



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 280 of 1997

EDWARD MACHI MITEI.....PLAINTIFF

VERSUS

JOHN M. KILEGES.....1ST DEFENDANT

JOHN GACHANJA MBURU.....2ND DEFENDANT

NAKURU DISTRICT LAND REGISTRAR.....3RD DEFENDANT

JUDGMENT

This judgment is in respect of this suit and H.C.C.C. No.477 of 1997 which were consolidated on 21/1/1999.

The Plaintiff alleged that on 23/9/1993 he purchased from one VIATER WAMBUI KAMUGA a parcel of land known as **NAKURU/OLENGURUONE/AMALO/163** (hereinafter to as “the suit premises”) at a consideration of Kshs.280,000/=. The said parcel of land measures 3.2 hectares or thereabouts. Thereafter he was registered as the absolute proprietor of the suit premises and was issued with a title deed. However, he found that the first defendant was in occupation of the suit premises, claiming that he had purchased the same from a brother of Viater Wambui Kamuga.

The Plaintiff sought judgment as hereunder:

- a) a declaration that he was the lawful owner of the suit premises.
- b) a declaration that the first defendant’s rights title and interest in the suit premises, if any, had been superceded by those of the Plaintiff by virtue of his registration as the absolute proprietor.
- c) an order directing the Land Registrar to remove a caution which had been filed by the first defendant.
- d) an order that the first defendant do vacate the suit premises immediately.

The first defendant filed a defence and averred that the plaintiff’s title to the land was void, the same having been procured fraudulently and stated that the plaintiff purported to purchase the suit premises from a person who had no rights to the same. The first defendant stated that he was in lawful occupation of the suit premises, having purchased the same and other adjoining parcels of land from a son of the

lawful owner of the same **BEATA WAMBUI KAMUGA** (now deceased).

In HCCC No.477 of 1997 which the second defendant had filed against the plaintiff and the third defendant, he sought a declaration that the said deceased person was the first registered proprietor of the suit premises and that the purported transfer of the same to the first defendant was illegal, null and void. He also sought an order for cancellation of the first defendant as the proprietor of the suit premises.

In his testimony in court, the plaintiff stated that he had known Viater Wambui Kamuga since 1991 and that she was a middle aged lady and she was the one who had sold the suit premises to him. In the sale agreement that he entered into with the alleged seller of the suit premises, the national identity card number of the vendor was 0744001/63. The vendor did not accompany the purchaser to the suit premises as she said she was afraid of going there since at the time there were tribal clashes in the area. The second defendant said that the late **BEATA WAMBUI KAMUGA** was his mother and she died on 14/12/1980 at the age of 70 years. He said that the deceased was the original owner of the suit premises which was sub divided into six sub-divisions. The second defendant was the administrator of the estate of his late mother and he sold the suit premises and three other sub-divisions to the first defendant. The sale agreement for the suit premises was dated 10/4/1994 and the price was Kshs.240,000/=. The second defendant produced a copy of his late mother's identity card and her name was spelt therein as **BIATAH WAMBUI KAMUGA** and her national identity card was number 6058778/69 which was very different from the identity card number of **VIATER WAMBUI KAMUGA**.

Susan Waridi Muchemi, an Assistant Land Registrar at Nakuru District Lands Registry told the court that the plaintiff's title was issued to him on 4/10/1995 and it was not a first registration as the first registered proprietor was Viater Wambui Kamuga and the registration was done on 6/2/78. She produced a certified copy of the register with respect to the suit premises (the Green Card). The same showed that on 24/8/1995 the Land Registrar had put a restriction on the register restricting any sale of the property until he was sure of the transaction. However, on 4/10/1995 the same Registrar removed the restriction and registered the plaintiff as the owner of the suit premises and issued him with a title deed. The parties concerned were not summoned before the Land Registrar before the same was removed. That was contrary to the provisions of the law. On 7/11/1995 another restriction was placed on the register by the Registrar. On 9/7/1996 the first defendant caused a caution to be registered.

On 28/2/1997 the Registrar heard an application for removal of the caution that had been put on the register by the first defendant. The parties that were present during the hearing were the plaintiff, the first defendant and the second defendant. All the aforesaid people testified and the Registrar reached a finding that the land in question initially belonged to **BIATAH WAMBUI KAMUGA** who had passed away long before the plaintiff purportedly acquired the same from her. He said that he suspected that there had been fraud in the said transaction which required further investigations. During the proceedings, the plaintiff told the registrar that the suit premises had been sold to him by a middle-aged lady but he did not avail her before the Registrar to testify.

The first defendant testified that on 10/4/1994, the second defendant sold to him the suit premises, having sold to him four other neighbouring sub-divisions of the original land. He had been in occupation of the land since December, 1993. In 1995, the plaintiff went to the suit premises and told the first defendant that he had purchased the land from Viater Wambui Kamuga whose identity card number was 0744001. The first defendant wrote to the Principal Registrar of Persons to confirm who the bearer of the said identity card number was and the Principal Registrar stated in a letter dated 4/8/2004 that the holder of the said identity card was one Jane Cherotich aged 46 years from Ole Nguruone sub-location, Molo Location; Nakuru District.

In light of the above evidence, I find that the suit premises was originally owned by Biatah Wambui Kamuga who was the bearer of a national identity card number 6058778/69 and who died on 14/12/1980. The deceased was the mother to the second defendant who then applied for letters of administration of his late mother's estate in succession cause number 1630 of 1996 in the High Court of Kenya at Nairobi. The grant was issued on 1/10/1996. The second defendant purported to sell the suit premises to the first defendant vide an agreement dated 10/4/1994. That was even before the second defendant had obtained

the grant. **Section 82(b)(ii) of the Law of Succession Act** provides that a personal representative cannot sell any immovable property before the grant has been confirmed. The second defendant justified his action by saying that under Kikuyu Customary law he had capacity to sell the property even before he had obtained the grant but that is not the position in law. Capacity to sell an immovable property by a personal representative is strictly conferred by law only upon confirmation of a grant and not by operation of any customary law. The sale agreement that was entered into between the first defendant and the second defendant is therefore null and void and of no legal consequence.

On the other hand, the plaintiff purported to have purchased the property from a lady known as Viater Wambui Kamuga, bearer of national identity card number 0744001/63. The said lady purported to have been the registered proprietor of the suit premises but in reality she was not. The plaintiff was unable to avail the purported vendor to testify and prove that she was the rightful owner of the suit premises before she allegedly sold it to the plaintiff. She did not also appear before the Land Registrar for the hearing of the application for removal of the caution. The plaintiff described the lady as middle aged whereas by 1993 the real owner of the suit premises had already died at the age of about 70 years. In any event, the Registrar of persons confirmed that Viater Wambui Kamuga was not the bearer of identity card number 0744001/63. Since 24/8/1995, the third defendant was aware that there was likelihood of a fraud having been committed with regard to the sale of the suit premises. That is why he put a restriction in the register but surprisingly, he removed the same on his own motion on 4/10/1995 and on the same date he issued a title deed to the plaintiff and in about a month's time thereafter the third defendant entered another restriction as he suspected fraud.

In my view, the third defendant should have initiated appropriate investigations into the transaction before he issued a title deed to the plaintiff. He should have summoned all the relevant parties and heard them before taking any action on the matter. He seems to have perpetuated the fraud that had taken place.

In view of the foregoing, I hold that the registration of the plaintiff as the absolute proprietor of the suit premises was fraudulent and hereby order and direct the third defendant to rectify the register by canceling the name of the plaintiff as the registered proprietor of the same and restoring the name of Biatah Wambui Kamuga in place of the plaintiff. Upon confirmation of the grant of representation to the second defendant, he may proceed for formally sell and transfer the same to the first defendant. In conclusion, the plaintiff's suit fails and the same is hereby dismissed with costs to the first and second defendants.

I enter judgment for the second defendant as prayed in H.C.C.C. No. 477 of 1997. The plaintiff and the third defendant shall bear the costs of the said suit.

DATED, SIGNED and DELIVERED at NAKURU this 31st day of March, 2006.

D. MUSINGA

JUDGE

31/3/2006

Judgment delivered in open court at Mr. Gekonga holding brief for Mr. Ochieng Gai for the defendant and Mr. Nyangweso for the plaintiff.

D. MUSINGA

JUDGE

31/3/2006