1982 transferring the Plot from Jane Wanjiru Wangui to Elizabeth Wambui Kamuru. P. W. 3 confirmed that the Plot did not belong to Jane Wanjiru Wangui. P. W. 3 told the trial Magistrate that there was another transfer dated 11th February 1982 transferring the Plot from Wangui Wambugu to Jane Wanjiru Wangui. The transfer has only one signature of the transferee but does not have the one of the transferor. P. W. 3 was unable to explain how the transfer was executed without the signature of the transferor. P.W. 3 said that the Land office received recommendation from the Nanyuki Municipal Council Clerk, dated 27th September 1982 to have the temporary occupation licences to be converted into long term leases. P. W. 3 stated that a letter of allotment was issued to Wanjiru Kamaru on the recommendation by the Council. By then the temporary occupation licence issued to Wangui Wambugu had not been revoked. P. W. 3 further stated that the temporary occupation licence lapsed upon the issuance of a lease. P. W. 3 said that the transfer of the Plot to Jane Wangui was consented by the Commissioner of Lands. He also

confirmed that Jane Wangui transferred the Plot to Wambui Kamuru. P. W. 3 said that a lease was given to Wambui Kamuru on the recommendation of the council and not Jane Wangui. P. W. 3 stated further that a temporary occupation licence automatically lapses upon the death of the licensee or once a long term lease is issued. It is also stated that **Plot No. A 4** was surveyed as **2787/692** and allocated to Wambui Kamuru as from 1st January 1983. A lease was then issued.

JAMES MWANGI KAMURU, (D. W. 1) (Appellant) was the only witness who testified from the defence. D. W. 1 said Plot No. **A4 BLOCK 8 214** Nanyuki Municipality is the property of his late mother Elizabeth Wambui Kamuru. D. W. 1 produced copies of the Grant of Letters of Administration to show that he is the legal representative of the Estate of Elizabeth Wambui Kamuru, deceased. D. W. 1 alleged that the deceased purchased the Plot from Jane Wangui on 29th November 1979. He produced the relevant agreement. The deceased was issued with a letter of allotment and later with a certificate of lease for 99 years with effect from 1st January 1983. In cross-examination, it emerged that Elizabeth Wambui Kamuru used to be a tenant in the Plot in dispute. The learned Ag. Senior Principal Magistrate analyzed and came to the conclusion that the Appellant's mother knew that Jane Wangui had not acquired any proprietary interest over the property hence she had nothing to transfer to her. She was therefore not an innocent purchaser for value. She invoked the provisions of *Section 64* of the Registration of Titles Act to cancel the certificate of lease issued to Elizabeth Wambui Kamuru and in her place she directed the name of Joel Ndirangu Njaramba to be inserted.

On appeal, the following issues were ably argued before this court by way of written submissions. It is apparent from the evidence tendered that the learned Senior Principal magistrate cancelled the leasehold issued to Wambui Kamuru. The aforesaid lease was issued on 11th July 1987 to last for 99 years with effect from 1st January 1983. The lease was issued pursuant to the provisions of the Registration of Titles Act (Cap. 281 Laws of Kenya). Under *Section 2* of the Registration of Titles Act, the Court is defined as the "High court". It is therefore obvious that the learned Senior Principal Magistrate had no jurisdiction to hear and determine the dispute. It is the submission of the Appellant that the temporary occupation licence in favour of the late Wangui Wambugu had lapsed upon her death and upon the issuance of a lease. I have re-evaluated the evidence and it is clear that the late Wambui Kamuru was given a letter of allotment and thereafter a certificate of lease after the original licensee had passed on. The deceased, no doubt had a temporary occupation licence given to her in 1949. In the case **FARAJ MAHARUS (ADMINISTRATOR OF THE ESTATE OF KHADIJA RAJAB SULEIMAN) =VS= J. B. MARTIN GLASS INDUSTRIES & 3 OTHERS C.A. NO. 130 OF 2003 (Unreported)** the Court of Appeal at Pg. 6-7 restated the law *inter alia* as follows:

"Thirdly, the temporary occupation licence issued in 1926 could not oust the certificate of title granted under the registration of Titles Act. The appellant does not possess title under the act.

It is indeed settled law in Kenya that a temporary occupation licence to occupy Government land is not sufficient to create or transfer title to the grantee or his personal representative. As was stated in RUNDA COFFEE ESTATE LTD. =VS= UJAGAR SINGH [1966] E.A. 564

"It is the essence of a licence of this nature that is personal to the licensee and creates no interest which can be disposed of by the licensee."

We would agree therefore, with the learned judge that the licence to occupy the suit property came to an end upon the death of Effendi Maharus and his widow and as the appellant had nothing to show for continued occupation of the suit land, his occupation as such amounted to trespass as against the registered proprietor.

It would appear from the circumstances of this appeal that temporary occupation licence issued to the late Wangui Wambugu lapsed upon her death and upon the issuance of a long-term lease by the Commissioner of Lands. Of course, Jane Wangui's (1st defendant) purported transfer of **Plot No. A4** to Wambui Kamuru was of no consequence. By then she had nothing to transfer. What happened in this case is curious. The evidence presented by the lands official **MWENDA KINYINGA MBOGORI** (P.W.3) gave two versions of how the late Elizabeth Wambui Kamuru acquired the suit premises. One version is that the 1st Defendant (Jane Wangui) transferred the same to herself from the deceased and then to Elizabeth Wambui Kamuru, deceased. The second version is that the Nanyuki Municipal Council made recommendations that she (Elizabeth), be issued with a lease. It is said both transactions were sanctioned by the Commissioner of Lands. In my view, either way, the situation does not change. At the time Elizabeth Wambui Kamuru, deceased, obtained title to the land in dispute, the temporary occupation licence had lapsed hence the Government through the Local Authority was right to allocate the land to any deserving person. It is apparent that the learned Senior Principal Magistrate completely ignored the law governing the existence or otherwise of a temporary occupation licence. She also misdirected herself when she failed to notice that she had no jurisdiction to hear and determine the dispute involving land registered under the Registration of Titles Act.

In the end, I allow the appeal by setting aside the judgment of the trial court and substitute it with an order dismissing the suit. Costs of the appeal and the suit are awarded to the Appellant.

Dated and delivered at Nyeri this 7th day of May 2010.

J. K. SERGON
JUDGE

In open Court in the presence of Mr. Muthigani for the appellant and Mr. Kiminda holding brief for Mr. Bwononga.