



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.248 OF 2013

JANE KIRIGO MOSES

(Administratrix of Estate of MOSES KIOI MUTURI).....1ST PLAINTIFF

OLIVE WAMUHU KINYANJUI.....2ND PLAINTIFF

VERSUS

LUCY WANJIRU NYAGA (Administratrix of the Estate of

JOSEPH NYAGA WAMBITI).....1ST DEFENDANT

CYRUS NGUGI MUGONYA.....2ND DEFENDANT

JUDGMENT

(Original plaintiff filing suit to stop the defendants from interference with the suit land; original plaintiff having purchased the suit land from the 1st defendant; title held by the original plaintiff being a title issued under the Registration of Titles Act (RTA); 1st defendant denying selling the land to the plaintiff and subsequently obtaining a title issued under the Registered Land Act (RLA); 1st defendant then transferring the RLA title to the 2nd defendant; adequate evidence that the 1st defendant sold the suit land to the original plaintiff and original plaintiff being issued with the RTA title in 1991; 1st defendant taking possession and leasing out the suit land; RLA title of the 1st defendant issued in 2012; issue of the second parallel title under the RLA regime being fraudulent; title of the original plaintiff upheld as there is evidence of sale and the defendants also being out of time in contesting the title; judgment entered for the plaintiffs and order issued that the defendants' RLA title be nullified)

1. The original plaintiff in this suit was Moses Kioi Muturi (for he is now deceased), and he sued Lucy Wanjiru Nyaga (as administratrix of the estate of the late Joseph Nyagah Wambiti) and Cyrus Ngugi Mugonya. In his plaint, he pleaded that he is the registered proprietor of the land registered as LR No. 1144/325 (Grant No. IR 77106) under the Registration of Titles Act, Cap 281, (RTA) (now repealed) which he purchased from Lucy Wanjiru Nyaga (1st defendant), who at the time held an allotment letter in favour of her late husband Joseph Nyagah. He averred that he took the requisite legal steps to acquire the title and he did so on 19 April 1991. He pleaded that since purchase he remained in possession of the said land and had been paying land rent to the Government. He pleaded that on 11 February 2013, Cyrus Ngugi Mugonya (2nd defendant), came to the land claiming to own it and had a title registered as Naivasha Municipality Block 5/2 under the Registered Land Act (RLA) (now repealed). He averred that he visited the land registry and found out that this title came to be registered in the name of Lucy Wanjiru Nyaga on 1 February 2013 and that on the same day the title was transferred to Cyrus Ngugi Mugonya. It is his view that this title is fraudulent and in this suit he wished to have it cancelled and that he be declared the rightful owner of the land.

2. In the course of the proceedings, the original plaintiff died and he was substituted with his administratrix Jane Kirigo Moses. Before his demise, Moses Kioi Muturi had sold the suit land and transferred his title to one Olive Wamuhu Kinyanjui. The latter was thus introduced into the case as 2nd plaintiff and the original plaint was amended. In the amended plaint, it is pleaded that the 1st original plaintiff sold the suit land to the 2nd plaintiff on 15 May 2012 for a consideration of Kshs. 9.5 Million. It is reiterated that it is on 11 February 2013 that the 2nd defendant came into the suit land claiming to own it. The plaintiffs believe that the title held by the 2nd defendant was as a result inter alia of a fraudulent conversion from the RTA to the RLA registration regime.

3. The defendants filed a joint statement of defence and counterclaim. The alleged sale agreement between the 1st original plaintiff and the 1st defendant is denied and it is pleaded that the alleged sale agreement is a fraud perpetrated by the original 1st plaintiff with the intention of disinheriting the estate of the late Joseph Nyaga Wambiti. It is pleaded that the original 1st plaintiff colluded with unknown persons in the

Lands Registry to procure a fraudulent title. It is also denied that the original 1st plaintiff had been in occupation of the suit land. In the counterclaim, it is pleaded that the suit land devolved to the 1st defendant, as beneficiary of the estate of the late Mr. Wambiti, through a confirmed grant issued to her on 26 April 1989, and pursuant to that, she sold her interest to the 2nd defendant on 31 January 2012. The defendants thus wish to have the title that they hold declared the good title and for the plaintiffs to be restrained from the land.

4. PW-1 was Jane Kirigo Moses, the daughter and administratrix of the original plaintiff. She principally relied on the statement of that her late father had filed in respect of the suit. She testified that her late father purchased the suit land from the 1st defendant and they had a sale agreement prepared by Ramesh Sharma Advocate. At that time, the land only had an allotment letter which was in the name of the late Mr. Wambiti. Transfer could not be effected before the 1st defendant got letters of administration, and after she got the letters, her late father followed up on the title and obtained the same. Her father rented out the property to some tenants who operated a garage and some temporary kiosks. When the 2nd defendant came to the land in the year 2013, her father wrote to the Chief Land Registrar who replied that the title of the 2nd defendant is not a good title. She stated that her father sold the suit property to the 2nd plaintiff for Kshs.9.5 Million and she thought that the sale by the 1st defendant to the 2nd defendant at a consideration of Kshs.800,000/= was way below the market value. She was cross-examined on the sale agreement that her father claims to have had with the 1st defendant but she could not explain much as she was not present when it was drawn. She relied on the contents of the documents. She stated that her father continued to pay land rates, but in the name of Joseph Nyaga (deceased), for he had not changed the name of the rate payer. She stated that her late father and the late Mr. Nyaga were good friends and were both Councillors at the Naivasha Municipal Council.

5. PW-2 was Olive Wamuhu Kinyanjui, the 2nd plaintiff. She testified that she purchased the suit land from the original 1st plaintiff through a sale agreement dated 15 May 2012. The purchase price was Kshs.9,500,000/=. At the time of purchase, the property was being used as a garage, and there were also some stalls, and the occupants used to pay rent to the original 1st plaintiff. She paid stamp duty of Kshs.399,140/= on 27 July 2012 but the property was not immediately transferred to her for the original 1st plaintiff wanted some more money and there were also some missing documents in the Land parcel file. Their dispute went to court and they agreed to settle at the original purchase price. The property was eventually transferred to her on 23 March 2015. She is now registered as proprietor of the RTA title LR No. 144/325. She was suspicious of the sale agreement between the 1st and 2nd defendants for she thought that the purchase price of Kshs.800,000/= was too low. She also wondered how the defendants had an RLA title to the same property.

6. PW-3 was Peter Nzuki Mutwiwa, a Deputy Director of Land Administration at Ardhi House. He testified that his office has a correspondence file for the suit land which was opened in the name of Joseph Nyaga Wambiti but he did mention that there were some documents missing in this file. He testified of a letter written by counsel for the original plaintiff which annexed various documents that were missing in their file. He then wrote to the District Land Registrar, Naivasha, asking him to expunge the records relating to Naivasha Municipality Block 2/5 for there already existed an RTA title on the same registered on 27 July 1998 which had not been cancelled. He testified that the owner of the RTA title had not applied for conversion to the RLA registration regime. He believed that the RLA title was prepared because of the absence of documents from the land correspondence file. He was questioned on how the transfer to the original 1st plaintiff was effected and he stated that it was not necessary for Joseph Nyaga to have been registered as proprietor before transfer could be effected to him, for a person could transfer through letter, his interest in an allotment letter, and title would be issued to the beneficiary and the allotment letter would be surrendered. He did not have the transfer to the original 1st plaintiff and he thought that this was probably done informally. He referred to a letter in his file dated 9 November 1988 confirming the transfer of the plot from the 1st defendant to the plaintiff. There was also in his file a grant of letters of administration issued to the 1st defendant on 3 May 1989. He was questioned on whether the 1st defendant could sell the land before this date but he pointed to his lack of privity on the transaction. He did reiterate that there are some documents missing in his file which he believed were plucked out so as to pave the way for the preparation of the RLA title. He stated that his investigations showed that the RLA title was not a genuine title and that is why he wrote to the District Land Registrar to have it cancelled.

7. With the above evidence, the plaintiffs closed their case.

8. DW-1 was the 1st defendant, Lucy Wanjiru Nyaga. She is wife of the late Joseph Nyaga Wambiti and also the administrator of his estate. She had the original allotment letter to the land which she produced as an exhibit. She denied selling the suit land to the original 1st plaintiff. She denied having entered into the sale agreement referred to by the original 1st plaintiff. The sale agreement was put to her and she denied having signed it stating that she ordinarily places a thumbprint. She denied receiving the deposit noted in that sale agreement. She acknowledged selling the land to the 2nd defendant and referred to the sale agreement where she had placed a thumbprint. She also mentioned that she does not know how to read. Cross-examined, she agreed that her husband and the original 1st plaintiff were friends and were both councillors. She did not know whether her husband had a loan with Kenya Commercial Bank (KCB) when he died and denied seeking financial assistance from the original 1st plaintiff after the demise of her husband. She admitted not using the suit land from 1987 and admitted that the people who occupied it were not her tenants. She also admitted to not paying rates from the year 1987. She deflected a number of questions stating that it is her daughter who is better versed with some matters touching on the land.

9. PW-2 was the 2nd defendant, Mr. Cyrus Ngugi Mugonya. He is a businessman in real estate. He lives in Ruiru. He stated that he bought the suit land at Kshs. 800,000/= from the 1st defendant on a willing buyer willing seller basis on 31 January 2012. The land was then described through its RTA title. He denied conspiring to fraudulently convert the suit land from the RTA to the RLA regime. He mentioned that when he bought the land, the 1st defendant held an allotment letter to it and had a confirmed grant. She also had a demand for land rent dated 29 October 2004 showing the title LR No. 1144/325. This money was paid on 25 May 2012 and he also had some payments made in the year 2013. He did have some correspondences and payments for the amendment of the Registry Index Map to convert the land to the RLA regime. He testified that a lease was registered on 31 January 2013 in the name of the 1st defendant as administrator of the late Joseph Nyaga Wambiti. Thereafter consent to transfer was obtained, and the requisite payments made, and subsequently the property was transferred to him. He now has a lease in his name. Cross-examined, he stated inter alia that he visited the land before purchase and he saw a garage and two containers on the land used as shops. He inquired from the occupants on what basis they occupy the plot but they did not answer him. He stated that he was not aware of the alleged sale of the land to the original 1st plaintiff. He acknowledged that it was him who made the payments in the year 2012 in respect of land rates and rents. He is also the one who paid for amendment of the RIM. He claimed to

have paid stamp duty though he did not have any receipts. He denied any fraud and pointed out that it was actually PW-3 who issued the consent to transfer.

10. With the above evidence, the defendants closed their case.

11. I invited counsel to file written submissions which they duly did and I have taken note of these before arriving at my decision.

12. Mr. Tombe, learned counsel for the defendants, inter alia attacked the alleged sale agreement between the original 1st plaintiff and the 1st defendant. He pointed out that the agreement provides for sale of the property at Kshs. 101,500/= out of which a deposit of Kshs. 60,000/= is said to have been paid to Ramesh Sharma Advocate as stakeholder but it was not clear how the balance of Kshs. 41,500/= was to be paid and no evidence was led on the same. He pointed out that the agreement is not dated. He also submitted that the 1st defendant had no capacity to sell as she did not hold a confirmed grant then. He pointed out that the sale agreement is claimed to have been done in 1987 but it was only in 1988 that the 1st defendant got the confirmed grant. He referred me to various authorities which provide that sale of immovable property before a confirmation of grant is prohibited including the cases of **James Masanya Ontiri Igendia vs Magero Marungo & Another (20-14) eKLR ; Re Esate of M. Ajogi M'Ikingu (2017) eKLR** and **Grace Akinyi Ajwang & Another vs Rosemary Atieno Abuto & 5 Others (2019) eKLR**.

13. Mr. Konosi and Mr. Ndubi, learned counsel for the 1st and 2nd plaintiffs respectively, submitted inter alia that there was a valid sale agreement between the plaintiff and the 1st defendant. It was submitted that the doctrine of estoppel applies and that the 1st defendant is estopped from denying its existence. It was submitted that the sale agreement was subject to the 1st defendant obtaining a confirmed grant and that this was obtained on 26 April 1989 and that the property was not disposed of until the grant was registered (probably meant confirmed). It was pointed out that Mr. Kioi took possession of the suit land and that the 1st defendant admitted not collecting rent or paying rates. It was also submitted that the claim of the defendants is time barred and I was referred to Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya. It was also submitted that the sale of the land by the 1st defendant created a constructive trust in favour of the plaintiffs.

14. In my view, the following issues are critical to the determination of this case being :-

- (i) Whether there was ever a valid sale agreement between the plaintiff and 1st defendant.
- (ii) Whether the 1st defendant validly transferred her interest to the plaintiff.
- (iii) Whether the plaintiff can plead limitation, estoppel, and/or trust.
- (iv) Who holds the valid title to the suit land.

15. The plaintiff's case in a nutshell is that he entered into a sale agreement of the suit land with the 1st defendant and pursuant thereto, the title to LR No. 144/ 325 was issued to him. He then sold this land to the 2nd plaintiff. The 1st defendant has denied entering into such sale agreement and has contended that it was her who was issued with a good title and she thereafter transferred her interest to the 2nd defendant.

16. I have looked at the documents produced by the plaintiff. One is the sale agreement. It is a fairly faint copy but from it I can discern that the seller is Lucy Wanjiru Nyaga (1st defendant) and the purchaser is Moses Kioi Muturi (original 1st plaintiff). The property being sold is LR No. 144/325 (the suit land) at a consideration of Kshs. 101,500/=. The sum of Kshs. 60,000/= is noted to have been paid to Ramesh Sharma Advocate as stakeholder. The agreement has special conditions, one of which, is that the agreement is subject to the vendor obtaining a grant of letters of administration. I have not seen a date on the sale agreement, but it could be that because it is a copy, though there is a receipt issued by Ramesh Sharma & Company Advocates, dated 2 November 1987 for the sum of Kshs. 60,000/= in respect of sale of LR No. 1144/325. If I follow this, then the sale agreement should be of even date. There is an affidavit dated 25 January 1988, sworn by Moses Kioi Muturi, authorising Mr. Sharma to disburse this Kshs. 60,000/= to KCB, inter alia towards payment of a debt owed by Joseph Nyaga Wambiti. There is a letter dated 9 November 1988, written by the Commissioner of Lands, addressed to the District Land Officer, Nakuru, and the Town Clerk Naivasha, informing them that LR No. 1144/325 – Naivasha Township has been transferred from Lucy Wanjiru Nyaga, the Administrator of the estate of the late Joseph Nyaga Wambiti, to Moses Kioi Muturi. I have seen a copy of a letter from M/s Ramesh Sharma & Company Advocates, dated 23 November 1988, written to Moses Kioi Muturi, where Mr. Sharma asks him to pay the balance of Kshs. 34,821.60/= pursuant to the sale agreement. There is a letter dated 9 March 1989, written by the Commissioner of Lands addressed to Moses Kioi Muturi, asking him to pay additional fees of Kshs. 430/= on the allotment letter addressed to Joseph Nyaga. There is a receipt dated 27 September 1988 or Kshs. 430/=. There is a letter dated 8 May 1991 from the Commissioner of Lands to Moses Kioi Muturi, asking him to pay an additional Kshs. 20/= being underpaid stamp duty to enable the Commissioner prepare a title to him.

17. Looking at the correspondence that I have outlined above, it is difficult not to arrive at the conclusion that the original 1st plaintiff and the 1st defendant did enter into the sale agreement drawn by Mr. Ramesh Sharma Advocate. If this was not the case, there would be no receipt issued by Mr. Sharma, and you would expect, that given that Mr. Muturi took possession of the land, the 1st defendant would complain that she has not sold the suit land to Mr. Muturi. It is not in any way suggested that Mr. Sharma engaged in any fraudulent activity and I do not believe the 1st defendant when she claims to be a stranger to the sale agreement that the plaintiffs produced. My own view of the matter is that there was a sale agreement which the 1st defendant entered into with the original 1st plaintiff and this sale agreement was entered into on 2 November 1987. Mr. Tombe in his submissions, of course raised the issue of whether this sale agreement was valid. It is true that at the time that the sale agreement was entered into, the 1st defendant did not have a confirmed grant of letters of administration. In fact, she did not have a grant of letters of administration for she obtained a grant on 9 November 1987. The legal position that she could not validly enter into a sale agreement on 2 November 1987 is thus correct. However, it is clear that upon receipt of a confirmed grant of letters of administration, vide which the suit property was vested in the 1st defendant, the 1st defendant proceeded to act upon the initial sale agreement, and

transferred the suit land to Mr. Muturi. This is revealed in the various correspondences that I have outlined above written by the Commissioner of Lands. If the 1st defendant wished to opt out of the sale agreement, she would not have proceeded to transfer the suit land to Mr. Muturi. The sale agreement certainly noted that it was subject to the 1st defendant obtaining a grant, which she subsequently did, and she acted upon the sale agreement and gave effect to it. The 1st defendant had the option of not transferring the allotment letter to Mr. Muturi, but it appears to me that she voluntarily did. The 1st defendant did not opt out and I do not see how, after 25 years, she can now detach herself from the sale.

18. In the event that I am wrong in the above, limitation would still come to assist the plaintiffs. The plaintiff acquired title on 19 April 1991 and took possession. This possession was notorious to all and it was also apparent to the 1st defendant. If the 1st defendant thought that the plaintiff had no good title and that his possession of the land was untenable, she had 12 years to file suit pursuant to the provisions of Section 7 of the Limitation of Actions Act, which provides as follows :-

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

19. The 1st defendant had 12 years from the time the original plaintiff took possession and/or acquired title to file suit to claim the same. She did not do so. She and the 2nd defendant, as a person claiming through her, are thus out of time in trying to vitiate the title of the plaintiffs.

20. Other than the law, it is my conviction that the 1st defendant actually sold the land to Mr. Muturi, the original 1st plaintiff. There is no way that she could not have sold the land yet remained quiet while the original 1st plaintiff acquired title, took possession, allowed persons to operate garages and shops in it, and collected rent from them. You would have expected her to raise a complaint, or demand rent from these persons. She did neither.

21. On the RTA title that was issued to the original 1st plaintiff and transferred to the 2nd plaintiff, I see absolutely nothing wrong with it. I have seen that the original 1st plaintiff made the requisite payments as was demanded by the Commissioner of Lands. The Commissioner of Lands then issued the RTA title in the year 1991. In my view, it is the title that is held by the defendants which is a fraudulent title and I am convinced that both the 1st and 2nd defendants were parties to the fraud. The 1st defendant of course acted fraudulently by selling the suit land to a second person while she knew that she had already sold her interest to the original 1st plaintiff. I do not believe that the 2nd defendant was in any way innocent. When the sale agreement was entered into, it did indicate that the property sold is LR No. 1144/325. A simple search would have revealed that the property already has a title that has been issued to Mr. Muturi. Due diligence at the rates office would also have shown that rates were being paid by the original 1st plaintiff. The property was also occupied by people and it would have been clear who owned the property by simply asking about it. I think the 2nd defendant knew that the property was all along sold but he believed that he could scheme to have a parallel title prepared under the RLA and have the RTA title vanquished. That is why the defendants were not too keen to have an RTA title issued and transferred to the 1st defendant and then to the 2nd defendant. They would in fact have reached a dead end on this avenue. They however thought that they could get away with their scheme if they had an RLA title issued, which is what they pushed for and obtained. I am not in doubt that this RLA title is a fraud for there was already issued before an RTA title in the name of a different person and that RTA title was a valid title. The law does not protect a title that has been issued fraudulently as noted in Section 26 of the Land Registration Act, which provides as follows :-

26. 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

22. I am persuaded, nay convinced, that the title now held by the 2nd defendant, and reading Naivasha/ Municipality Block 5/2 was issued through fraud and misrepresentation of which both defendants were party to. The title was also issued unprocedurally, for there was already an unsundered and valid RTA title in existence, and/or such title was issued illegally, and/or through a corrupt scheme. The title now held by the 2nd defendant and reading Naivasha Municipality Block 5/2 is a bad title and it is hereby cancelled. I order the Land Registrar, Naivasha, to proceed and cancel the register containing this title and not to make any further dispositions based on this title or register. I see nothing wrong in the title now held by the 2nd plaintiff reading LR No. 1144/325 Grant IR No. 77106, and I hereby declare it to be an authentic and genuine title. Having upheld her title, the 2nd plaintiff is entitled to an order of permanent injunction restraining the defendants from interfering with her possession of the suit property which orders I hereby issue.

23. The only issue left is costs, and the defendants shall jointly and/or severally bear the costs of the main suit and of the counterclaim.

24. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 1st day of October 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Ndubi present for the 2nd plaintiff and holding brief for Mr. Konosi for the 1st plaintiff.

Mr Tombe present for the defendants.

Court Assistants: Nancy Bor/Alfred Cheron.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU