



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 681 OF 2017

JOHN GUCEHA MWANGI.....PLAINTIFF

VERSUS

JULIANA MUTHONI KIMANI1ST DEFENDANT

NJOKI KIMANI.....2ND DEFENDANT

JUDGMENT

The Plaintiff herein **John Guceha Mwangi** instituted this suit vide a Plaint dated **21st July 2017**, against the Defendants and contended that he is the registered owner of **L.R Ruiru East/Juja East Block 2/3831**, having bought the suit property from **Kimani Kanju**, who was the registered owner. He contended that the 1st Defendant has illegally occupied the suit property from **2016**, and thereby interfering with his proprietary rights. Further that the 2nd Defendant registered a **Caution** on **31st May 2016**, as a beneficiary, further interfering with the Plaintiff's Rights over the suit property.

The Plaintiff particularized disturbance as:- trespassing on the suit property and denying him access and cautioning of the suit property and thus interfering with his rights to enjoy the use of the suit property.

The Plaintiff therefore sought for the following orders as against the Defendants;

- a) That the Defendants be ordered to vacate the suit parcel L.R No. Ruiru East/Juja East Block 2/3831***
- b) The Withdrawal of a caution registered on 31st May 2016 by the 2nd Defendant***
- c) A Declaration that L.R No. Ruiru East/Juja East Block 2/3831 belongs to the Plaintiff absolutely***
- d) Costs of this suit.***

The suit was contested and the Defendants herein filed a **Defence** and **Counter Claim**, wherein they denied all the allegations made in the Plaint and further averred that their late father **Kimani Kanju**, never registered for a title for the suit property until his demise in **1998**. That at the time of the demise of their Deceased father, he was the legal owner of the suit property, but never registered for a Title. However, he held shares of Juja Farm Limited.

That if the Plaintiff purports to have bought the suit property from **Kimani Kanju**, then the purported registered owner was not their Deceased father who was the owner, but a fraudulent person. Further, that the 2nd Defendant did register a caution to protect her beneficial interest on the suit property as well as the other beneficiaries as they are the rightful heirs of the Deceased with the right to inherit the proprietary rights of the said suit property. That the purported transfer of the suit property to the fraudster and subsequently to the Plaintiff is a **nullity, fraudulent** and **illegal** and the Plaintiff's purported proprietary rights are legally unenforceable.

In their Counter Claim, the Defendants averred that they were issued with letters of Administration **Ad litem** vide **High Court at Murang'a Probate & Administration Cause No. 978 of 2013**, and have the capacity to sue and be sued in matters relating to the Estate of **Kimani Kanju** (Deceased) and that they are the beneficial owners of the suit property, being the rightful heirs of the Estate of **Kimani Kanju**, the legal owner of the suit property. Further, that the Deceased who was the legal owner of the suit property passed on, on **3rd April 1998**, and it was not possible that he sold the suit property to the Plaintiff on **17th May 2011**, as alleged in the Plaintiff's purported sale agreement as he had already died about **13 years** earlier.

The Defendants sought for the cancellation of the Plaintiff's title and particularized the Plaintiff's illegalities on the suit property as:

- *Causing a title deed to be issued fraudulently on the suit property,*
- *Interfering with the Estate of the Deceased illegally,*
- *Preventing the beneficiaries of the Deceased from having unfettered use of the suit property.*

The Defendants therefore sought for Judgment to be entered as against the Plaintiff for orders that;

- a) *A Declaration that land parcel No. Ruiru East/Juja East Block 2/3831 belongs to the Estate of Kimani Kanju (Deceased).*
- b) *An order for cancellation of the Title Deed of land parcel Number Ruiru East/Juja East Block 2/3831*
- c) *Rectification of the register as pertains land parcel Number Ruiru East/Juja East Block 2/3831.*
- d) *Costs of the Counter claim and dismissal of the Plaintiffs suit with costs.*

The parties closed their pleadings and the hearing proceeded on **15th June 2021**, wherein the Plaintiff called **two** witnesses, while the Defendants called one witness.

PLAINTIFF'S CASE

PW1 John Guccha Mwangi adopted his witness statement as part of his evidence and further produced his list of documents as Exhibit 1 and urged the Court to allow his claim. He testified that he bought the suit property on **17th May 2011**, from **Kimani Kanju**, and that he had not seen him since **2011**. That it is the Defendants who had invaded his land and that he was not aware that the said **Kimani Kanju** allegedly died in **1998**. Further, that **Kimani Kanju's** Title Deed was issued in **1991**. That he conducted a search and noted that the land was owned by **Kimani Kanju**, and that he has not utilized the land since **2011**.

It was his evidence that he reported the matter to the **Police** and the Defendants were charged with trespass. That he paid the monies to **Kimani Kanju**, and he had a bank statement; That he did not see Kimani Kanju's wife during the transaction, but **Kimani Kanju** was with his son. That the title deed was issued in **2011**, and the same is neither irregular nor illegal. That the suit property had been advertised in the **Daily Newspaper** and that he called the number but it is no longer in service. He stated that he was shown the land which was next to **Kimani Kanju's** land and the same was not occupied and later a structure was built. That he intended to buy the suit property, but was shown a different parcel of land. That the Defendants did not receive any of the monies.

It was his further evidence that he had sued **Njoki Kimani** and as per the **Green Card**, the land was for **Kimani Kanju**. That he paid **Kshs.1,000,000/=** for the suit property and he followed the right procedure.

PW2 John Muchai Kimondo, adopted his witness statement dated **6th April 2017** and testified that the Plaintiff is his father in law and he was present when he bought the suit property. That he called the number in the Advertisement and gave the Police the said number. Investigations were done and the **DCIO** did not charge anyone. That the suit property was being sold at **Kshs.1.3million**, and they negotiated to **1 million**. That **one million** was given to **Kimani Kanju**, and **300,000/=** to **Kimani** and he had never seen the two since that day. That he met **Kimani Kanju** and told him that they had gotten the Title Deed. That **Kimani Kanju** showed them the title deed and the land, but the Surveyor showed them a different parcel of land. That when they purchased the land, they noted that the same was being utilized and that the money was paid in cash. Further that **Kimani Kanju**, told them that his wife was Deceased, that they had the original Title Deed for **Kimani Kanju**, and they went to see the land.

DEFENCE CASE

DW1 Njoki Kimani, the **2nd** Defendant herein adopted her witness statement dated **20th April 2018**, as part of her evidence in Court. She further produced the list of documents dated on **20th April 2018**, as Exhibit 1. She stated that the suit property belonged to her father **Kimani Kanju**, who died in **1998**, and he was buried on the suit property. That her father could not have sold the suit property in **2011**, as he was Deceased. Further that there are two houses on the suit property and they live on the suit property. That her father never obtained a **Title Deed**, and never surrendered the ballot document and the Title Deed held by the Plaintiff is fake. It was her further evidence that they had not distributed their father's Estate nor have they sold the suit property. She urged the Court to allow her Counter Claim.

The Court directed the parties to file written submissions and in compliance with the said directive, the Defendants filed their submissions dated **7th July 2021** on **4th October 2021** through the **Law Firm of Karanja Kangiri & Company Advocates**. The Plaintiff did not file his submissions.

The Court has carefully read and considered the evidence on record and the submissions. From the evidence adduced, what is not in dispute is that one **Kimani Kanju** is the proprietor of **Land Parcel No. Ruiru East/Juja East Block 2/3831**. However, what is in dispute is whether he sold and transferred the suit property to the Plaintiff and or whether the person who transferred the said property to the Plaintiff had the capacity and interest to transfer it to the Plaintiff and therefore passing a good title to him. The Court thus finds the issues for determination are;

1. *Whether the Plaintiff acquired a good Title.*

2. *Whether the Plaintiff's claim is merited*

3. *Whether the Counter Claim is merited*

1. Whether the Plaintiff acquired a good Title

It is the Plaintiff's contention that he bought the suit property from one **Kimani Kanju and** entered into a Sale agreement dated **17th May 2011** to support his claim which he produced in evidence. The basis upon which the Plaintiff acquired proprietary rights over the suit property and which is the foundational basis of this suit is the said sale agreement. **Section 3(3) of the Contract Act** provides;

"No suit shall be brought upon a contract for the disposition of an interest in land unless: -

(a) The contract upon which the suit is found-

(i) Is in writing

(ii) Is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

Therefore, as per the provisions of law, the Contract which the Plaintiff seeks to rely on has to be in writing which is in writing and signed by all parties.

Though the Defendants have not been sued in the Plaintiff as the Administrators of the Estate of **Kimani Kanju**, in their Counter Claim they have sought to sue as Administrators. The Defendants produced in evidence Limited letters of Administration **Ad litem** dated **18th September 2013**, that indicated that the said **Kimani Kanju (Deceased)** died on **3rd April 1998**. There has been no evidence produced in this court to prove the contrary. Therefore, it follows that the said **Kimani Kanju**, who is alleged to have sold the suit property to the Plaintiff died in **1998**, and the Plaintiff entered into an alleged Contract in **2011**, meaning there is no way the same would be possible.

The only logical conclusion to the above scenario is that a fraudster impersonated the said **Kimani Kanju**, and entered into a **void** and **null** Contract with the Plaintiff and the same would explain why the Plaintiff was shown a different parcel of land.

In the case of **Silverbird Kenya LimitedVs... Junction Ltd & 3 Others [2013] eKLR** the Court held that ;

"...In my view, it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in my view does not satisfy the requirements of Section 3(3) of the Law of Contract Act to be the foundation of the plaintiff's claim against the defendants. Section 3(3) of the Law of Contract Act is indeed couched in mandatory terms and does in fact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff's suit must fail for being in contravention of Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya."

The Contract upon which the Plaintiff seeks to rely on to gain possession of the suit does not meet the requirements of law as it was never signed by the vendor since he was already Deceased.

Therefore, this court finds and holds that the Contract is **null** and **void** and the suit cannot stand in the absence of a valid Contract.

Further, the Plaintiff could not have acquired a **good title** over the suit property as the person who allegedly passed the title to him is non-existent. The said **Kimani Kanju**, who allegedly sold the suit property to the Plaintiff was Deceased by the time the Contract was signed and entered into. It is evident that only the legal representatives of **Kimani Kanju** could transact on his behalf and an imposter could certainly not transact as he had no legal authority and or interest and therefore could not pass a good title as he did not have any to pass. Consequently, this court finds and holds that the Plaintiff did not acquire a good title over the suit property.

2. Whether the Plaintiff's claim is merited

The Plaintiff had sought for orders that the Defendants be ordered to vacate from the suit property; for the withdrawal of the caution and a Declaration that the suit property belongs to him.

The Court has held and found that the Contract that is the foundational basis of the suit property cannot stand. Further, the Court has found that the Plaintiff did not acquire a good title over the suit property since the alleged owner **Kimani Kanju** was Deceased at the time of transfer of the suit property to the Plaintiff, and there would be no way he would have transferred the same to him. Evidently, the transfer was illegal and hence **null** and **void**. The Upshot of the above analysis therefore is that the Court finds and holds that the Plaintiff's claim is **not** merited.

3. Whether the Counter Claim is merited

From the pleadings filed in Court, it has not been in doubt that **Kimani Kanju** is the lawful owner of the suit property. The Defendants who are the Administrators and the Legal Representatives of the Estate of the **Kimani Kanju**, have produced in evidence being a ballot paper number **1594** and **Share Certificate**. The Court noted that it has been unable at this juncture to have the connection between the suit property **L.R No. Ruiru East/Juja East Block 2/3831**, and the ballot and share Certificate.

However, a copy of a certificate of official search dated **19th May 2011**, produced in evidence by the Plaintiff and the fact that the Defendants are in possession of the suit property and in the absence of any contrary evidence, the Court is satisfied that the said **Kimani Kanju** (Deceased) is the absolute and indefeasible owner of the suit property herein.

In their Counter Claim, the Defendants had sought for a Declaration that the suit property belongs to **Kimani Kanju** and for an **Order** that the Plaintiff's registration as proprietor of the said property be cancelled and for rectification of the register.

The Court has held and found that the Plaintiff's registration as proprietor of the suit property was **illegal** and **procedural**. Therefore, the Certificate of ownership was acquired **illegally** and **unprocedurally** and can be impeached as per the provisions of **Section 26 of the Land Registration Act**. The import of **Section 26(1)(a) & (b) of the Land Registration Act** was considered in the case of *Elijah Makeri NyangwraVs...Stephen Mungai Njuguna & Another [2013] eKLR*, where the Court held that;

“ First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

The Court thus finds and holds that the Certificate of title held by the Plaintiff can be impeached. **Section 80 of the Land Registration Act** empowers the Court to order for the rectification of a register if it finds that the certificate of title can be impeached. The Court having impeached the Plaintiff's title and having been satisfied that the Deceased **Kimani Kanju** was the proprietor of the suit property, then it further finds and holds that the Defendants' **Counter Claim** is merited.

4. Who should bear the costs of the suit

It is trite that costs usually follow the events. **Section 27 of the Civil Procedure Act** gives the Court discretion to grant costs and unless special circumstances are presented, the Court can exercise its discretion in awarding costs.

The Defendants herein are the successful parties and are thus entitled to the costs of the suit. However, the circumstances of this case are that the Plaintiff must have been conned and though not always that in such cases the Court would exercise its discretion in favour of the unlucky party as each case bears its own unique facts and circumstances. In this instance, the Court is thus inclined to order that each party should bear its own costs of the suit.

The Upshot of the foregoing is that the Court finds and holds that the Plaintiff has failed to prove his case on the required standard of balance of probabilities and thus his claim as contained in the Plaint dated **21st July 2017**, is dismissed entirely.

However, the Court finds that the Defendants have succeeded in their **Counter Claim** dated **11th April 2018**.

Consequently, the court enters judgment for the Defendants as prayed in the **Counter Claim** on the following terms:

- a) A Declaration be and is hereby made that land parcel No. Ruiru East/Juja East Block 2/3831 belongs to the Estate of Kimani Kanju (Deceased).*
- b) An order be and is hereby made for cancellation of the Title Deed of land parcel Number Ruiru East/Juja East Block 2/3831*
- c) An order be and is hereby made for the Rectification of the register as pertains land parcel Number Ruiru East/Juja East Block 2/3831, to reflect the rightful owner of the said property being Kimani Kanju*
- d) Each party to bear is its own costs of the suit.*

It is so ordered

Dated, Signed and Delivered Virtually at Murang'a this 2nd day of February 2022.

L. GACHERU

JUDGE

Delivered virtually:

In the presence of

N/Appearance for the Plaintiff

Wangui H/B for Karanja Kangiri for the 1st & 2nd Defendants

Kuiyaki – Court Assistant

L. GACHERU

JUDGE