



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 348 OF 2017

MWANGI KABURU - PLAINTIFF

VS

EVANSON MWANGI KAMAU - DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on 20/4/17 against the Defendant seeking the following orders: -

- a. Cancellation of the Defendant's title over land parcel No. Loc.20/Mirira/4581.
- b. Cost of the suit.
- c. Interest on (b) above.
- d. Further relief as may be just.

2. In the plaint the Plaintiff avers that at all material times he is the registered owner of plot No. Loc.20/Mirira/4581, which the Defendant has unlawfully and fraudulently caused it to be registered in his name. That he retains the original title and is in occupation/possession of the suit land. He seeks cancellation of the Defendant's title.

3. In denying the Plaintiffs claim the Defendant retorted that he is a bonafide purchaser for value without notice of the suit land. Maintaining that the suit discloses no cause of action, he sought dismissal of the same.

4. In his written statement as well as evidence in chief the Plaintiff avers that the Defendant obtained title through fraud and sought both eviction against the Defendant and cancellation of title. See para 6 of his statement dated the 1/4/17. He has produced certificate of title and certificate of official search dated 15/1/99 and 28/2/17 respectively to support his case.

5. Further he stated that he did not sell his land measuring 0.75 acres to the Defendant nor to Samuel Githua Njoroge. That his land does not measure 2 acres but 0.75 acres. He confirms that the Defendant was sold the suit land by Samuel Githua Njoroge who had no legal right over the suit land. He stated that though the Court order indicated that he was to give Samuel Githua Njoroge 2 acres, his land is only 0.75 acres in LDT No. 72 of 2007. He avers that the title was registered in the name of Githua Njoroge without his consent. That the Defendant has not sought to evict him from his land, nor did he file any counter claim against him.

6. The Defendant gave a long history surrounding the land. That the suit land was subject to a case in the Tribunal at Kiharu Land Dispute Tribunal between Samuel Githua Njoroge and the Plaintiff. The Tribunal on 16/10/07 determined that the said Samuel Githua Njoroge had a right to be given 2 acres by the Plaintiff, the suit land being included in the said 2 acres.

7. That on 17/11/2008 the award of the Kiharu Tribunal was adopted as an order of the Court in SPMCC LDT No. 72 of 2007 where the Court ordered as follows;

“That Judgement be and is hereby entered in terms of Kiharu Land Disputes Tribunal: That the Plaintiff is to get 2 acres starting with the Land in this dispute Loc.20/Mirira/4581 measuring 0.31 Ha; that the Land Registrar Murang'a and the District Officer Kiharu to facilitate the registration”.

8. The Defendant further averred that pursuant to the said order, the Court issued another order on 9/1/2009 as follows;

“ a) That the Executive Officer of this Honourable Court be and is hereby authorized and directed to execute for and on behalf of

the Defendant all documents necessary to transfer whole price of Land Loc.20/Mirira/4581 measuring 0.31Ha. to the Plaintiff.

b) That the Executive Officer be and is hereby authorized and directed to do anything and all things that ought to be done by the Defendant which are necessary to transfer the Parcel No. Loc.20/Mirira/4581 to the Plaintiff.

c) That such further order or other orders be and are hereby made necessary to give effect to the decree of this Court dated 7th November, 2008”.

9. That pursuant to that the Samuel Githua Njoroge was issued with a title on 5/3/09 as shown in the copy of green card attached.

10. The Defendant stated that the said Court on 15/12/2009 issued an eviction order against the Plaintiff from the suit land.

11. That after carrying out due diligence on the land he entered into a sale agreement with the one Samuel Githua Njoroge on 29/11/2012 for the purchase of the suit land. That he paid the full purchase price on 20/12/12 and was issued with a title on completion of the transfer on 9/5/13. That at all material times he was not aware of the Plaintiffs claim in respect to the suit land. That his wife filed a caution on 24/3/16 to forestall threats to sell, trespass and interference of his enjoyment of the suit land by the Plaintiff.

12. That he later learnt that the land was subject to a suit at Kiharu LDT Tribunal between the seller of the suit land and the Plaintiff. That the Plaintiff still held the original title in his possession which for whatever reason he had refused to surrender to the Lands office.

13. In his evidence in Chief the Defendant stated that he bought the land from Samuel Githua Njoroge. That he obtained the Land Control Board consent to the transaction and on completion proceeded to construct a permanent house in 2013 and cultivated the land until 2015. He stated that his wife fearing that the suit land may be registered in the name of her co-wife lodged a caution on the title 31/3/16.

14. On Cross-examination, he stated that he carried out a search on the suit land which indicated the said Samuel Githua Njoroge is the registered owner. That it is only in 2015/16 that he learnt that there had been a dispute in respect of the suit land between the said Njoroge and the Plaintiff. That by then he had become registered as owner of the suit land.

That he is not aware that the seller obtained the suit land through fraud. He also clarified that his wife did not live on the land for 30 years.

15. PW 2 Samuel Githua Njoroge testified that his father one Njoroge Mbiro bought the land from Wamumu Muthoko, the mother of the Plaintiff in 1975. That the land bought by his father was LR No. Loc 20/Mirira/1768. That subsequently he and his brother the late Joseph Mbiro settled on the land in 1975 and started farming and even dug a borehole. That the process of transfer of the land to his father was not completed by the time his father and the Plaintiff’s mother died. That they moved out of the land when his brother’s house was torched by unknown persons. That by then he states that they realized the Plaintiff had sold 2 acres of the land to one Joram Kimwe in 1997. It would appear that the Plaintiff obtained grant of letters of administration in 1997 and succeeded her mother and was registered as owner of the said land L.R No Loc 20/Mirira/1768 measuring 1.56 Ha.

16. That in 2008 he filed a case at Kiharu LDT Tribunal in respect to Loc.20/Mirira/4581 in which the tribunal decided in his favour and determined that he was entitled to 2 acres from the Plaintiff starting with Loc.20/Mirira/4581. The land became registered in his name pursuant to the Court decree dated 8/8/08 and a title issued on 5/3/09.

17. That later he sold the suit land to the Defendant who became registered as owner on 9/5/13. He also confirmed that the Plaintiff did not sell the land to him at 120,000/=. That the entry on the green card is erroneous and unsupported. He stated that he did not acquire the land fraudulently. He clarified that he did not occupy the suit land prior to selling to the Defendant.

Determination.

18. From the evidence, the background of this case flows as follows;

- a. The suit land is a subdivision of Loc.20/Mirira/1768 which was registered in the name of Wamumbu Muthotho in 29/4/75.
- b. That the said Wamumbu Muthotho sold the land measuring 0.81 Ha. to Njoroge Mbiro around 1975. However, the transfer to the name of Njoroge Mbiro was not completed by the time the parties passed away.
- c. Wamumbu Muthotho was the mother of the Defendant and Njoroge Mbiro was the father of one Samuel Githua Njoroge.
- d. It would appear that the Plaintiff succeeded the land from his mother Wamumbu Muthotho and got registered as owner on 16/10/97 pursuant to Succession Cause No. 26/97 at Murang’a. The said land on subdivision was dealt with as follows;

I. Mwangi Kaburu	-	0.75 acres
II. Muchoki Kaburu	-	0.75 acres
III. Joram Kirwa Mwangi	-	2.0 acres
IV. Eunice Wagatiri Kaburu	-	0.4 acres

e. Title No. Loc.20/Mirira/4581 refers to the suit property registered in the name of the Plaintiff on 15/1/99.

f. From the evidence of one Samuel Githua Njoroge (which evidence is not controverted) his family settled on portion of the land upon purchase of the same by his father (Loc.20/Mirira/1768) a portion measuring 0.81 Ha.) That the sale was approved and has attached a copy of green card for Loc.20/Mirira/1768 and a consent from Land Control Board approving the transaction.

g. Proceedings of LDT Ref. LND/Disp/Tri/102 of 2006 attest to a dispute between the Plaintiff and the said Samuel Githua Njoroge which tribunal awarded 2 acres to the said Samuel Githua Njoroge starting from 0.31 Ha. comprised in Loc.20/Mirira/4581 registered in the name of the Plaintiff.

h. The said award was adopted as an order of the Court on 8/8/08 which order stated as follows;

“a) That Judgment be and is hereby entered in terms of Kiharu Land Disputes Tribunal.

b) That the Plaintiff is to get 2(two) acres starting with land in this dispute Loc. 20/Mirira/4581 measuring 0.31 Ha.

c) That the Land Registrar Murang’a and the District Officer Kiharu to facilitate the registration”.

i. On the 9/1/2009 the Court further ordered as follows;

“ a) That the Executive Officer of this Honourable Court be and is hereby authorized and directed to execute for and on behalf of the Defendant all documents necessary to transfer whole price of Land Loc.20/Mirira/4581 measuring 0.31Ha. to the Plaintiff.

b) That the Executive Officer be and is hereby authorized and directed to do anything and all things that ought to be done by the Defendant which are necessary to transfer the Parcel No. Loc.20/Mirira/4581 to the Plaintiff.

c) That such further order or other orders be and are hereby made necessary to give effect to the decree of this Court dated 7th November, 2008”.

j. Pursuant to that order the said Samuel Githua Njoroge was registered as owner on 5/3/09.

k. On the 23/10/09 the Court issued eviction orders against the Plaintiff in the following terms;

“ a)That the OCS Murang’a Police Station is ordered to provide security during eviction of the Defendant from suit land Loc.20/Mirira/4581.

b) Costs be provided by Defendant”.

- The said Samuel Githua Njoroge sold the suit land to the Defendant who became registered as owner on 9/5/13.

19. I have considered the pleadings, evidence, rival submissions filed by both parties and the issues that commend themselves for determination are;

A. Who is the legitimate owner of LR No. Loc.20/Mirira/4581?

B. Whether the title registered in the name of the Defendant should be cancelled on account of fraud?

20. As regards the 1st issue, the Plaintiff has adverted in his evidence that he is the registered owner of the land; he is in possession; he has not transferred his land to the Defendant or to one Samuel Githua Njoroge by way of sale or any other manner. He has averred fraud on the part of the Defendant.

21. The Defendant has claimed in his evidence and pleadings that he bought the land from one Samuel Githua Njoroge, through an agreement of sale which he duly attached; that pursuant to the said purchase he became registered owner; that he denies any fraud in acquiring the title to the suit land.

22. The said Samuel Githua Njoroge testified that he became registered as owner pursuant to a Court orders dated 8/8/08, (adopted the award of LDT 72/2007 Kiharu issued on 17/11/2008, 9/1/09 (directed the Executive Officer to execute documents in favour of the said Samuel Githua Njoroge).That he also obtained eviction orders issued on 23/10/09 seeking to evict the Plaintiff from the suit land. That having registered as owner, he then sold the land to the Defendant on 29/11/12 who became registered as owner on 9/5/13.

23. The Court has observed that though the Plaintiff pleaded fraud in paragraph 4 of the Plaintiff, he did not particularize the fraud in the plaintiff nor present evidence to support a plea of fraud in the case. The Plaintiff has alluded to fraud in his written submission by stating that the order registered on title reads 2005 instead of 2007. The Court has seen the orders on record which show 2007. No evidence was shown to support that entry was fraudulent. He also alluded to Kshs. 120,000/= entry on green card as fraudulent; the third party explained in his evidence that it was an error. He clarified that the amount was an error. That he did not buy the suit land from the Plaintiff but acquired it

through an adopted award of the LDT Kiharu Ref. 72/2007. No evidence has been led by the Plaintiff to controvert this explanation.

24. Fraud is defined at in the **Black's Law Dictionary** as follows;-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

25. As regards standard of proof of fraud, the law is quite clear. In **R. G. Patel v. Lalji Makanji** (supra), the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

26. The Defendant in his defence and submissions states that he carried out due diligence on the suit title by carrying out a search which indicated the owner as Samuel Githua Njoroge, the seller. He proceeded to apply for the Land Control Board consent which he obtained. The Defendant states that he only realized that there could be a problem when he noticed interference from the Plaintiff in 2016 as the Plaintiff started uprooting the trees from the suit land. He insisted that the Plaintiff has not proved fraud as contemplated in section 26 of the Land Registration Act No. 3 of 2016. There is no evidence that the Land Control Board consent was ever challenged. As it is, there is a consent validly given by the Land Control Board. The Court has no basis to investigate the same as there is no proper application before it.

27. From the above it is clear that the Defendant had no knowledge of the fraud by the seller of the suit land (if any); neither can he be said to have been involved in any fraudulent activity in buying the land. In the Courts view, he did what a buyer would do, that is to carry out the due diligence required and based on that did buy the land. The Court has not found any fault on the part of the Defendant. In any event the Plaintiff has not discharged the duty of proof to the required standard stated in the **R.G Patel** case supra.

28. It is trite law that for the Plaintiff to challenge the title of the Defendant he has to do that on account of fraud, or misrepresentation to which the Defendant must be proved to have been a party or that the title was acquired illegally, unprocedurally or through a corrupt scheme. The Plaintiff has not led evidence at all to place the Defendant's title in disdain as required under section 26 of the Land Registration Act, No 3 of 2012.

29. That Notwithstanding the Court's attention has been drawn to the fact there is a judgment issued on the 8/8/2008 by the Senior Resident Magistrate at Muranga in SPMCC LDT N0 72 of 2007. There is no evidence that this judgment has been appealed, stayed, set aside or varied. The parties in that case were the Plaintiff and one Samuel Githua Njoroge. It is claimed by the said Samuel Githua Njoroge that he became registered owner of the land pursuant to this judgement. The evidence on record is that Samuel Githua Njoroge became registered owner of that suit land pursuant to the judgement of SPMCC LDT No 72 of 2007 stated above. It was for the Plaintiff to challenge this judgement in a Court of law before bringing this suit. This action cannot be said to be illegal or fraudulent.

30. Section 80 of the Land Registration Act states as follows;

“(1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2)The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default”.

31. Having analyzed the evidence of the parties the Court finds that there is no fraud or mistake made in or relating to registration of the title to the suit land in favour of the Defendant.

32. The upshot is that the Plaintiff's claim fails and is hereby dismissed with costs to the Defendant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 2ND DAY OF JULY 2018.

J G KEMEI

JUDGE