



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.55 A OF 2016

JOSEPH KAMENJU MWAURA.....PLAINTIFF

VERSUS

SAMMY NGURE MUTHINJI.....DEFENDANT

JUDGMENT

(Suit by plaintiff claiming that defendant's title to land was acquired fraudulently and that is was his (defendant's) deceased mother's title, plaintiff's claim to the title centred on a ballot bearing the same number to the title but no evidence that titles were issued in accordance with the ballot numbers; no evidence that defendant's title is fraudulent; plaintiff's suit dismissed with costs).

1. Through a plaint filed on 23 February 2016, the plaintiff pleaded that he is the biological son of one Beth Nduta Mwaura , who died on 18 June 2012 (the deceased) and that he holds letters of administration for her estate. He averred that the defendant wrongfully transferred to himself the deceased's land and acquired title it. The said land is the land parcel Naivasha/Maraigushu Block 18/542 (hereinafter also referred to as the suit land). In this case the principal order sought is for the revocation of the defendant's title.

2. The defendant filed a defence vide which he refuted the claims of the plaintiff. He pleaded that his title is to the land parcel Naivasha/Maraigushu Block 18/542 (Naivasha Unity) and has no relationship with the land parcel Naivasha/Maraigushu Block 18/542 (missing the words "Naivasha Unity" at the end) and he cannot therefore be accused of having acquired title that was to be owned by the deceased. He also contested that the plaintiff holds letters of administration to the estate of the deceased. He asked that the suit be dismissed.

3. In his evidence, the plaintiff testified inter alia that he is son to Beth Nduta Mwaura (the deceased). He testified that the deceased purchased land as a member of Nyonjoro Farmers Group, which Group had bought shares from Naivasha Unity Farmers and were given their portion. He stated that Nyonjoro Group was exclusively owned by women, and each member was given her land, with the deceased being allocated the Plot No. 542 after a balloting process. After his mother died in the year 2012, he filed a succession cause in Engineer Magistrate's Court and was issued with a Grant of Letters of Administration. When he went to the Naivasha land registry to collect the title deed, he found that the defendant already has title to the suit land. He produced the Certificate of Death, the Grant of Letters of Administration, a ballot No. 607 which he stated the defendant picked, a ballot No. 542 A which he said his mother picked, and some receipts. He also produced some Chief's letters and a search. He stated that the defendant's plot is No. 607 and not No. 542 and he produced a map of the area. He testified that the land he is claiming from the defendant is the same, with or without the words "Naivasha Unity".

4. Cross-examined by the defendant, he stated that her mother joined Nyonjoro Farmers Group on 13 September 1978. He testified that there was a person who used to check on the land on their behalf from the year 1981, one Francis Mwaura Muiruri, although he never lived on the land as he had his own land about 3 plots away. He acknowledged that the ballot to Plot No. 542 A held by his mother was issued by Nyonjoro Farmers and not Naivasha Unity Group. He explained that Nyonjoro Farmers Group bought shares in Naivasha Unity and were therefore absorbed into Naivasha Unity.

5. He did not call any other witnesses and closed his case.

6. The defendant on the other hand testified inter alia that he is a retired teacher and that he purchased shares by paying Kshs. 2,000/= which entitled him to 3 acres of land from land being sold by one Kairu which was purchased by Naivasha Unity. The acreage was however reduced from 3 acres to one acre per share. He testified that he paid to Naivasha Unity money for survey and processing of title and he produced various receipts for this. He testified that his ballot is No. 607 but that the ballot number is not the same as the land title number. He stated that this ballot entitled him to the suit land, land parcel No. 542. He stated that he has never seen the plaintiff or his mother before. He produced these receipts paid to Naivasha Unity, rates receipts, his share certificate, search, and maps of the area. He was questioned on an apparent discrepancy in the first title deed issued to him, which did not show the acreage, and he explained that he had sent his son to collect the title deed and when it was issued, it did not have the acreage. He had it returned and the acreage was later inserted. He asserted that the ballot number was not the same as the plot number and did not know where the ground to ballot No. 542 would be.

7. With the above evidence, the defendant closed his case.

8. None of the parties in this case is represented by counsel and I probably do not have the benefit of some critical evidence which would have been brought out by the skill of counsel. I will have to make do with what is before me as presented by the parties.

9. The case of the plaintiff is that the land to which the defendant holds title actually belongs to his deceased mother. His case is that his mother balloted for this plot as a member of Nyonjoro Farmers which was absorbed into Naivasha Unity Group. The defendant's position on the other hand is that he is the rightful proprietor of the said land as he polled a ballot No. 607 which was for the suit land. Before I go to the issues, I need to sort out some preliminary points raised by the defendant. Firstly, he did contest that the plaintiff is not the administrator of the late Beth Nduta. There is no substance in this objection as the plaintiff did produce a grant of letters of administration showing that indeed, he is the administrator of the estate of the deceased. Secondly, the defendant dispelled that the land claimed by the plaintiff is the same land that he holds title to, because what is pleaded and what he holds, is different for lack of the words "Naivasha Unity". I do not see any substance in this argument. The land may have been described with a bit of difference, but to me the land claimed is the same. There can be small variations in descriptions, which are excusable, and I am not persuaded that we are talking of two different parcels of land.

10. On the substance of the case, the plaintiff did produce some various documents in an attempt to demonstrate that the suit land is of the deceased. He produced various receipts which I take note were issued by Nyonjoro Farmers Group. Among them is a receipt dated 13 September 1978 being of Kshs. 1,000/= for share capital; a receipt of Kshs. 50/= dated 27 January 1980 as entrance fee; and receipt dated 30 September 1997 as development fund. He also produced a ballot No. 542A. What I have not quite understood is the relationship between the deceased and Nyonjoro Farmers Group, for the plaintiff produced an alleged Certificate of Registration No. 45664 which shows that Nyonjoro Farmers is a business name of whom Nduta Mwaura (the deceased) was sole proprietor. I cannot quite place this in the larger scheme of things, for it is also the plaintiffs evidence that Njonjoro Farmers Group was a group of women who came together and purchased shares from Naivasha Unity Group. The other important evidence of the plaintiff is the ballot which is a ballot No. 542A. That ballot is shown to have been issued by Nyonjoro Farmers Group but it does not show any name in it. I also find it curious that the plaintiff availed two original ballots to Plot No. 542A. The ballot that the defendant has, bears the No. 607, but that ballot is a bit different from what the plaintiff availed, for it is stamped by "Naivasha Unity Farmers Co" and not "Nyonjoro Farmers Group." I have also seen that among the defendant's documents is a share certificate from Naivasha Unity Farmers Company Limited, showing that the defendant is the proprietor of the Plot No. 542 in Naivasha Unity Farmers Company Limited. The said certificate was issued on 15 November 2001.

11. From what I see, the plaintiff's sole connection to the Plot No. 542 is the ballot which bears the number 542A. The only other document bearing No. 542A is a development receipt issued on 30 September 1997 by Nyonjoro Farmers Group. The plaintiff has nothing else. The other receipts are payments for share capital and some fees to Nyonjoro Farmers Group and they do not point at this Plot No. 542. I have no evidence that the ballot No. 542A relates to the land parcel Naivasha/Maraigushu Block 18/542. Indeed, it could relate to any parcel of land. To prove that the ballot No. 542A issued by Nyonjoro Farmers Group relates to the land parcel Naivasha/Maraigushu Block 18/542, the plaintiff needed to give evidence of a nexus between the two. The best way to do so would have been to call an official to produce the records of the ballots and the land reference to which the ballot was assigned. I have no such evidence before me. I am therefore unable to dispel the defendant's claim that the ballot that he drew, that is ballot No. 607, was assigned the land parcel Naivasha/Maraigushu Block 18/542 (Naivasha Unity). I have also seen that the defendant has a share certificate from Naivasha Unity Farmers Company, indicating that he has been assigned the Plot No. 542. In addition, he holds title to the said land.

12. Section 26 of the Land Registration Act, Act No. 3 of 2012, thus applies and it provides as follows :-

26. (1) The certificate of title issued by the Registrar (on 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.

13. Once a person holds a Certificate of title, that certificate is to be taken as prima facie evidence that the person noted therein is the absolute and indefeasible owner. Title can be annulled if the said title was acquired through fraud or misrepresentation to which the title holder is a party, or if such certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. The evidence that the plaintiff has tendered is too thin to support any allegation of fraud or misrepresentation on the part of the plaintiff's acquisition of the title. A lot more than just a mere production of a ballot bearing No. 542A, and a receipt endorsed No. 542A, was needed to demonstrate that it is the deceased who was entitled to be registered as proprietor of the suit land and not the defendant. The plaintiff also tried to make heavy weather of the fact that the title of the defendant, when first issued, did not have the acreage, but this was inserted later. I see no problem with this. There is no bar to the Land Registrar making corrections to title, and to me, making an entry on the acreage is not proof that the title is fraudulent. The burden of proving that the defendant's title is a bad title was upon the plaintiff and I am afraid that he has not discharged that burden.

14. The plaintiff has therefore not proved on a balance of probabilities that it is the deceased who was entitled to ownership of the land parcel Naivasha/Maraigushu Block 18/542 (with or without the words Naivasha Unity) and I have no option but to dismiss his suit with costs to the defendant.

15. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 4th day of July 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

The plaintiff - Acting in person.

The defendant- Acting in person.

Court Assistant :Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU