



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 248 OF 2014

DANIEL NJOGU NYAGA.....PLAINTIFF

VERSUS

ALICE WANJIKU.....DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff filed the instant suit against the defendant for:

(a) An order of eviction against the defendant by herself, her family members, tenants, assigns, agents, employees, servants, erectment, structures, crops, trees, animals, and/or any other person or physical thing claiming by or under her from the suit parcel of land No. BARAGWE/KARIRU/1462.

(b) Costs of the suit plus interest at Court rates.

In a statement of defence and counter-claim dated 18th December 2015, the defendant denied the plaintiff's claim and sought by way of counter-claim the following orders:

(a) A declaration that the plaintiff obtained registration of L.R. No. BARAGWE/KARIRU/1462 fraudulently and the Land Registrar Kirinyaga be ordered to cancel the same and revert to the names of NJERU MWATHUKI.

(b) Costs of the suit and counter-claim.

PLAINTIFF'S CASE

The plaintiff testified that he is the registered proprietor of land parcel No. BARAGWE/KARIRU/1462 which he purchased from one Joseph Mugo Gasaramu in the year 1998. In the year 2012, he visited the land and found that the boundaries had been destroyed and that someone had erected a structure on his land. He also found out that the defendant had encroached on his land. He went to his lawyers and recorded a statement and a list of documents dated 21st August 2014. On 10th February 2016, he filed a further list of documents. He stated that he did not obtain the suit land fraudulently as he complied with all the statutory formalities in purchasing the suit land.

DEFENDANT'S CASE

The defendant, Alice Wanjiku stated that she knows Njeru Mwathuki as her father-in-law. His wife was Grace Wakatima. They have both passed on and that she is the only surviving heir in that family. She said that she does not know the plaintiff in this case. She does not also know Joseph Mugo Gasaramu and stated that to the best of her knowledge, she is not aware of any agreement between her late father-in-law disposing the family land. Her father-in-law passed away in December 1998. She said that she has been ploughing the family land after the demise of her father-in-law and that she has never seen Mugo cultivating their family land. She got married in 1998 and her mother-in-law passed away in 2007. She has been living in the family land since then. She is the only surviving person in that family.

ANALYSIS AND DECISION

I have considered the evidence adduced by the parties and the submissions by their counsels. This case had initially proceeded for formal proof after the defendant failed to file defence to the plaintiff's claim and interlocutory judgment was entered in favour of the plaintiff. Judgment was delivered on 20th March 2015 whereof the defendant was given 45 days from the date of the decree to remove herself and whatever structures she has put on the suit land. That judgment was later set aside and the defendant was granted leave to file defence. On

6th January 2016, the defendant filed her statement of defence and counter-claim to this suit. From the sale agreement between one Joseph Mugo Gasaramu made on 16th September 1997 for land parcel No. BARAGWE/KARIRU/621, the said Joseph Mugo Gasaramu was purporting to sell a share of his uncle's land comprising one (1) acre. In a supplementary agreement made on 11th December 1998 between the same Joseph Mugo Gasaramu and the plaintiff Daniel Njogu Nyaga, the said Joseph Mugo Gasaramu was now selling the whole land known and described as BARAGWE/KARIRU/1462 which resulted after the sub-division of land parcel No. BARAGWE/KARIRU/621. The agreed purchase price for the said land was Ksh. 425,000/=

From the defendant's list of documents dated 9th September 2016 Item No. 5, the defendant produced a death certificate of one Njeru Mwathuki (deceased) who is the registered owner of land parcel No. BARAGWE/KARIRU/621 who died on 7th October 1998. The green card also produced as Exhibit No. 8 for land parcel No. BARAGWE/KARIRU/621 indicates that the said NJERU MWATHUKI was registered as proprietor of the said land on 13th January 1959 and a land certificate issued on 25th May 1972. The same green card further indicates that on 3rd June 1998, the title closed on sub-division after the land was sub-divided into two new portions namely BARAGWE/KARIRU/1461 and 1462. Parcel No. BARAGWE/KARIRU/1461 was registered in the name of the deceased NJERU MWATHUKI while parcel No. BARAGWE/KARIRU/1462 was registered in the name of Daniel Njogu Nyaga, the plaintiff herein.

The plaintiff in his evidence has not proffered any explanation how he acquired the suit property. He has not explained why he agreed to buy land from the seller, one Joseph Mugo Gasaramu who purported to be selling shares of land from his "**uncle**" one NJERU MWATHUKI whom he did not establish whether he was alive or dead. The plaintiff in my view was not only careless but reckless. The two agreements which the plaintiff entered with the purported seller one Joseph Mugo Gasaramu are not only null and void but also illegal and this Honourable Court cannot countenance such illegality. The purported vendor Joseph Mugo Gasaramu had no legal capacity to deal with the subject property parcel No. BARAGWE/KARIRU/621 where the registered owner had passed on and letters of administration were yet to be taken by the legal administrators. I therefore find and hold that the purported sale agreement dated 16th September 1997 and the supplementary agreement dated 11th December 1998 giving rise to the sub-division of land parcel No. BARAGWE/KARIRU/621 into land parcel Nos. BARAGWE/KARIRU/1461 and 1462 was done through fraud and illegality which cannot be allowed to stand.

In the case of *ALICE CHEMUTAI TOO VS NICKSON KIPKURUI KORIR & 2 OTHERS (2015) e K.L.R, MUNYAO SILA J.* stated as follows:

"The position that a fraudulent title cannot be allowed to stand has been affirmed in a number of other cases. They are several and it is not necessary to set them out here. I will only mention one where the point was clearly made, that is the Court of Appeal decision in the case of Arthi Highway Developers Limited Vs West end Butchery Ltd & 6 others, Court of Appeal at Nairobi Civil Appeal No. 246 of 2013 (2015) e K.L.R. This is a case where certain crooks fraudulently acquired title to land and later sold the same to other parties. The Environment and Land Court at Nairobi, cancelled all titles and ordered the land to revert back to the original owner. The decision was upheld by the Court of Appeal".

I totally agree with the decision of the learned Judge.

Having considered all the arguments, I honestly do not see how the title of that plaintiff can stand having been obtained illegally and fraudulently. I find the plaintiff's suit lacking merit and the same is hereby dismissed with costs. Regarding the defendant's counter-claim, I find that the defendant has proved her counter-claim to the required standard. I therefore enter judgment for the defendant against the plaintiff as prayed with costs.

In the final analysis, I make the following orders:

- 1. The sub-division of land parcel No. BARAGWE/KARIRU/621 was fraudulent and illegal and the same is declared null and void.***
- 2. The title registered as No. BARAGWE/KARIRU/1461 and BARAGWE/KARIRU/1462 are hereby cancelled.***
- 3. The register of the said parcel No. BARAGWE/KARIRU/1461 and BARAGWE/KARIRU/1462 be rectified, so as to remove the entries in favour of DANIEL NJOGU NYAGA and the title to revert back to the proprietorship of J.N. NJERU MWATHUKI Alias NJERU MWATHUKI.***
- 4. The costs of this counter-claim and the dismissal of the suit shall be borne by the plaintiff.***
- 5. A copy of this judgment is hereby forwarded to the Directorate of Criminal Investigation (C.I.D) Kirinyaga County for investigation and prosecution of persons who may be found to have committed acts of fraud in this case.***

READ and SIGNED in open Court at Kerugoya this 5th July, 2019.

E.C. CHERONO

ELC JUDGE

5TH JULY, 2019

In the presence of:

1. *M/S Mohindi holding brief for Maina Kagio for Plaintiff*
2. *Defendant in person - present*
3. *Plaintiff in person - present*
4. *Mbogo Court clerk – present*