



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 75 OF 2017

SYMON KATHOMBIA NJAGI.....PLAINTIFF

**(Suing in his capacity as the Administrator of the
Estate of NJAGI NGARI (Deceased))**

VERSUS

RICHAADA MBEERE NJIRU....1ST DEFENDANT

JAMES AYUB MURIITHI.....2ND DEFENDANT

JUDGMENT

By a plaint amended on 26th June 2019, the plaintiff sought the following orders:-

- a. An order of cancellation of the 2nd defendant's name as the owner of land parcel No. NGARIAMA/RUNG'ETO 1779 and the said land to revert to the names of Njagi Ngari, deceased to pave way for a succession cause to be conducted.**
- b. Costs of the suit with interest.**

By way of an amended defence dated 10th July 2019, the 1st and 2nd defendants denied the plaintiff's claim and all particulars of fraud alleged by the plaintiff and sought to have the suit dismissed with costs.

The Plaintiff's Statement of Facts

The plaintiff alone testified and stated that his father the late Njagi Ngari (deceased) was the registered proprietor of the suit property Land Reference No. NGARIAMA/RUNG'ETO/1779. The plaintiff further stated that his late father was registered as proprietor of the suit land aforesaid to hold in trust for himself and his family on the 20th January 2012 after the said land parcel resulted from the sub-division of land parcel No. NGARIAMA/RUNG'ETO/1838. He stated that him and his siblings have been living on the said land all along where they have put up their houses and developed the land extensively. The plaintiff also stated that his father passed away on 23rd April 2016 and that sometime early in the month of May 2017, the defendant entered upon the suit land and started cutting down their crops namely coffee stems and threatened to evict them.

In the process of conducting an inventory of their late father's assets, the plaintiff found some documents purporting that their late father Njagi Ngari, without their knowledge and involvement entered into an agreement for the sale of the suit land No. NGARIAMA/RUNG'ETO/1779 on 17th February 2016 to the defendant herein at a consideration of Ksh. 1,200,000/= whereby he acknowledged receipt of Ksh. 785,940/= from defendant leaving a balance of Ksh. 414,060/= which the defendant is still owing. The plaintiff further stated that upon purchasing a copy of the green card, they discovered that the defendant herein caused the suit land to be illegally, irregularly and fraudulently transferred to himself on the 23rd day of March 2017, about 10 months after the demise of their father. He stated that it was after the aforesaid illegal transfer of the suit land that the defendant entered upon the suit land and carried out wanton destruction of coffee stems in addition to threatening to evict them from the suit land. He stated that while this case was pending, the 1st defendant transferred the suit land to the 2nd defendant. He referred to the list of documents dated 29th August 2019 which he produced as Plaintiff's Exhibits 2, 3, 4 and 5 respectively.

Defendant's Factual Statement

The 1st defendant testified as DW1 and confirmed that the plaintiff is the son of one Njagi Ngari (deceased) who sold him a parcel of land

No. NGARIAMA/RUNG'ETO/1779 at a consideration of Ksh. 1,200,000/= on 17th February 2016. The 1st defendant also stated that he entered into an exchange agreement with the said Njagi Ngari (deceased) whereby he agreed to exchange land parcel No. NGARIAMA/RUNG'ETO/1838 belonging to the late Njagi Ngari (deceased) with land parcel No. NGARIAMA/RUNG'ETO/4650 which belongs to him at the said consideration of Ksh. 1,200,000/=. The 1st defendant also stated that on 18th February 2016, they entered into a revocation agreement whereby they revoked the exchange agreement and he paid the total purchase price for the suit land parcel No. NGARIAMA/RUNG'ETO/1779 as follows:-

- a. Ksh. 785,940/= - paid to clear the decretal amount in CMCC No. 54 of 2012 (Kerugoya)
- b. Ksh. 152,000/= paid to the wife of Njagi Ngari on 10th March 2017
- c. Ksh. 262,060/= paid in cash to Njagi Ngari on diverse dates while he was sick.

He stated that he followed the proper procedure to obtain the title to the suit land which he subsequently sold to a third party.

The 2nd defendant James Ayub Muriithi on the other hand testified as DW2 and stated that he bought the suit land parcel No. NGARIAMA/RUNG'ETO/1779 from Richaada Mbeere Njiru, the 1st defendant herein on 7th July 2017 at a consideration of Ksh. 2,200,000/= which he paid in full and a title was issued in his name after all the procedures and statutory consents were sought and obtained. He stated that after execution of the agreement, he took possession of the land but later, the plaintiff denied him access and that he no longer utilize the same. He said that he was not aware that there was a case pending in Court and that there was nobody living on the suit land. He testified that he is a purchaser for value without notice.

Legal Analysis and Decision

The issues that emerge for determination in this dispute are as follows:-

1. Whether the acquisition of the suit property parcel number NGARIAMA/RUNG'ETO/1779 from Njagi Ngari (deceased) to the 1st defendant and the 2nd defendant was fraudulent, irregular, illegal, un-procedural and tainted with corrupt scheme and therefore liable to be cancelled?
2. What are the appropriate orders to issue?
3. Who shall bear the costs of this suit?

1. Whether the acquisition of the suit property parcel number NGARIAMA/RUNG'ETO/1779 from Njagi Ngari (deceased) to Richaada Mbeere Njiru (1st defendant) and subsequently to James Ayub Muriithi (2nd defendant) was fraudulent, irregular, illegal, un-procedural and tainted with corrupt scheme and therefore liable to be cancelled?

It is trite law that a certificate of title issued to a proprietor is a sacred document which the Courts are enjoined to protect its sanctity. **Section 26(1) of the Land Registration Act No. 3 of 2012** provides exceptional grounds under which a certificate of title issued to a proprietor of land can be challenged as follows:-

26 (1) The certificate of title issued by the Registrar upon Registration or to a purchaser of land upon 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, un-procedurally or through a corrupt scheme”.

The plaintiff in his testimony stated that the suit land is a sub-division of the original land parcel No. NGARIAMA/RUNG'ETO/1838 which is an ancestral land given to their father, the late Njagi Ngari (deceased) to hold in trust for himself and his family and not available for disposal without consent of the family. A copy of the green card for the suit land confirms that the same is a sub-division of the original land parcel No. NGARIAMA/RUNG'ETO/1838. The plaintiff has also annexed a bundle of photographs to an affidavit in support of a Notice of Motion filed contemporaneously with this suit sworn on 10th May 2017. The photographs of semi-permanent houses and plantations which include coffee stems and other plantations are annexed. These developments go to confirm the testimony by the plaintiff that they are in occupation of the suit land and that they have developed the same extensively. These averments given on oath have not been controverted or challenged by the defence. I therefore agree with the contention by the plaintiff that being an ancestral land, the suit property was not available for sale without the consent of the plaintiff and his family and the rest of the siblings who were in occupation and have developed the same extensively. The defendant did not even do due diligence in purporting to buy the suit property. Due diligence is going beyond obtaining a certificate of search from the Land Registrar concerned. The other issue of concern is the manner in which the 1st defendant sold and transferred the suit property during the pendency of this case. The 1st defendant was aware that there was a dispute involving the subject property and should have waited the hearing and determination of the suit. The only conclusion to be drawn by such actions is that the 1st defendant knew that process of title to the suit land was not above board.

Whereas the law respects and upholds the sanctity of title, the same law also provides for situations when title shall not be absolute and indefeasible. I am satisfied that the plaintiff has given sufficient grounds to warrant this Court to remove protection of title to property under **Article 40 (6) of the Constitution of Kenya, 2010**. This Constitutional provision as read together **with Section 26 (1) (a) and (b) of the**

Land Registration Act No. 3 of 2012 in my view places a heavy responsibility upon a purchaser of a titled properties to establish and ascertain a background check on the status of the property, including whether the land in question is ancestral land, whether the land is sold with vacant possession, whether there are any developments and whether those developments were carried out by the seller himself. It is not enough to conduct an official search and assume that the person named as proprietor of the land is indeed absolute and indefeasible. In the case of **Milan Kumar Shah and 2 others Vs City Council of Nairobi & Attorney General (Nairobi) HCC Suit No. 1024 of 2005, (O.S)**, the Court held thus:-

“20. We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law, and secondly where it is demonstrated to a higher degree than the balance of probability that such registration was procured through persons or a body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.

21. The concept of absolute and indefeasible ownership of land cannot be (to) cloth with legal and Constitutional protections if the interest was acquired through fraud, misrepresentation, illegality, un-procedural ways or corrupt schemes. This concept cannot be used to sanitize the Commissioner if it allocates or issues title in such a manner. In the case of Champaklal Ramji Shah & 3 others Vs A.G & Anor, HCCC No. 145 of 1997, it was held that the Court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required”.

I agree with the reasoning by the learned Judge in that decision and apply the same mutatis mutandis to this case.

Conclusion and Decision

In view of the matters aforesaid, it is only fair proper and just for the suit land’s register to be rectified to restore proprietorship of the suit land to Njagi Ngari who is the original owner for succession process to be undertaken. Flowing from the findings above, this Court hereby enter judgment for the plaintiff against the defendants jointly and severally as follows:-

- 1. An order of cancellation of the 2nd defendant’s name as the owner of the land parcel No. NGARIAMA/RUNG’ETO/1779 and the said land to revert to the names of Njagi Ngari (deceased) to pave way for a succession cause to be undertaken.**
- 2. The costs of this suit shall be borne by the defendants jointly and severally.**

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 12th day of February, 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Plaintiff – present
2. 1st Defendant – present
3. 2nd Defendant – present
4. Kabuta, Court clerk – present