



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 1241 of 2003

HARRISON KAMAU NGANGA.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST
DEFENDANT

FRANCIS WAWERU ANDREW GIATHI.....2ND
DEFENDANT

JUDGMENT

By a plaint filed in court on 1st December, 2005, the plaintiff, Harrison Kamau Ng'ang'a sued the Attorney General and Francis Waweru Andrew Giathi, jointly and severally, seeking

- (a) **The transfer in vacant possession of the suit property;**
- (b) **Rectification of title register and registration of the plaintiff as the registered proprietor, absolutely;**
- (c) **Mesne profit from the time of the unlawful transfer to the time of vacant possession, to the plaintiff;**
- (d) **Costs of this suit;**
- (e) **Interest on C and D, at court rates.**

The records show that 30 day notice to institute proceedings against the Government was issued to the Attorney General vide a letter dated 1st October 2002, before the institution of the suit.

Both defendants filed separate defences. The 1st defendant denied knowledge of ***“the illegally alleged in para 6 of the plaint.....”***. He also stated that no notice to sue had been issued, and prayed the court to dismiss the plaintiff's suit with costs.

The second defendant on the other hand, stated that, there were no ***“restrictions or other inhibitions registered against the title when he bought the suit premises”***.

He further averred that the plaintiff's suit against him was, ***“time barred under the Limitation of Actions Act”***.

A further issue taken up by the second defendant was that the “**particulars of the alleged irregularity had not been pleaded**”. He too prayed that court to dismiss the plaintiff’s suit with costs.

The plaintiff, Harrison Kamau Nganga is a farmer in Nakuru. He sued the Attorney General on behalf of the Land Register, Kiambu in respect of his piece of land, currently registered in the name of the second defendant.

The plaintiff was given a plot by Kagwima Gathu, in 1959. The plot was Limuru/Bibirioni plot No. T.424. That the plot was registered in his names Harrison Kamau on 23.4.1959, but on 11.9.80, he went to the Lands office to complete a form to add and or include his father’s name in the title. He prepared an affidavit which he left at the land’s office in Kiambu. He produced the affidavit as Ex.1 in court.

On 18.9.90, he went back to the Land’s office and was given a title deed in the names of Harrison Kamau Ng’ang’a, ID No. 2344587/T.65. He produced a copy of the said title deed as Ex. 2 in court. He could not produce the original as it was in the bank, and he produced a letter in court from the bank to that effect, dated 7th December, 2004.

The plaintiff complained that the Land Registrar cancelled his name on 9.11.83 without telling him why, and entered a restriction in the register restricting dealings in the land until further orders. He produced a copy of the green card as Ex.3. It reflects the restriction placed, and the further fact that on the same day, that is, 9th November, 1983, the restriction was “**REMOVED**”, and on 31.10.83, a title deed i.e. “**Land Certificate**” was issued to “**HARRISON KAMAU KAMOKO**” and on that same day, i.e. 31st October, 1983, the land was sold to Muigai Kimuitie, for Kshs.25,000/= and on 9th April, 1984, a title document namely Land Certificate was issued in his name.

About 4 months later on 20th August, 2004, the same land was again sold to one Peter Kimani Thuku (ID 3121813/63) and a Land Certificate issued to him the same day, i.e. 20th August, 2004 and about 2 years later on 10th April, 1986, the land was sold to Francis Waweru Andrew Giathi for Kshs.15,000/= and the Land Certificate issued.

The last entry in the Register shows that on 18.7.1986, a restriction was entered in the Register to the effect that there should be “**NO FURTHER DEALINGS UNTIL ORDER FROM THE LAND REGISTRAR**”.

The plaintiff referred to the green-card which was handwritten. It “**looks tampered with**” as far as dates particularly the years are concerned, particularly 1983, has additions on it to make it read 1984.

The plaintiff said that his names are not “**Harrison Kamau Kamoko**”, as shown in the green card, both typed and handwritten.

The plaintiff produced an “**application to correct name**”, lodged by Harrison Kamau Kamoko, dated 31st October 1983, in which he requested the Land Registrar, Kiambu to correct his names in the register in respect of Land Title No. LIMURU/BIBIRIONI/T.424 to read HARRISON KAMAU KAMOKO. Upto that date, the said land had been registered in the name of HARRISON KAMAU NG’ANG’A.

Looking at the green card, the plaintiff lamented that on 31.10.83, his land was transferred to 2 people i.e. MUIGAI KIMUITIE (ID 7249073/70 and HARRISON KAMAU KAMOKO.

The plaintiff did concede that at the beginning, people built on plots which were not theirs, but the mistakes were rectified and fresh titles given, that is how he was issued with the Land Certificate to LIMURU/BIBIRIONI/T.424. The plaintiff produced several documents to support his claim.

In the course of investigations, the Chief Land Registrar, at the Ministry of Lands and Settlement did on 14th July 1986, write to the plaintiff as follows in para 2 of his letter,

“It appears from our investigations that someone impersonated you and gave the information that you are changing your name from HARRISON KAMAU NG’ANG’A to HARRISON KAMAU KAMOKO. This change of name was registered and the land was transferred first to Muigai Kimuitie and subsequently to Kimani Thuku. You are therefore a victim of a fraud and the register cannot be rectified so as to restore the land to you without an order of the court. You are therefore advised to report the matter to the CID Kiambu so that the culprit can be prosecuted and on conviction, the court will issue the necessary orders. By a copy of this letter, the Land Register, Kiambu is directed to place a restriction on the title to stop further transactions”.

It was upon this letter that the Land Registrar, Kiambu placed a Restriction on the register relating to this land on 18.7.1986. In the meantime, the plaintiff went to report the matter to the CID Nakuru. The matter was investigated by police who finally forwarded their file to the Attorney General for advise, and the then Deputy Public Prosecutor, advised the plaintiff on 3.7.1992, that,

“Your problem is basically a civil matter involving a land transaction and this point has been explained to you several times by officers of this department. Although we very much sympathize with your situation, unless the facts show that a crime was committed, this Department would not be able to do anything.....”.

On 7th November, 2003, the Director of CID wrote to the plaintiff to tell him that they had closed their file on the investigations relating to his land issue, on the advise of the Attorney General, who had suggested that the plaintiff pursues a civil action, if he so wished. The plaintiff filed the present suit, after that. He stated further that he has not had a chance to live on his land all this time, that even Francis does not live there, he merely cultivates.

The lawyer for the Attorney General, Mr. Njoroge addressed the court and said that he was not calling any witnesses. Mr. Muhoro, advocate for the 2nd defendant also told court that he would not call any witnesses. None of them explained why they were not calling their clients to give evidence in this case.

The plaintiff filed his written submissions. Counsel for the 1st and 2nd defendants also filed written submissions. All this was done by consent of the 3 parties.

In his submissions, the plaintiff repeated the evidence he had adduced on oath; he once more denied any knowledge of Harrison Kamau Kamoko, whom he said had the land transferred to him on 31.10.1983, yet he swore an affidavit on 1st November, 1983 after the transfer of land to his name, to the effect that, **“he had been the owner of this land since the time of demarcation, and on further that sometime on 4th January, 1959 he sold the land to Muigai Kimuiti, who had since been in occupation and possession”**. In the affidavit, he also stated that **“both names HARRISON KAMAU and HARRISON KAMAU KAMOKO, are his”**. The plaintiff denied the claim by the 2nd defendant that the land belonged to him. He also denied the claim that his claim was time barred as he had all along been pursuing his title to the land.

Mr. Mwangi Njoroge for the 1st defendant, the Attorney General, denied the plaintiff’s claim and stated that the Land Registrar could not have known that Harrison Kamau Kamoko, was not the owner of the land as he even swore an affidavit to that effect, that is why the land must have been transferred to his name.

The 1st defendant prayed the court to dismiss the plaintiff’s name against him.

The second defendant on the other hand submitted that the plaintiff had not given particulars of the fraud claimed and this was fatal to his case. He quoted the provisions of Order VI Rule 4(1) of the Civil Procedure Rules, and stated further that the second defendant relied on the fact that he was a purchaser for value without notice.

The advocate cautioned further that the person from whom the second defendant bought land, should

have been sued.

The 2nd defendant also denied there being any fraud in the transaction.

The 2nd defendant also relied on Section 143(2) of the Registered Land Act, which he quoted and stated further that,

“in absence of allegations and proof against the second defendant of knowledge of the alleged fraud or contribution thereto by commission, default or neglect, the 2nd defendant’s title over the suit land is protected and sacrosanct”.

The second defendant further contended that the plaintiff’s suit is “**time barred**” as he (the plaintiff) testified that he knew him since 1987 when he conducted an official search that the land was registered in the second defendant’s name, and the plaintiff did not move to court to challenge it until December 2003, and according to the 2nd defendant, his title was by then extinguished. The 2nd defendant prayed the court to dismiss the plaintiff’s suit.

I have considered the pleadings in this case and the oral evidence recorded from the plaintiff only, as both defendants failed and or neglected to give evidence in court.

The failure by the defendants to give evidence means that the plaintiff’s evidence has not been challenged, the evidence in which he alleged the fraudulent transfer of his land first to Harrison Kamau Kamoko, then to Muigai Kimuitie, then to Peter Kimani Thuku, and finally to Francis Waweru Thuku.

The handwritten copy of the green-card as I have stated shows “**interference**” with dates. Only the Land Registrar Kiambu, could explain this. The Attorney General was sued on his behalf, since he is a Government servant, and I expected to come to court and explain these entries in the register as reflected in the green-card, but he did not come, and the lawyer for the Attorney General simply said they had no evidence to offer, and in the written submissions, the lawyer said,

“The 1st defendant denies the claim and relies on the evidence of the plaintiff to show that other third parties were responsible for the alleged fraud”.

I reject this submission totally because the 1st defendant who was sued on behalf of the Land Registrar Kiambu, had custody of the register and the green-cards. He was therefore in a position to explain how the entries were made in the register, especially, the attempts to erase “**83**” to try and make it read “**84**”, in hand. Furthermore, the Land Registrar would have been the best person to explain the entries – for example, on 9.11.83, a Restriction was entered on the title, and the same day it was removed, and on the very same day, land was registered in the name of Harrison Kamau Kamoko. What really happened?

For the 1st defendant to say in the written submissions that,

“the defendant had no reason to suspect that the person applying for rectification of the name Harrison Kamau Kamoko, was not the plaintiff himself at the time,” is “**suspect**” because the document presented by Harrison Kamau Kamoko, the “**application to correct name in the register**”, was dated 31.10.83, the day his name appeared in the register for the 1st time, according to copy of the green-card and on the same day, the land was transferred to the one Muigai Kimuitie.

The Land Registrar Kiambu must have only acted on the information on that card, which I find he did not verify, as I find further that the affidavit sworn by Harrison Kamau Kamoko, on 1st November, 1983, was sworn **after** the transaction by the Land Registrar on 31.10.83 transferring the land to Harrison Kamau Kamoko. **This I find was the fraud committed in this case**, and both the Land Registrar Kiambu and Harrison Kamau Kamoko, must have been parties to it!

The fraud was perpetuated further when the land was not only transferred to Harrison Kamau Kamoko,

on 31.10.1983 but the same land was transferred further to Muigai Kimuitie, on the same day.

My further consideration of the evidence in this case shows that Harrison Kamau Kamoko having had the land transferred to him fraudulently as I have shown, never acquired a legitimate title which he could transfer to anybody. This means that the transfers to Muigai Kimuitie, Peter Kimani Thuku and Francis Waweru Gaithi, were no transfers in law as they were tainted with fraud and none of the parties therefore acquired any title in law to this land.

The second defendant claims to be a “bona fide” purchase for value without notice of the fraud”, and that there were no restrictions on the title when he bought the land. He also pleaded Limitation of Actions Act, but he did this in the defence and written submissions, but refused to appear in court to give evidence in court and thereby give the plaintiff a chance to cross-examine him, and the court to assess his credibility as a witness, and decide whether indeed he had no notice of the fraud.

From the evidence I have considered in this case as a whole, I make a finding of fact that the 2 defendants having failed to give evidence on oath in court, their defences and submissions drawn by their lawyers cannot rebut the plaintiff’s oral evidence on which he was cross-examined strenuously. I therefore reject the defences of the 2 defendants plus the submissions tendered on their behalf. Instead I believe the plaintiff’s evidence from which I find that he proved his case on a balance of probabilities against the 2 defendants jointly and severally.

The plaintiff had prayed for “**mesne profits**”, however, during the hearing he did not quantify his loss in this respect, so I will not grant this prayer, but I proceed to direct the Land Registrar Kiambu to transfer the land LIMURU/BIBIRIONI/T.424, into the name of the plaintiff Harrison Kamau Ng’ang’a as the absolute owner, and register the same into his name, and **secondly**, the Land Registrar is further directed to cancel the registration of the land from the name of Francis Waweru Andrew Giathi, forthwith.

The Land Registrar should issue the plaintiff with a new title document i.e. Land Certificate to this land, and **finally**, I award the plaintiff the costs of this suit.

Dated at Nairobi this 13th day of October, 2004.

JOYCE ALUOCH

JUDGE