



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1494 of 2007

AMON MUTHAMIA MBUI IGWETA.....PLAINTIFF

VERSUS

STEVE KIONI KINYA.....DEFENDANT

JUDGMENT

The plaintiff moved to this court, by way of a plaint dated 5th day of September 2007 and filed on 6th September 2007. In it, he avers vide paragraph 3 that he is the proprietor of parcel number Kiambu/Municipality Block 111/163, in respect of which the defendant obtained a transfer some time in October 2001 through fraud, whose particulars are set out in paragraph 4 of the plaint. The major one being that he failed to ascertain the really owner of the above mentioned suit/and, before obtaining the transfer of the same to himself from the purported owner of the suit land.

It is the plaintiffs, stand, that when he learned of the said transfer in November 2001, he moved promptly to report the matter to the police, had the perpetrators arrested, prosecuted, vide criminal case Number 2822 of 2001 and one died while the others were convicted.

For the reasons given above the plaintiff, seeks cancellation of the transfer of the suit land, registered into the defendants' name on 29/10/2001, and restore the registration back into his name.

Summons to enter appearance were taken out for service upon the defendant but since he could not be traced for service, the plaintiff applicant moved to court, by way of chamber summons dated 14th day of November 2007, and filed on 15th November 2007. It sought an order that service of the summons in this matter be effected through substituted service by advertisement once in either the Nairobi or the standard Newspaper and that the costs of the application to be in the cause.

The orders regarding the said application were granted by the court on 23/11/2007. Service by way of advertisement was effected on 29th November 2007 in the Daily Nation. When no response was forth coming from the defendant, the plaintiff applied for an interlocutory judgment which was entered by the Deputy Registrar on 28th day of January 2008. There after the matter was listed for formal proof, which formal proof was conducted on 17/04/2008 and judgement in respect of the same duly delivered on the 17th day of April 2008.

Upon discovery that the original plaint, on the basis of which judgment had been given, had an error, the plaintiff presented an applications by way of Notice of Motion dated 22nd day of May 2008, and filed

on 29th May 2008 seeking the setting aside of the judgment, of 17th day of April 2008 and that leave be granted to amend the plaint, which was allowed on the 20th day of July 2008.

Following the allowance of that application, the plaintiff duly presented an amended plaint amended on 11th day of November 2008 and filed on 11th November 2008. This is the amended plaint that has formed the basis of the current hearing.

In the current hearing, the plaintiff simply reiterated the content of the plaint. He then produced a judgement in the CMCC No 2822 of 2001. It indicates that the prosecutor is the Republic, where as the accused persons were one John Muriithi Mukua alias Amon Muthamia (deceased) Rufus Gitaiya Kariri and Evans Nyaga Kathiri as accused persons. At the start of the said judgment the learned magistrate made observations that the accused persons had been charged with the offence of making a document without authority C/S 357(A) of the penal code , uttering a false document with intent to deceive C/S 357B of the penal code, Forgery contrary to section 349 of the penal code, and obtaining money by false preferences contrary to section 31 (3) of the penal code.

The plaintiff gave evidence as PW1, and simply confirmed that he was the owner of the suit plot. When he decided to develop it, he was surprised to find that some one else was already developing the plot. Upon inquiry, it turned out that the person who was developing the plot was the defendant, who claimed to have purchased it through the accused persons. Both decided to report the matter to police, and the accused persons. Both decided to report the matter to police and the accused persons were arrested and arraigned in court

The defendant on the other hand gave evidence as PW2 confirmed, particularly the evidence of PW1 as regards the sale of the plot to him by the 1st and 3rd accused, upon being told that the plot belonged to the plaintiff and him defendant had been cheated and or defrauded, he accompanied the plaintiff to p/st, reported the matter and had the perpetrators arrested and prosecuted. PW3 simply testified as regards use of the proceeds of the sale of the property where as PW4 was the advocate who drew the agreement of sale between the plaintiff and the company which sold the plot to plaintiff. Where as PW5 was the land Registrar Kiambu who effected the purported transfer of the property from the plaintiff to the defendants acting on the documentation he had before him believing them to be genuine. He was surprised to be brought 3 certificates of leases in different names but bearing the same plot number. Lastly police officers gave evidence as to how they received the complaints from plaintiff and defendant, arrested accused persons, carried out a search and recovered exhibits and had the accuseds prosecuted.

One accused person had died as at the time the accused persons gave evidence. The rest gave evidence. At the end of it, the learned magistrate made findings that the 1st and 3rd accuseds had obtained money by false preferences and 3rd accused was sentenced to serve 2 years.

PW1 went on to state that to prove that the fraud had been effected, he carried out a search on the title vide exhibit 2 and he confirmed that indeed his property had been transferred to the defendant on 29/10/2001 and yet him plaintiff still holds the original title to the said land, produced as exhibit 3, added that exhibit 2 and 3 is proof of the fraud committed as there is no way one title can be owned by two different persons. This is clear proof of fraud. He therefore pleads to the court to reverse the entry effected on 29/10/2001 so that the title reverts back into his name. PW1 was the only witness.

On the courts assessment of the facts herein as well as the documentary exhibits, exhibited, the court, makes the following findings:

- (1) It is correctly averred in the plaint, and stated by PW1, that, indeed the suit land was registered in his name on the first day of March 1995 and he still holds the original title in his name.
- (2) As per the summary of evidence and judgement in the criminal case, 3rd parties forged the said title deed and had the land sold to the defendant when this was discovered by the plaintiff, the matter was reported to the police, and with the co-operation of the defendant, the perpetrators were arrested and

brought to book.

(3) It is therefore clear that on the facts, the plaintiff was not involved in the transfer of his land from himself to the defendant and he was therefore entitled to complain.

(4) It is therefore understandable that the defendant has not even bothered to defend the title. He was satisfied with the evidence adduced in the criminal proceedings that he was defrauded.

(5) It is only proper that the plaintiff pursues his rights to get back his title.

(6) The defendant is at liberty to pursue the fraudsters to recover the money he paid to them.

The plaintiffs cause has merit. The same is allowed and the court, makes the following orders:-

(1) An order be and is hereby made that the transfer of title number Kiambu/Municipality/Block III/163 effected on 29/10/2001 from Amon Muthamia Mbui Igweta to Steve Kioni Kinya be and is hereby cancelled.

(2) That an order be and is hereby made that the said title number Kiambu/Municipality/Block III/163 be and is hereby ordered to be restored back in the plaintiffs name of Amon Muthamia Mbui Igweta from the defendant Steve Kioni Kinya.

(3) The plaintiff will have costs of the suit.

Dated, Read and delivered at Nairobi this 15th day of May 2009.

R.N.NAMBUYE

JUDGE