



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 204 OF 2014

NAKURU AUTOMOBILE HOUSE LTD PLAINTIFF

VERSUS

LAWRENCE MAINA MWANGI 1ST DEFENDANT

DISTRICT LAND REGISTRAR NAKURU 2ND DEFENDANT

JUDGMENT

1. By plaint dated 15th July 2014 and filed in court on the same date, the plaintiff averred that it is the registered owner of the parcel of land known as LR No. Nakuru Municipality Block 9/110 which property it bought in 1997 from Kiptui C. Chesang, J Kigen, Onesmus Muiya and Joseph Muthomi who in turn had been allocated the property in 1996 by the Commissioner of Lands. That a certificate of lease was issued in its name on 30th March 1997, that it had paid land rates and rent since 1997 and that it had been in occupation and use of the property since 1998 to the date of filing this suit. It further stated that it learnt in May 2014 that the 1st defendant was claiming the suit property on the basis of a certificate of lease issued to him on 9th July 1997 and that the 1st defendant's certificate of lease was fraudulently obtained in collusion with or through assistance of the 2nd defendant.

2. The plaintiff therefore sought judgment against the defendants jointly and severally for:

a) A temporary order of Injunction be issued against the 1st and 2nd defendant/respondent's by themselves, his agents or servants restraining them from selling, mortgaging, charging, transferring, constructing or in any way interfering with the suit property till this Application if heard and decided.

b) A temporary order of injunction be issued against the 1st and 2nd defendants/respondents by themselves, his agents or servants restraining them from selling, mortgaging, charging, transferring, constructing or in any way interfering with the suit property till this suit is heard and decided.

c) A declaration that the plaintiff is the legally registered owner of L.R. No. Nakuru Municipality Block 9/110.

d) A declaration that the Certificate of Title held by the 1st defendant and issued by the 2nd defendant is a forgery and a fraud.

e) An Order that the 2nd defendant cancel or revoke Certificate of Lease issued to the 2nd defendant on 9/07/1997 and all other subsequent.

f) Costs of the suit be provided for.

g) Any other relief that this honourable court may deem fit and just to grant.

3. Needless to state, prayers a) and b) above are spent.

4. The 1st defendant filed statement of defence in which he averred that he is the registered owner of the suit property pursuant to the certificate of lease issued to him on 9th July 1997 and that he had been paying land rent and rates as and when demanded from him. He denied the plaintiff's allegations of fraud and collusion and urged the court to dismiss the plaintiff's suit with costs.

5. The 2nd defendant did not file any defence or offer any evidence despite being given opportunities to do so, as is manifest in this court's rulings dated 12th June 2019 and 18th June 2020.

6. At the hearing, Vijay Morjaria testified as the sole plaintiff's witness. He stated that he is the Managing Director of Nakuru Automobile House Ltd and that the plaintiff is registered owner of the suit property, Nakuru/Municipality Block9/110. He stated that he had an initial title dated 30th March 1997 but which he lost in a robbery and that he was issued with a replacement title on 2nd May 2001. He produced a copy of title dated 2nd May 2001 (PExb.1) and a copy of the title dated 30th March 1997 (PExb.2). He stated that he purchased the plot from Mr. Kiptui C. Chesang, Mr. J. Kigen, Mr. Onesmus Muiya and Mr. Joseph Muthomi who were its previous owners. That after he acquired the property, which was commercial with a petrol station, he prepared architectural drawings which were approved by the Municipal Council of Nakuru and the Land Registry. That there was a previous case concerning the suit property being Nakuru HCC No. 44 of 2005 wherein a representative of the Commissioner of Lands testified concerning ownership of the property and in which judgment was delivered on 14th June 2012.

7. Mr Morjaria further testified that the plaintiff has been paying land rates and rent since 1998 and that he conducted official searches as at 4th March 2005 and as at 29th January 2002 both of which showed that the property belongs to plaintiff. That he came to know about the 1st defendant's claim over the property in 2014 when the plaintiff wanted to charge the property to Fidelity Bank but instead encountered problems at the land registry. That when he later came across the 1st defendant's documents, he noted that the 1st defendant's title is dated 9th July 1997 which is 4 months after the plaintiff's title and that the 1st defendant's green card had no signature on it.

8. He further testified that since the plaintiff bought the property in 1997, he had never seen the 1st defendant on the property and that in 2014 after the filing of this suit, the 1st defendant went to the property at night with a truck full of men and started fencing it with timber posts and iron sheets. That he obtained an injunction and since then there has been no activity on the property. He added that the 1st defendant's title is not genuine and should be cancelled. That it was not proper for the 2nd defendant to issue a second title in respect of the property when plaintiff already had a title. He produced a bundle of copies of land rent and rates receipts (PExb.3), copies of architectural drawing (PExb.4), a copy of Provincial Physical Planning Officer's letter dated 7th November 1996 (PExb.5 (a)), a copy of letter from Municipal Council of Nakuru dated 23rd May 2001 (PExb.5 (b)), a copy of certificate of search as at 4th March 2005 (PExb.6), a copy of certificate of search as at 29th January 2002 (PExb.7), a copy of judgment in Nakuru HCCC No. 44 of 2005 (PExb.8) and a copy of proceedings in Nakuru HCCC No. 44 of 2005 (PExb.9).

9. Under cross-examination and re-examination, he stated that when he started construction, the Municipal Council started claiming that the land did not belong to plaintiff and that it was public land. The council then brought hawkers to the land. That he bought the property from allottees and that a lease was issued in plaintiff's name. He added that he lost the lease in a robbery and that if it turns out that 1st defendant's lease is genuine then he would not blame him but would instead blame the government.

10. The plaintiff's case was then closed, and a date was taken for defence hearing. The plaintiff later filed an application dated 21st June 2017 seeking to re-open its case. For reasons stated in the ruling dated 20th December 2017, the application was dismissed.

11. Defence hearing then proceeded on 6th March 2018. The 1st defendant testified as the sole witness in his case. He described himself as a property dealer and stated that the suit property belongs to him. That he applied for it to the Commissioner of Lands on 11th February 1996 and was issued with an allotment letter on 8th April 1996. The letter gave conditions requiring him to accept the offer and pay KShs 179,250 within 30 days. He added that he complied and paid on 30th April 1996 and that on 9th July 1997 he was issued with ownership documents being a letter forwarding a lease from Commissioner of Lands. He proceeded to the 2nd defendant and was issued with a Certificate of Lease dated 9th July 1997 as well as a Memorandum of Registration of Transfer of Land. He also stated that he took possession in 1996 and remained in possession even as at the date of his testimony. That he only came to know about the plaintiff when he was served with summons for this case. He produced copy of lease dated 28th January 1997 (DExb 1), copy of certificate of Lease dated 9th July 1997 (DExb 2), copy of letter dated 7th February 1997 forwarding the lease (DExb 3), original of certificate of search dated 30th May 2014 (DExb 4A), and original of payment receipt for KShs 520 (DExb 4B).

12. The 1st defendant further testified that the plaintiff herein lodged a complainant with police on 4th April 2017 after closure of plaintiff's case as a result of which criminal charges were preferred against him on 14th December 2017. He added that he entered a plea of not guilty and the case was ongoing as at the date of his testimony. Under cross-examination, he acknowledged that the plaintiff has been paying land rates and rent in respect of the property and that he had not made any payment towards the land rates and rent since allocation. He added that charges in the criminal case relate to making false documents.

13. Defence case was then closed. Parties were ordered to file and exchange written submissions. The plaintiff and the 1st defendant duly filed submissions. The 2nd defendant did not.

14. The plaintiff in its submissions dated 12th October 2020, raise the following issues for determination: first, who is the registered owner of the suit property; secondly, whether the 1st defendant holds a genuine certificate of lease over the suit property or the same is a forgery or obtained through fraudulent means; thirdly, whether the plaintiff is entitled to the prayers sought for and finally, who should bear the costs.

15. On the first issue of who is the registered owner of the suit property, the plaintiff submits that it was registered as proprietor of the land on 30th March 1997, was issued with a replacement certificate of lease on 2nd May 2001 and has been paying land rent and rates. It relied on the case of **Dr. N. K. Ngo'k v Justice Ole Keiwua & 2 others C. A. No. 60 of 1997** where the Court of Appeal stated:

Section 23(1) of the [Registration of Titles] Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.

16. Accordingly, the plaintiff argued that it is the registered owner of the suit property with an indefeasible title whose sanctity the court should protect.

17. On the issue of whether the 1st defendant holds a genuine certificate of lease, the plaintiff contends that the 1st defendant's certificate of title dated 9th July 1997 was issued four months after the plaintiff's. Citing the case of **Elijah Makeri Nyangwira v Stephen Mungai Njuguna & another [2013] eKLR**, it argued that evidence tendered in HCCC No. 44 of 2005 by the Chief Land Administration Officer confirmed that the suit property belongs to the plaintiff. Consequently, it argued that the 1st defendant's title was acquired through fraudulent means and that the 1st defendant was party to the fraud.

18. The plaintiff therefore urged the court to grant it the prayers sought, together with costs.

19. The 1st defendant in his written submissions dated 26th October 2020, raised six issues for the court's determination. These are: firstly, whether the 1st defendant is the registered owner of the suit property and whether he demonstrated the process leading to him being the registered owner; secondly, whether the plaintiff has demonstrated the process leading to it being issued with a certificate of lease; thirdly, whether the plaintiff has proven the allegation of fraud and/or collusion as against the 1st defendant to the required standard; fourthly, whether the 1st defendant's certificate of lease was issued earlier than the certificate of lease purportedly issued to the plaintiff; fifthly, whether the plaintiff is entitled to the reliefs sought and, lastly, who should bear the costs of this suit.

20. On the first issue, the 1st defendant argued that he demonstrated the processes and procedure followed leading to him being issued with certificate of lease for the suit property and that he has not simply waved a title document in front of the court. He relied on the case of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**.

21. On the issue of whether the plaintiff has demonstrated the process leading to it being issued with a certificate of lease for the suit property, the 1st defendant argued that the process leading to the plaintiff becoming the registered proprietor was not clear. He argued that the plaintiff did not produce any sale agreement to support its alleged purchase, any police OB report to support the allegation that the original certificate of lease was lost in a robbery or the lease that led to issuance of its title. He argued that the plaintiff has not proven the root of its title and placed reliance on the case of **Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others [2019] eKLR** where the Court of Appeal stated as follows:

61. This Court has often times stated that when a certificate of title is under challenge, the root of title must be proved. The lawfulness of the acquisition of title must be demonstrated to oust the provisions of Article 40 (6) of the Constitution. In the instant matter, the appellant never led convincing evidence to establish the root of his title. We thus find that the trial court did not err in finding that the certificate of title held by the appellant was null and void.

62. It is settled law that in an action for declaration of title to land, a claimant must succeed on the strength of his case and not on the weakness of the defence. However, where the defendant's case supports that of the claimant and contains evidence on which the claimant may rely, the claimant is entitled to rely on and make use of such evidence. In the instant matter, it was incumbent upon the appellant to lead evidence to prove his case. The sale agreement upon which the appellant rests his claim refers to Rhoda Chelangat Kandie as the registered proprietor of the suit property. From the word go, the appellant knew or ought to have known that the validity of his title to the suit property is grounded on the validity of the certificate of title held by Rhoda Chelangat Kandie. If the certificate of lease held by Rhoda Chelangat Kandie is invalid, it would follow that the appellant's certificate would be invalid. In this matter, it was incumbent upon the appellant to lead evidence establishing the root of title of Rhoda Chelangat Kandie. This he failed to do with the consequence that there is no evidence on record establishing the procedural validity and lawfulness through which Rhoda Chelangat Kandie acquired her certificate of title. For this reason, we find that the Judge did not err in annulling the certificate of lease in the name of Rhoda Chelangat Kandie. Likewise, the Judge did not err in failing to make an order reverting the title back to Ms. Rhoda Chelangat Kandie.

22. On the third issue, the 1st defendant argued that the plaintiff failed to prove the allegation of fraud and/or collusion against him to the required standard and that allegations against him in the criminal case remain unproven. He relied on the cases of **Gichinga Kibutha v Caroline Nduku [2018] eKLR**, **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR** and **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR**.

23. On the fourth issue, as to whether the 1st defendant's certificate of lease was issued earlier than that of the plaintiff, the 1st defendant argued that the plaintiff failed to demonstrate the root of its title and further that the plaintiff in his testimony confirmed that his certificate of lease was issued on 30th March 1998 while the 1st defendant's was issued on the 9th of July 1997. Consequently, the 1st defendant contended, his title takes precedence. Regarding HCCC No. 44 of 2005, the 1st defendant argued that it was not a party to the said case and that the case has no bearing on this case.

24. The 1st defendant therefore urged the court to dismiss the plaintiff's case with costs and to order cancellation of the plaintiff's title.

25. The plaintiff filed supplementary submissions in which it argued that it was declared as the rightful owner of the suit property in HCCC No. 44 of 2005, that there is no challenge to its title before this court by the vendors from which it purchased the property, the 1st defendant's claim of first allocation would only stand in a case of double allocation which is not the case herein and that the 1st defendant's prayer for revocation of its title is an afterthought as it was not prayed for in his defence.

26. I have considered the parties' respective pleadings, evidence and submissions. Two issues emerge for determination: firstly, whether the plaintiff has proven the allegation of fraud and collusion and secondly, whether the reliefs sought are available.

27. The plaintiff has built its case largely on the allegation that the title document held by the 1st defendant was fraudulently obtained in collusion with the 2nd defendant. Particulars of fraud pleaded include that the defendants forged the title and letter of allotment, that the defendants “created a 2nd certificate of lease on top of another certificate of lease” and that they created a green card in the names of the 1st defendant.

28. Fraud is a serious allegation. Beyond pleading and particularising it, the party alleging it must strictly prove it. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR**. The burden of proof facing a party alleging fraud is higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**. A party alleging fraud cannot simply expect the court to infer fraud from the facts.

29. In a case such as this where the alleged fraud concerns matters of registered proprietorship of land, the provisions of **Section 26** of the **Land Registration Act** come into play. The section provides as follows:

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...

30. The parties have placed before the court three certificates of title in respect of the suit property: one in the name of the plaintiff and dated 30th March 1998, a second in the name of the plaintiff and dated 2nd May 2001 and one in the name of the 1st defendant and dated 9th July 1997. The title dated 2nd May 2001 is stated on its face to be a re-issue. The plaintiff and the 1st defendant both claim the suit property. Whereas the plaintiff seeks cancellation of the 1st defendant’s title, the 1st defendant is content with the multiple titles and is simply seeking dismissal of the plaintiff’s case.

31. Besides its title documents, the plaintiff produced a certificate of search dated 29th January 2002 and another dated 4th March 2005, both of which show that it became registered proprietor of the suit property on 30th March 1998 and that a certificate of lease was re-issued to it on 2nd May 2001. On the other hand, the 1st defendant produced a certificate of search dated 30th May 2014 which shows that it became registered proprietor of the suit property on 9th July 1997. The plaintiff’s case is that the 1st defendant’s title was issued after the plaintiff had already been registered as proprietor of the suit property. The suggestion therein is that the 1st defendant’s title was issued after 30th March 1998 and backdated to 9th July 1997. Although that is possible in theory, the plaintiff has not adduced evidence to the required standard to prove fraud. Among others, the plaintiff could have adduced evidence on dates when the various instruments were prepared and presented for registration as well as dates when payments for registration were made. As correctly pointed out by the 1st defendant, the plaintiff ought to have demonstrated its root of title by producing its letter of allotment and other supporting documents leading up to its title. It is not enough to just tell the court that its title was established in **Nakuru HCCC No. 44 of 2005 Nakuru Automobile House Limited v Town Clerk & Municipal Council of Nakuru**.

32. The plaintiff has not demonstrated that the defendants forged the 1st defendant’s title document. The plaintiff has neither demonstrated fraud or misrepresentation or proven that the 1st defendant is party to any fraud or misrepresentation nor shown that the 1st defendant’s certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. In those circumstances, I have not been given material upon which to interfere with the 1st defendant’s certificate of title pursuant to the provisions of **Section 26** of the **Land Registration Act**.

33. Whereas the plaintiff has established that it has had possession of the suit property, that it has been paying land rates and rent in respect thereof and that it even submitted building plans in respect of the property to the local authority as far back as 1999 and notwithstanding that the 1st defendant conceded that he has never paid any land rates or rent in respect of the suit property, such possession and use by the plaintiff do not in any way demonstrate fraud on the part of the 1st defendant. Similarly, even though the 1st defendant conceded in his testimony that there is an ongoing criminal case pending against him in the subordinate court wherein he was charged with making false documents in connection with, among others, a letter of allotment and a certificate of lease in respect of the suit property, that alone does not establish fraud.

34. The plaintiff also sought to rely on the judgment dated 14th June 2012 delivered in **Nakuru HCCC No. 44 of 2005 Nakuru Automobile House Limited v Town Clerk & Municipal Council of Nakuru** and the proceedings therein to show that it has a valid title over the suit property. I note however that the 1st defendant was not a party to the said case and further that the 1st defendant’s title dated 9th July 1997 was not in issue in the said case. To the extent that the plaintiff claims that it became registered proprietor of the suit property on 30th March 1998, a date which falls after 9th July 1997 which is the date of the 1st defendant’s title, **Nakuru HCCC No. 44 of 2005** cannot possibly be said to have examined the two titles. It follows therefore that the outcome of the said case has no bearing on whether or not the defendant’s title was fraudulently obtained or whether the plaintiff’s title should be upheld as against the 1st defendant’s title.

35. I therefore agree with the 1st defendant that the plaintiff has failed to prove the allegations of fraud and collusion, which constitute the fulcrum and mainstay of its case, to the required standard. That being the case, the reliefs sought by the plaintiff cannot issue.

36. I am alive to the fact that the outcome of this case does not resolve the question of who between the plaintiff and the 1st defendant is the valid registered owner of the suit property. This court can only make a determination based on the evidence tendered by the parties and their respective pleadings. It cannot be otherwise in our adversarial system of justice. As I noted earlier, the 1st defendant did not find it necessary to mount any counterclaim with a view to establishing and upholding his own title. He, perhaps, had his reasons for not sticking his neck out. The parties will have to live with the consequences of the respective paths they chose in the litigation and the manner in which they advanced their respective cases.

37. In the result, I dismiss this suit with costs to the 1st defendant.

Dated, signed and delivered at Nakuru this 18th day of January 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Ashioya holding brief for Mr Mutubwa for the plaintiff

Mr Kahiga for the 1st defendant

No appearance for the 2nd defendant

Court Assistants: B. Jelimo & J. Lotkomoi