



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE NO. 235 OF 2015

JANE WANJIRU S. KIMANI

JOHN IHUGO KIMANI

(suing as the administrators of the Estate of SAMUEL KIMANI MWAURA(deceased)).....**PLAINTIFF**

VERSUS

PETER KARATU KIMANI.....**1ST DEFENDANT**

JOYCE WANJIRU KIMANI.....**2ND DEFENDANT**

JOHN KAMAU WANJIKU.....**3RD DEFENDANT**

J U D G M E N T

1. The suit herein was commenced by way of a Plaint dated 13th August 2015 which was amended on 1st September 2015. The plaintiffs averred that they were entitled to land parcel No. Naivasha/Maraigushu Block 18/1152 (Naivasha Unity) (herein after referred to as “the suit property”). They averred that the late Samuel Kimani Mwaura bought shares in Naivasha Unity Farmers’ Co-operative Ltd between the years 1975 – 1996 and was given ballot No. 329 and allocated land parcel No. 1152.

2. The plaintiffs further averred that the deceased took possession of the land and after he died in 2005, the 1st defendant trespassed onto the suit property and was issued with a title deed in his name. The 2nd defendant unlawfully caused removal of a caution placed by the plaintiffs and the 3rd defendant fraudulently obtained the registration of the suit property in his name. The plaintiffs vide the amended plaint sought the following orders against the defendants:-

1. A temporary injunction in the interim and a permanent one in the long-term to restrain the defendants by themselves, their agents, servants, employees or others whosoever from selling, leasing out, transferring, charging, subdividing, trespassing upon or dealing in any other manner with property title number Naivasha/Maraigusu Block 18/1152 (Naivasha Unity)

2. An order for cancellation of the title deed issued to the defendants or any other titles emanating from unlawful survey, subdivision and alienation of the suit property.

3. An order of eviction of the defendants or anyone else in possession and occupation of property title number Naivasha/Maraigushu Block 18/1152 (Naivasha Unity) or any subdivisions therefrom.

4. Costs and interest.

3. The defendants were served with summons to enter appearance but they did not enter appearance except for the 3rd defendant. The 3rd defendant filed his statement of Defence dated 9th September 2015 and subsequently amended it on 2nd October 2015. The 3rd defendant denied that the plaintiffs are the beneficial owners of land parcel No. **Naivasha/Maraigushu Block 18/1152 (Naivasha Unity)** and stated that he purchased the suit property from the previous owner vide a sale agreement dated 20th March 2012 and he was an innocent purchaser for value without any notice of any defect in the title.

4. The 3rd defendant averred that he was not aware of any defect on the title of the 1st defendant and pleaded fraud and/or misrepresentation on the part of the 1st defendant and stated he was entitled to full indemnity from the 1st defendant should his title be successfully impeached. The Co-defendants notice of indemnity was filed on 5th October 2015 by the 3rd defendant as against the 1st defendant.

5. The matter was listed for hearing on 24th February 2021 when the hearing proceeded in the absence of the 1st and 2nd defendants who had neither appeared and/or filed any defences after being served with summons.

6. The 1st plaintiff testified and adopted her witness statement filed on 13th August 2015 and relied on the bundle of documents also filed on the same date. The documents were admitted in evidence as **PEX 1 – 8**. The 1st plaintiff testified that she had sued the defendants claiming that land parcel No. Naivasha/ Maraigushu Block 18/1152 was owned by her late husband as he had bought shares from Naivasha Unity Co. Ltd and he had been given ballot No. 329 for plot No.1152. She testified that her husband died on 13th June 2005 and that she had obtained a grant in respect of his estate. That after her husband died, she informed the company and inquired about her late husband's parcel of land and the chairman had requested her to pay Ksh.30,000/= for title processing but when she went to pay, the chairman Peter Maina refused to accept the money stating her husband had no land in the company.

7. She testified further that she went to the land where her husband had showed her and found the 1st defendant who informed her that the company had sold the land to him. The 1st defendant was summoned to the Chief's office where he stated that he had been issued with a title deed on 16th March 2009 for the suit land. The 1st plaintiff lodged a caution at the Lands registry which caution was allegedly irregularly removed. The 1st plaintiff further testified that after she discovered the removal of the caution, she lodged another caution and reported the matter to the police and three people were arrested and charged in Naivasha Criminal Case No. 1084/2014 which case is still pending in court. She prayed that the prayers sought in her amended plaint be allowed as prayed.

8. On cross examination, the 1st plaintiff confirmed that her husband bought plot no. 1152 which was one acre in size. She stated she had receipts and the ballot paper issued to her late husband but did not have a share certificate. She confirmed that they had never used the land and that in 2009 she found David Karatu on the property who informed her that he had bought the land from the company. She stated that Jane Wanjiru Kimani (2nd defendant) was the one who removed the caution and that it was during that period that the 3rd defendant bought the suit property. She confirmed that she had nothing to show how ballot 329 became land parcel No. 1152.

9. The 3rd defendant testified as DW1. He adopted his witness statement dated 2nd October 2015 and relied on his bundle of documents of the same date. The documents were admitted in evidence as '**DEX 1-5**'. He testified that in 2012 he was looking for a plot to buy and he engaged a broker to assist him locate a plot which he did in Unity Farm. He entered into a land sale agreement dated 20th March 2012, paid the full purchase price, and constructed a residential house thereon in which he presently resides. He concluded his testimony stating that he was an innocent purchaser for value without any notice of any defect on the title that he purchased.

10. On cross examination he confirmed that he knew the 1st and 2nd defendants in the year 2012 when he bought the suit property from them. He stated the land belonged to Peter Karatu Kimani before it was transferred to him. He stated that he obtained a certificate of search dated 21st March 2012.

11. The 3rd defendant affirmed that the transfer to him was registered on 15th October 2012 and he was issued with a title deed. He stated at the time the land was transferred to him there was no caution registered against the title. He stated that although he had been charged in a criminal case at Naivasha following a complaint by the 1st plaintiff, the charges against him were withdrawn for lack of any evidence to sustain the charge.

12. Following the closure of the trial the plaintiffs and the 3rd defendant filed written submissions as per the court's directions. I have reviewed the pleadings, the evidence and the submissions and the following are the issues that arise for determination.

(i) Whether the 1st plaintiff's deceased husband, Samuel Kimani Mwaura was the beneficial allottee of land parcel Naivasha/Maraigushu\Block 18/1152 by Naivasha Unity Farmers Co-op Ltd.

(ii) Whether the 3rd defendant was a bonafide and/or innocent purchaser for value of the suit property from the 1st defendant?

(iii) Whether the 3rd defendant acquired a valid title to the suit property?

(iv) Whether the plaintiffs are entitled to the reliefs sought?

13. The plaintiffs submitted that Samuel Kimani Mwaura (deceased) was the lawful beneficial owner of the suit property on the basis of the receipts he had been issued by Naivasha Unity Farmers Co-op Ltd which the plaintiffs exhibited in their bundle of documents. The plaintiffs submitted the deceased balloted for the plot vide ballot No.329 which they stated was for plot No.1152 now registered in the 3rd defendant's name. The plaintiffs submitted that the 3rd defendant did not avail any documents to show that the 1st defendant from whom he claimed to have bought the plot was a member of Naivasha Unity Farmers' Co-operative Ltd and had been allocated the said plot. The plaintiffs contended that the 3rd defendant was not a bonafide purchaser for value without notice and pointed to the sale agreement executed by the 3rd defendant and 1st defendant on 20th March 2012 and the certificate of search issued on 21st March 2012 and argued that the 3rd defendant ought to have realized the plaintiffs had an interest in the suit property since they had lodged a caution against the title.

14. The plaintiffs in their submission that the 3rd defendant was not a bonafide purchaser placed reliance on the case of Munyu **Maina -vs- Hiram Gathiha Maina (2013) eKLR** where the court held that: -

“—when a registered proprietor's root of title is under challenge it is not sufficient to dangle the instrument of titles as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove

the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”

15. The 3rd defendant for his part submitted he was an innocent purchaser for value without any notice of any defect in the title he purchased. He stated there was evidence that the 1st defendant was a member of Naivasha unity Farmers Co. Ltd and that he had paid fees for the processing of title for the suit property in 2009. He submitted the chairman of Naivasha Unity Farmers Co. Ltd in 2009 informed the plaintiff that the deceased was not the owner of the suit property and hence the plaintiff had failed to prove that the deceased was ever allocated the subject suit property by the company. The 3rd defendant submitted that as the registered owner of the suit property he was vested with absolute ownership rights and in terms of section 26 of the Land Registration Act, 2012 his title was indefeasible and could only be challenged on grounds of fraud and/or misrepresentation in respect of which he must be shown to have been party to. He contended that the plaintiffs had not proved or shown that he obtained his title fraudulently or he was party to any fraud in the acquisition of title in his favour.

16. The 3rd defendant relied on the case of **Gichinga Kibutha -Vs- Caroline Nduku (2018) eKLR** which highlighted the standard of proof required when fraud is alleged. The courts have through a long list of decisions reiterated that fraud has to be proved at a standard higher than a balance of probabilities though not as high as proof beyond a reasonable doubt as is the norm in Criminal cases. In the case the judge held:-

“ It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved above a balance of probabilities but not beyond reasonable doubt

*- The allegations of fraud in particular called for detailed evidence to reach the threshold of proof. I am well alive to the case of **Koinange & 13 others -vs- Koinange (1986) KLR 23** where the court restated the cardinal precept of the law of evidence that he who alleges must prove it. In the cases of **Ratilal Gordhanbhai Pater -vs- Lalji Makanji 91957) EA314 and Ulmila Mahindra Shal -vs- Barclays Bank International & Another (1979) eKLR** the courts have stated that fraud had everything to do with one's state of mind and intentions, and not the outcome of actions and the standard of proof for fraud is very high beyond the usual standard of balance of probabilities in Civil cases approaching but below proof beyond reasonable doubt”*

17. On the question of protection of a bonafide purchaser's title the 3rd defendant placed reliance on the cases **Shimoni Resort -Vs- Registrar of Titles & 5 others (2016) eKLR** where the court held that the title in the hands of a bonafide purchase cannot be impugned unless the title holder was proved to have been a party to the fraud or misrepresentation that led to the registration of the title .

18. The plaintiffs case is predicated on the deceased ownership of the suit property before his death. **Has there been proof that indeed Samuel Kimani Mwaura (deceased) was a member of and was allocated the property the subject of the suit by Unity Farmers Co-operative Ltd?** It is a rule of evidence that he who alleges bears the burden of Proof. (*See section 107 of the Evidence Act (Cap 80 Laws of Kenya)*). The plaintiff produced some receipts that were purportedly issued by Naivasha unity Farmers Co-operative Ltd to the deceased between 1975 and 1996. No share certificate from the company in the name of the deceased was exhibited and no certified copy of the members register was exhibited and no official of the company was called to testify. Although the plaintiff testified that her late husband balloted for and was allocated a plot and produced a copy of the ballot paper 329 in evidence, there was no evidence that the plot balloted for and allocated was land parcel Naivasha/Maraigushu Block 18/1152 (Naivasha Unity). There was no members list showing plot allocations produced in evidence to illustrate the plot allocated to the 1st plaintiff's deceased husband. Thus a part from the plaintiffs showing that the deceased may have made some payments to Naivasha Unity Farmers Co-op Ltd there was no evidence to show he was allocated the suit parcel of land. There was further no evidence that after the allocation the deceased took possession and/or occupied the allocated plot. On the evidence adduced by the plaintiffs, I was not satisfied that the deceased, Samuel Kimani Mwaura was allocated the suit property. Indeed, it is noteworthy that the plaintiffs claimed the plot allocated was about one (1) acre yet land parcel Naivasha/Maraigushu Block18/1152 measures about half acre. The plaintiffs claimed the plot was subdivided, and that the other half is occupied by some other people who are not parties to this suit. There was no evidence of any such subdivision and/or the particulars of that other portion of land. The plaintiffs in my view have failed to prove the deceased was allocated the suit property and/or any other property by Naivasha unity Farmers Co-operative Ltd.

19. The 3rd defendant in his evidence maintained that he had validly and procedurally purchased the suit property from the 1st defendant who was the registered proprietor in 2012 when he entered into the purchase transaction. There is no dispute that the 1st defendant was registered as the proprietor of the suit property in 2009 and was so registered in March 2012 when he entered into the sale transaction with the 3rd defendant. The 3rd defendant was entitled to rely on the title register in carrying out the sale transaction. Once the caution that had been lodged against the register was removed, the 3rd defendant was equally entitled to assume that the caution had been regularly removed by the Land Registrar as the person mandated under the Land Registration Act 2012 to carry out such functions. The 3rd defendant was registered as proprietor of the suit property on 15th October 2012 following the purchase transaction. Upon registration as the proprietor, the 3rd defendant was vested with absolute rights of ownership in terms of sections 24 and 25 of the Land Registration Act, 2012. His title could only be challenged under the limited instances set out under section 26 (1) (a) and (b) of the Land Registration Act, 2012 otherwise his title was indefeasible. Section 26 (1) (a) & (b) provides:-

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.

20. The issue to determine as regards the 3rd defendant was whether he was a bonafide purchaser for value without notice. The 3rd defendant's title can only be impeached if it is demonstrated and proved that he acquired the same fraudulently and/or he was privy to any fraudulent conduct of his predecessor. In the manner he acquired the title that he transferred to him and/or that by exercise of due diligence he would have become aware of such fraudulent conduct. In the case of **Samuel D Omwenga Agwenyi -vs- National Land Commission & 2 others (2019) eKLR** this court sitting in Kisii considered the application of the doctrine of indefeasibility of title and relied on the Court of Appeal decision in the case of **Charles Kaaraathe Kiarie & 2 Others -Vs- Administrators of Estate of John Wallace Mathare (deceased) & 5 others (2013) eKLR** where the court held:-

“ The Registration of Titles Act is entirely a product of the Torren system of registration. The Word “ Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and Pioneer and authors of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss, arising from an error in registration the person affected is guaranteed of government compensation. This statutory; presumption of indefeasibility and conclusiveness of title under the Torrens system can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved”

21. In the Omwenga Agwenyi case (supra) I stated thus:-

“In my view section 26 1(a) & (b) is a codification of the principle of indefeasibility of title such that where a person is registered as proprietor of a parcel of land his/her title can only be impugned on grounds of fraud and /or misrepresentation to which he is shown to have been involved in and/or party to.”

22. In the present case the plaintiffs have not proved that the 3rd defendant was registered as proprietor fraudulently. The 3rd defendant has demonstrated that he entered into a sale agreement with the 1st defendant on 20th March, 2012 and after the transaction was completed the suit property was transferred and a title issued in his favour on 15th October 2012. As at the time he was registered there was no encumbrance registered against the title. The abstract of title (green card) shows that a caution that had earlier been registered against the title was removed on 21st March 2012. There was no evidence that the 3rd defendant had anything to do with the removal of the caution registered by the 1st plaintiff. It is never enough for a party to merely allege fraud and leave it up to the court to infer or deduce fraud from the facts. Fraud has to be pleaded and proved by evidence. See the case of **Kinyanjui Kamau -Vs- George Kamau Njoroge (2015) eKLR** where the court of appeal stated as follows:-

“ In cases where fraud is alleged, it is not enough to

*Simply infer fraud from the facts. In **Vijay Morjaria -Vs- Nansingh Madhusingh Darbar & Another (2000) eKLR (Civil Appeal No.106 of 2000) Tunoi JA (as he then was) stated as follows:-***

“ It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and it should be stated that these acts were done fraudulently. It is also settled law that fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

23. In the present matter the plaintiff merely averred that the 1st defendant fraudulently transferred the suit property to the 3rd defendant. The onus to prove fraud rested on the plaintiffs. As stated earlier in this judgment the plaintiffs did not establish that Samuel Kimani Mwaura (deceased) through whom they claim was allocated the suit property and there was therefore no evidence that the parcel of land (the suit property), that was registered in the 1st defendant's name and which he sold to the 3rd defendant, at any time belonged to the deceased. In the circumstances it is my finding and holding that the plaintiffs did not prove any fraud on the part of either the 1st defendant or the 3rd defendant.

24. On the basis of my analysis and evaluation of the evidence, I am satisfied that the 3rd defendant was a bonafide purchaser for value without any notice of any defect in the title and he therefore acquired a valid title which is absolute and indefeasible. He is entitled to enjoy the full rights of a registered proprietor and the caution registered against the title by the 1st plaintiff is without any justification and should be removed.

25. The net result is that I find and hold that the plaintiffs have failed to prove their case against the defendants on balance of probabilities. The same is hereby ordered dismissed with costs to the 3rd defendant

26. Orders accordingly.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 4TH DAY OF NOVEMBER 2021.

J M MUTUNGI

JUDGE