



KISHINGA KIMUNYI.....PLAINTIFF

Versus

KIBUGI KATHIGI1st DEFENDANT

JAMES KASHINA WANYUA2nd DEFENDANT

J U D G M E N T

The plaintiff initiated this claim against the defendants sometimes on or about 2nd October, 1998 vide a plaint filed in court on that date. On or about 22nd October, 1998 and 23rd June, 2003 respectively, the defendants filed their respective defences. Subsequent thereto, the plaintiff sought and was granted leave to file an amended plaint latest by end of October, 2005. Apparently, the plaintiff was unable to comply with the above directive by **Khamoni J.** However, being still desirous of amending the plaint, he filed a formal application dated 28th September, 2006 seeking leave to amend the plaint. Though the application was opposed, it was nonetheless granted. On 25th June, 2007, the plaintiff filed in amended plaint. From that plaint, the plaintiff prayed for:-

- “(a) A declaration that the plaintiff is the lawful owner of the suit premises to wit; MWEA/TEBERE/B/92 now registered as MWEA/TEBERE/B/146 and 147 and an order that the Chief Land Registrar do cancel the subsequent entries and that entry MWEA/TEBERE/B/92 in the name of the plaintiff be reinstated.**
- (b) An injunction to restrain the defendants by themselves, their servants or agents or otherwise however from disposing of (sic) alienating, transferring charging or in (sic) otherwise interfering with the plaintiff’s quiet (sic) possession of the property known as L.R. No.MWEA/TEBERE/B/92.**
- (c) Costs of this suit and interest at court rate.**
- (d) Such further order or remedies as this honourable court would deem as just and expedient:”**

The plaintiff’s action was based on the fact that he had since 1965 been the registered owner of the parcel of land known as **Mwea/Tebere/B/92** measuring about 14.12 HA which on or about 15th April, 1971 he charged to Barclays Bank of Kenya, Embu Branch to secure a loan. In the process he surrendered the title to the bank. Whilst the title was still held by the bank the defendants illegally and fraudulently caused the suit premises aforesaid to be subdivided into and new titles issued bearing numbers **Mwea/Tebere/B/476** and **477** respectively. Thereafter the 1st defendant entered and occupied **Mwea/Tebere/B/477**. Though he remained in the portion delineated **Mwea/Tebere/B/476**, the defendants had threatened to subdivide the same further and had refused and or neglected to recognize the plaintiffs claim and interest therein. Hence the suit.

When served with the amended plaint, the defendants did not see the need to file amended defences. They retained faith in their original defences that they had filed when served with the initial plaint. In those defences the defendants denied each and singular the allegations of the plaintiff. The 1st defendant

went on to state that it was infact the plaintiff who had caused the suit premises to be subdivided and sold parcel number 477 thereof to him as a purchaser for value and in good faith. For the 2nd defendant he stated that he was the Chief of the area in which the suit premises were located. He occupied permanent houses owned by Kirinyaga Cotton Farmers Co-operative Society who were allocated a portion of the suit premises by Kirinyaga County Council, that was part of the plaintiff's original suit premises and that his presence therein was purely official as he was instructed to occupy the same by his superiors.

On 9th June, 2009, the hearing of the suit commenced before me. The plaintiff called a finger print expert as his first witness. She was called **Margaret Njeru**. She testified that in March, 2001 the Principal Registrar of persons received an exhibit memo from D.C.I.O Buru Buru with a request to ascertain finger prints marked A and compare with those on a transfer of land document marked D. After examination she reached the conclusion that exhibit A did not match exhibit D. Exhibit A also did not match exhibit D being the identity card. However she prepared the report with a disclaimer. The disclaimer was that the finger print mark on the land transfer document was not sufficiently recorded. If the finger print had been recorded in full, her opinion would probably have been different, either positive or negative. She conceded in the circumstances that her evidence was inconclusive and she left it to court to attach whichever weight to the same. Her disclaimer was founded on the fact that she did not receive the 16 ridge characteristics which would allow her to give a positive identification.

Thereafter the plaintiff took the stand. He testified that he previously owned land parcel **Mwea/Tebere/B/92**. The parcel of land had since been grabbed by the defendants under circumstances that were unclear to him. When threatened with eviction he went to the survey department and got a green card. It is then that he discovered that his land had been subdivided into two **Mwea/Tebere/B/476** and **477**. Whereas 476 was still registered in his name, 477 had been registered in the name of the 1st defendant. When the land was purportedly subdivided as aforesaid the title deed was still with Barclays Bank. He denied having signed a transfer form. He reported the matter to the C.I.D. He thereafter sued the defendants because they had grabbed his land. He therefore prayed for the cancellation of the titles issued to the defendants as foreshad.

Cross-examined by the 1st defendant, he stated that he had never had any dealings with Kirinyaga County Council over his original land. He conceded though having another piece of land at Kiamanyeki. However he was given that land by his clan. He denied having been moved to Kiamanyeki by Kirinyaga County Council in return for his original land to pave way for the development of Wanguru town. He did not know whether a portion of his land in town had been taken over by Kirinyaga Cotton Farmers Co-operative Society courtesy of the council. He conceded though that his original land had been subdivided into plots by the council and given out to residents of Wanguru. He had sued the council in respect of the same parcel of land in Nairobi HCCC No.172 of 1999 which had since been transferred to Embu High Court where it was still pending. He never surrendered his land to the council. He was not aware of the restriction placed on the title by the Chief Land Registrar so that he could not deal with the land as he had already been given another parcel of land by the council in exchange. He denied having approached the 1st defendant for him to purchase a portion of his land. He denied receiving Ksh.260,000/= from him as the purchase price. He denied also attending the land control board. He never gave possession of his land to him in 1998. He admitted that the defendant had put up a house on his portion and stays thereat with his family. However he has not taken steps to evict him.

Cross-examined by the 2nd defendant, he responded that he had sued him because he evicted him from his land. He did not know that he should have sued the Attorney General.

That marked the close of the plaintiff's case.

The 1st defendant testified that he acquired his suit premises from the plaintiff legally when he bought them for Ksh.260,000/=. He paid the amount and the plaintiff acknowledged receipt of the same on 17th June, 1998. He tendered in evidence the original acknowledgement slip. The plaintiff had been given notice dated 5th May, 1985 by Kirinyaga Cotton Farmers Co-operative Society Limited which required him to vacate the piece of land allocated to them by the council. He also came with a letter addressed to

the same society dated 22nd July, 1985 requesting the Sacco not to interfere with him as he had not been fully compensated for his land by the council. The 1st defendant paid him the amount so that he could relocate his family from the suit premises to **Mwea/Gathigiriri/276** that had been given to him by the council. Thereafter they jointly made an application for the consent which was granted. They then proceeded to **Messrs Rugaita & Co. Advocates** and executed a transfer which was subsequently registered. Once the transfer was registered he obtained a title deed being **Mwea/Tebere/B/477** on 3rd October, 1989. On 24th January, 1990 he obtained a loan on the strength of the said title deed. Since then he had subdivided the premises into 1505 and 1516. He denied the plaintiff's allegation that he did not know him. He never grabbed the land. Rather he was a purchaser for value.

Cross-examined by **Ms Mwai**, learned counsel for the plaintiff, he responded that the plaintiff was illiterate. There as no sale agreement other than the acknowledgement note written in English. His son **Humphrey A. Gachogi Kituro** was present during the negotiations but never witnessed the agreement. He was not aware that his title deed was with the bank. In any event the same bank gave him a loan and if the title was still with them they would have raised the issue. The plaintiff attended the land control board meeting for subdivision and transfer. He was also present when the land was surveyed. If the plaintiff had any grievance, he should have taken it up with the land control board, the surveyor and or Land registrar.

DW2 was **Sergeant Jacob Muriithi**. In June 2001 he received a complaint from the plaintiff whilst at Kirinyaga CID offices. The complaint was that the suit premises had been fraudulently transferred to the 1st defendant. He was handed a copy of land transfer form, finger prints of the plaintiff and a report of the Principal Registrar of Persons. The report from the Registrar of Persons indicated that the thumb print in the transfer was not identical to the plaintiff's finder prints. He declined though to act on the report since it had been brought by an interested party. He then requested the Land Registrar for the original documents in respect of the suit premises. Having received the same, he took the plaintiffs finger prints and forwarded the same to the Principal Registrar of Persons to ascertain who had executed the transfer. He later received a report which indicated that the finger prints appearing on the transfer form and application for consent were those of the plaintiff. This differed with the report which he had received from the plaintiff earlier.

The 2nd defendant testified that he was the Chief of Tebere location. He stated that all that plaintiff had testified to was untrue. He never subdivided the plaintiff's land. Nor did they collude with the 1st defendant to grab the plaintiff's land. He maintained that the plaintiff should not have sued him in person but the Attorney General as he was said to have been acting on behalf of the Government. That marked the close of the defence case.

Parties thereafter agreed to file and exchange written submissions. They subsequently did so. I have carefully read and considered them. What then are the issues for determination in this case? To my mind they are essentially two; whether the defendants fraudulently acquired the plaintiff's suit premises and costs.

The plaintiff's case is that he was the registered owner of the original **Mwea/Tebere/B/92**. According to the green card, the said parcel of land measured about 14.12 HA. Whilst he had charged the same to Barclays Bank of Kenya Ltd in 1971, the defendants fraudulently had it subdivided into two portions namely **Mwea/Tebere/B/476** and **477**. The 1st defendant became the registered owner of 477, while 476 remained in the name of the plaintiff. On the other hand, the case for the defendants is that the 1st defendant purchased land parcel 477 from the plaintiff for a sum of Kshs.260,000/=. He produced various documents in support of his case. The 2nd defendant on other hand denied receiving instructions from the 1st defendant to evict the plaintiff. He stated that he was not a beneficiary of the plaintiff's land.

The plaintiff's case in anchored on alleged fraud. It is trite law that fraud has to be specifically pleaded and proved. Much as the plaintiff made attempts to specifically plead fraud and gave the particulars thereof in his amended plaint, he did not at all at the hearing endeavour to prove by credible evidence that

the defendants were responsible for the alleged fraud if at all. He did not show how the defendants put or caused to be put entries in the Register without his knowledge and or consent. He did not prove by evidence that the defendants were responsible for the closure or causing the title to the suit premises to be closed and subdividing the land into two portions, issuing or causing to be issued fresh titles for the subdivision when the original title was subsisting and in the custody of the bank and finally the plaintiff did not prove to the required standard that the defendants transferred a portion of the suit premises to the 1st defendant. Indeed it would appear that what the plaintiff is complaining about are acts and or activities committed by other parties such as, the Land Registrar, surveyor e.t.c who were never made parties to this suit. I cannot see how the acts of third parties can be visited upon the defendants. It is not enough to accuse a party as being fraudulent without tangible evidence. This is what has happened in the circumstances of this case. The plaintiff should have endeavoured to show that the land registrar's actions with regard to the suit premises were at the instigation of the defendants. We know as a fact that the defendants could not on their own have made entries in the register subdivided the land, closed the title, issued fresh title deeds and or even transferred the suit premises to the 1st defendant after the subdivision.

The plaintiff too claimed that his land was subdivided as aforesaid whilst still charged to Barclays Bank of Kenya Limited. However apart from exhibiting a green card to that effect no other tangible evidence was brought to bear on the subject. It is hard to believe that charged documents would have been realised to strangers, to wit, the defendants by the bank to facilitate the fraudulent transfer. If that was the case then I would imagine that the plaintiff would have enjoined in this suit Barclays Bank of Kenya Ltd as a defendant as well. That he did not deem it right to do so and offered no explanation in his evidence for that fatal omission tells a lot about the plaintiff's credibility and truthfulness as a witness.

The plaintiff in his evidence was certain that the defendants had grabbed his land but could not tell when and how. He did not know the circumstances under which he lost the suit premises to the 1st defendant until when he was being evicted. It was then that he went to the survey office and asked for the green card. He then learnt that his original land had already been subdivided into 2 portions. However there is evidence that the land was subdivided by the District Surveyor Kirinyaga in 1989. The mutation forms clearly show that it was the plaintiff who gave the instructions. It also appears that the plaintiff was present during the survey. Consequently, the plaintiff is not being candid when he claims that he only came to know of the subdivision when he purchased the green card as aforesaid. The mutation forms were used for purposes of subdivision. There is also ample evidence that the plaintiff made an application for consent to subdivide his land and consent was duly granted. The plaintiff did not adduce any evidence to prove that the consent was improperly obtained and survey illegally carried out. There must be records somewhere that testify to these transactions. Why could the plaintiff avail them? Survey, is the sort of exercise that cannot be carried out in privacy or secrecy. The surveyor must come to the suit premises. If this is what happened, why did the plaintiff contest the subdivision of his land then and there. On the pleadings and evidence on record, I cannot see how the defendants can be condemned for what befell the plaintiff with regard to his original suit premises.

There was evidence by the plaintiff's witness who is a thumb print expert. She examined a transfer of land form which was allegedly thumb printed by the plaintiff in favour of the 1st defendant. In her report she concluded that the questioned thumb print and the known thumb print did not match. However, in her oral testimony, the witness said that her findings were not conclusive for the reason that all the ridges of the thumb had not been captured on the impression being examined. Accordingly there was a disclaimer with regard to her evidence. She left it to court to attach whichever weight it deemed necessary on her evidence. In my view this disclaimer alone makes her evidence entirely unreliable and I will attach no weight at all to it. On the other hand the defendants tendered evidence through DW2 on the issue. His report was that the finger prints appearing on the transfer form and application form for consent were according to the report he received from the Registrar of Persons those of the plaintiff. I believe this evidence as the same was not at all challenged by the plaintiff. It is also not lost on me that the said transfer form was drawn by an advocate, **H.K. Githinji** and an advocate by the name **E. Rugaita** witnessed the signatures. In those circumstances, I find it hard to believe that these documents would have been forgeries. If indeed they were, why then were the defendants not charged with any criminal offence?

The plaintiff as I have said elsewhere in this judgment was not a candid witness. For instance in paragraphs 7 and 8 of the amended plaint he has averred that he has remained on the portion delineated as parcel No.476 which the defendants are proceeding to further subdivide and the 2nd defendant acting on the ostensible authority and or directions of the 1st defendant has ordered him to vacate. However he did not say the same thing in his evidence. He categorically denied having had any dealings regarding the suit premises with Kirinyaga County Council. However during cross-examination he admitted having had such dealings that culminated in HCCC No.172 of 1999. In that case the plaintiff averred categorically that on or about 1998 the 1st defendant meaning Kirinyaga County Council purportedly acquired his land amongst others and unlawfully proceeded to allocate various plots to other defendants. How then can he turn around in this suit and now claim that it is the defendants who illegally and fraudulently acquired the said land. The defence in that suit is also interesting. To my mind I think it perhaps sets out the correct scenario with regard to this whole transaction. In the defence, Kirinyaga County Council have averred that in early 1970s the plaintiff and the 1st defendant entered into an agreement for the exchange of **Mwea/Tebere/B/92** belonging to the plaintiff with **Mwea/Gathigiriri/276** belonging to it. Accordingly the plaintiff and the first defendant exchanged possession of the parcels of land with the plaintiff taking possession of **Mwea/Gathigiriri/276** and the 1st defendant taking possession of **Mwea/Tebere/B/92**. These averments have some support from the documentary evidence tendered by the 1st defendant. In particular regard should be had on the Notice issued to the plaintiff dated 5th May, 1985 by Kirinyaga Cotton Farmers Co-operative Society Limited as well as a letter dated 22nd July, 1985 addressed to the Secretary, Kirinyaga Cotton Farmers co-operative Society Ltd and copied to the plaintiff amongst others by clerk to Kirinyaga County Council. The later letter clearly confirms that the council acquired the plaintiff's land for the expansion of Wanguru Township. It is also noteworthy that in respect of the amended plaint in Nairobi HCC No.172 of 2000; the plaintiff is praying that as against the first defendant which is the Kirinyaga County Council orders that it removes any restrictions, caveats placed on land parcel **Mwea/Tebere/B/476** and renounce any claim thereto. By this prayer, the plaintiff is clearly admitting to there have been some dealings involving Kirinyaga County Council and himself. He makes no mention of 477. How else would the Council have claimed ownership and proceeded to register restrictions and caveats in the absence of prior dealings between the two. Indeed a perusal of the certificate of official search in respect of the said parcel of land indicates that on 3rd October, 1989 a caution in favour of Kirinyaga County Council claiming beneficiary interest was registered. Having regard to the averments of the plaintiff in the Nairobi case, the plaintiff cannot again accuse the defendants in this suit for subdividing land parcel No.476. The plaintiff allegations in this suit are a total departure from the averments in his plaint in the Nairobi case.

I think the plaintiff has a problem with Kirinyaga County Council and not the defendants. It may be he feels cheated out of a prime property by the council. But that is a problem between him and the council. He cannot blame it on the defendants. The defendants have never subdivided the original land parcel. Not even 476 nor have they colluded to cause the eviction of the plaintiff. If anything the plaintiff testified that he still stays on a portion land parcel No.476. As further evidence that the plaintiff is not a person to be trusted he even failed to disclose when he filed the instant suit that infact he had another case over the same suit premises in another court with competent jurisdiction, i.e. the Nairobi case that is now pending in Embu.

At the time the plaintiff came to court **Mwea/Tebere/B/477** was non existent, it having been subdivided, and the title closed on 8th May, 1998. The plaintiff came to court on 2nd October, 1998. It would appear that upon subdivision as aforesaid, some plots were transferred to third parties who were never made parties to this suit. Yet if I was to grant the orders sought by the plaintiff, it would radically affect their interests as well in those plots. A court of law should never make an adverse order against a non-party to a suit since it will amount to condemning them unheard.

The upshot of all the foregoing is that the defendants did not fraudulently acquire the plaintiff's suit premises. The plaintiff had absolutely no case at all against the 2nd defendant. Knowing that fact, he nonetheless opted to drag him in this case. The plaintiff's suit is accordingly dismissed with costs to the defendants.

Dated and delivered at Nyeri this 29th day of October, 2009.

M.S.A. MAKHANDIA

JUDGE