



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC MISC. APPLICATION NO. 35 OF 2017

PETER KINUTHIA WAGACHA.....APPLICANT

VS

THE LAND REGISTRAR, THIKA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

HENRY WALLACE MAINA.....3RD RESPONDENT

RULING

1. By a Notice of Motion dated 23/6/2017 the Applicant filed a Misc. application under Article 50 of the Constitution of Kenya 2010, Order 53 rules 3 & 4 of the Civil Procedure Rules, section 3 & 3A of the Civil Procedure Act Cap 21 and rules thereof 2010, sections 6,7,8,9,10 & 14 of the Land Registration Act 2012 and all enabling provisions of the law seeking for the following orders;

- a. That the land Registrar Thika do cancel the Title Deed issued to Henry Wallace Maina and Esther Wambui Maina on the 28th December 2015 in L.R No. LOC 16/KIGORO/68 and any subsequent transfers.
- b. That the land Registrar Thika do reinstate the name of Simon Wagacha Kinuthia on the record of L.R No. LOC 16/KIGORO/68 and cancel any other entries made therein.
- c. That the Land Register Thika do register Jane Njeri Wagacha, Peter Kinuthia Wagacha and John Njoroge Wagacha as the legal heirs of parcel No. LOC 16/KIGORO/68 by Grant issued on the 27th January, 2004 in Nairobi High Court Succession Cause No. 1552 of 2002.
- d. Costs be provided for.

2. The application is premised on the Grounds that;

- a. That on 7/11/2002 James Kariuki Nganga filed suit being THIKA SPMCC No.1006 of 2002 against the Applicant's mother Jane Njeri Wagacha and the Applicant herein seeking cancellation of the transfer and registration of Simon Wagacha Kinuthia being the Applicant's father as the proprietor of the parcel No. L.R No. LOC 16/KIGORO/68 herein referred to as the suit land. A judgment was then delivered in favour of the Plaintiff on 2/9/2003 by the learned Senior Principal Magistrate Hon. Anambo.
- b. Following that judgement the Hon. Senior Principal Magistrate issued a decree on 2/10/2003 directing the District Lands Registrar Thika to cancel the name of Simon Wagacha Kinuthia and replace it with that of Nganga Muchara the Plaintiff's father which was duly effected by the District Lands Registrar.
- c. The Applicant herein together with his mother then appealed against that judgment on 1/10/2003 which was heard and a judgment was delivered by Hon Mr. Justice A. Mbogholi Msagha on 7/12/2016, in which the appeal was allowed and the judgment of the lower Court was set aside in its entirety. In effect the ownership of the suit land reverted back to the Applicant's Father and subsequently to his heirs as per the confirmed grant in High Court Succession Cause No. 1552 of 2002.
- d. That the Applicant's efforts to have the Lands Registrar Thika reinstate his father as the registered owner of the suit land and subsequently transfer the same to him and the other beneficiaries have been futile.

3. The application is supported by the affidavit of Peter Kinuthia Wagacha. In addition to reiterating the grounds on the face of the application he deposes that his father, Simon Wagacha Kinuthia died on 19/12/1998 leaving behind his mother, brother and him as the

beneficiaries of the suit land. That on 7/12/2002, One James Kariuki Nganga filed a suit against his mother Jane Njeri Wagacha and the Applicant in Thika SPMCC NO 1006 of 2002 claiming that his father Nganga Muchara was the legal owner of the suit land and sought cancellation of the title in the name of Simon Wagacha Kinuthia. A judgement was delivered in favour of the James Kariuki Nganga on 2/9/2003 and consequently a decree was issued directing the Lands Registrar to register the title in the name of Nganga Muchara. Aggrieved by the decision of the learned Magistrate, the Applicant and his mother Jane Njeri Wagacha appealed to the High Court vide HCCA No 642 of 2003 on 1/10/2003. That during the pendency of the aforesaid appeal the land was transferred to the 3rd Respondent and his wife Esther Wambui Maina purportedly pursuant to a purchase on the 28/12/15.

4. On the 7/12/2016 the appeal was determined by the Hon. Mr. Justice A. Msagha Mbogholi who set aside the decision of the lower Court in its entirety. This judgment effectively reversed the ownership of the land to Simon Wagacha Kinuthia. He alleged that the 1st Respondent has refused, neglected and/or declined to so register the reversion stated in the preceding sentence on the title. He has attached a letter addressed to the 1st Respondent dated 7/2/2016 which seems not to have been acknowledged or responded to. He has also annexed a copy of the Certificate of Confirmation of Grant issued by the High Court in Succession Cause No. 1552 of 2002 issued on 27/01/2004 which distributed the the suit land to the Applicant and other beneficiaries.

5. On the 4/10/2017 Henry Wallace Maina was enjoined to the suit herein as the 3rd Respondent.

6. In resisting the Applicants claim, the 3rd Respondent in his Replying Affidavit dated the 17/10/2017 and filed on the 18/10/2017 deponed on his behalf and that of Esther Wambui Maina that he and Esther Wambui Maina purchased the suit land from James Kariuki Nganga who died before transferring the land to them. That upon his death his joint administrators, Jasnter Wanjiku and Geoffrey Nganga Kariuki transferred the suit land to them on 18/12/2015 after obtaining the Land Control Board Consent issued on 28/8/2015. He clarified that the suit land had originally been registered in the name of Nganga Muchara in 1962 and later in the name of Simon Wagacha Kinuthia in 1988.

7. He stated that he was aware that the said James Kariuki Nganga acquired the suit land after he obtained a judgment in his favour in Thika PMCC No. 1006 of 2002. He also makes reference to HCCC No. 249 of 2004 filed by the Applicant which was dismissed and claims that it is after that dismissal that the administrators of the James Kariuki Nganga's estate proceeded to sell to him the suit land hence he is a bonafide purchaser for value without notice and that he acquired a good title. He also makes reference to the National Land Commission decision which declared the suit land to be public land and denies that the Giachuku Secondary School owned any proprietary rights over the suit land. He disclosed that he has filed a JR No 1 of 2017 at the High Court in Muranga seeking orders for certiorari against the National Land Commission *inter-alia*.

8. The 3rd Respondent stated that he was unaware of the appeal HCCA No 642 of 2003 by the Applicant and faults the duration taken to have the appeal concluded and particularly takes issue with the fact that it was concluded soon after he acquired title to the suit land. He also wondered how the appeal proceeded against a dead person; one James Kariuki Nganga who died in 2007. He also faults the Applicant for not raising any issues that he had with the transfer of the suit land to his name at the Land Control Board or other authorities. He concludes the Applicant has been mischievous by concealing information with the purpose of misleading the Court.

9. In Response to the 3rd Respondent's Affidavit, the Applicant filed a further affidavit on the 17/11/2017. He deponed that he is a beneficiary of the suit land pursuant to an annexed confirmation of grant in HC Succ. Cause No 1552 of 2002 issued on 27/1/2004. That the other beneficiaries of the suit land are his mother and brother, one John Njoroge Wagacha. Maintaining that the appeal proceeded with the knowledge of the joint administrators of the estate of James Kariuki Nganga, he attached the Court order as well as the substituted services for both the enjoinder issued on 24/4/2016 and the hearing notice for the appeal dated 2/6/2016 to support that averment. He deponed that James Kariuki Nganga was represented by the firm of Muturi Njoroge & Co Advocates. That the said joint legal representatives were served with the Applicants written submissions through their address on record. That the Land Control Board in total disobedience of a stay order issued by the Court in Thika CMCC No 696A of 2009 (where the 3rd Respondent and his wife were the Plaintiffs) issued on 24/6/2011, proceeded to issue the consent to transfer the suit land to the 3rd Respondent without his knowledge and in total contempt of the said Court order.

10. He contends that the certificate of grant issued to the estate of James Kariuki Nganga in CMCC No 291 of 2004 on the 13/5/2009 should not have been issued in view of the grant already issued in HC Succ. Cause No 1552 of 2002 (in favour of his father's estate) which cause has not been challenged or set aside. He stated that the 3rd Respondent was also aware of the appeal. He stated that the 3rd Respondent was aware of their occupation on the suit land and that a portion had been sold by his family to Giachuki Secondary School in 1966.

11. The Parties elected to canvass the application by way of written submissions.

12. The Applicant submitted that the judgment delivered in their favour in HCCA No 642 of 2003 on 7/12/2016 has not been set aside. That currently the suit land is being occupied by the Applicant and Giachuki Secondary School. That the National Land Commission determined upon a full hearing that the said land is public land and that the said title registered in the name of the 3rd Respondent and his wife should be cancelled and registered in the name of the National Treasury to hold in trust for the school.

13. He claims that the 3rd Respondent was not a bonafide purchaser for value without notice as the 3rd Respondent has admitted in his Replying Affidavit that he was aware of the unconcluded appeal at the time he purportedly purchased the suit land. Further that the transfer to the 3rd Respondent was neither genuine nor in good faith as the same was done on the basis of a confirmation of Grant issued by the lower Court while a previous Grant had been issued by the High Court on the same parcel of land. That the 3rd Respondent and Gatanga Land Control Board disregarded the stay orders issued on 24/6/11 served on them by the Applicant during the land board sitting.

14. It is the Applicant's contention that the 3rd Respondent obtained the title to the suit land fraudulently, illegally and through material non disclosure of facts and that the 3rd Respondent was an accomplice in that fraudulent acquisition. He maintains that he is entitled to the orders sought in line with the Judgment of the High Court and the Certificate of Confirmation of Grant in High Court Succession Cause No. 1522 of

2002. That both orders of the Court have not been set aside. He submits that they had a sale agreement dated 18/01/1966 with the school and have already apportioned to them their share of the suit land which they are in occupation and use.

15. The 3rd Respondent submits that he is a bonafide purchaser for value as the transfer was done after the dismissal of HCCC No. 249 of 2009 in which the ownership of the suit land was in issue. That the parties appeared before the Land Control Board and consent to transfer was issued on 28/8/2015. He contends that he was unaware of the HCCA No 642 of 2003 until this case was filed. He castigated the Applicant for not registering a caution or Court order in the alleged CMCC No 696A of 2009, which order or caution would have put him on notice of any defect in the suit title which would perhaps make him avoid buying the land. That the Applicant has failed to adduce evidence of fraud against the 3rd Respondent as pleaded. He contends that the decision of the National Land Commission complicates the case of the Applicant further in that the reliefs being sought by the Applicant are in the domain of private land while the National Land Commission has pronounced itself in a manner that the suit land is public land. He stated that the school occupies a small portion of the land while the Applicant is not in occupation.

16. The 3rd Respondent further submitted that he acquired a good title from the estate of the late James Kariuki Nganga pursuant to grant of letters of administration. He denies any Court orders in CMCC NO 696A of 2009 that set aside the Court orders in CMCC No 696 of 2009. Indeed, he insists the former case did not exist.

17. That the application is procedurally and substantively defective in that in order to pursue a claim for violation of rights under Article 50 of the Constitution the Applicant ought to have filed a petition, that the Applicant failed to seek leave to file the Judicial Review application as required under Order 53 of the Civil Procedure Rules. That section 4 of the Government Proceedings Act prohibits proceedings being brought against Government officials for responsibilities related to a judicial process. That the Applicant failed to issue a 30 days' notice in accordance with section 13A of the Act, and finally that the Court powers are limited under section 16 of the Act to only issuing declaratory orders which the Applicant has not applied for therefore the application is bound to fail. He relied on the case of **CA No 133 of 2006 – Nancy Kahoya Vs Expert Credit Limited and John Ngacha** to support his case that the title cannot be cancelled on vague allegations of fraud.

Analysis and Determination

18. I have considered the application, the rival affidavits and the submissions and the issues for determination are; (A) Whether the 3rd Respondent is a purchaser for value without notice. (B) Whether the Applicant is entitled to the orders sought. (c) Costs of the application.

19. It is clear that from the application that the High Court in HCCA 642 of 2003 ruled in the favour of the Applicant and his mother Jane Njeri Wagacha. The issue of ownership of title is therefore determined as belonging to the late Simon Wagacha Kinuthia, the father of the Applicant. The said judgment has not been vacated, appealed or set aside. It remains valid. Vide Succ Cause No. 1552 of 2002, they were granted letters of administration to the estate of the said Simon Wagacha Kinuthia. The orders that the Applicant is seeking therefore are consequential to the judgement aforesaid.

20. Against that background, the 3rd Respondent has alleged that he and his wife are legitimate owners of the suit property pursuant to a purchase/sale between him and the legal representatives of the late James Kariuki Nganga (the Respondent in the HCCA 642 of 2003) and the Court order in CMCC No 696 of 2009, Thika issued on 24.8.2010 ordering the legal representatives of James Kariuki Nganga to transfer the suit land to the 3rd Respondent and his wife. He claims to be a bonafide purchaser for value without notice. The Applicant presented to the Court an order issued in CMCC No 696A of 2009, Thika on 24.6.2011 staying the execution of the decree issued on 24.8.2010 (aforesaid) pending inter-partes hearing on 5.7.2011. The Applicant has not disclosed what happened on the 5.7.2011 or whether the order was confirmed.

21. It is on record that the legal representatives of James Kariuki Nganga were parties to the appeal in HCCA 642 of 2003 and were duly represented by counsel. There are two confirmed grants in respect to the suit land; the first one issued to the Applicant and his mother in Succ. Cause No. 1552 of 2002 issued in 2004 and the second one issued to the legal representatives of James Kariuki Nganga in Succ cause No CMCC No 291 of 2004 issued on 22.4.2009. This grant was faulted by the High Court in appeal No HCCA 642 of 2003 where the learned judge termed it an affront to the orders of the High Court Succ cause No HCCA 642 of 2003 granted earlier in 2004 and remain unchallenged to-date.

22. It would appear that the suit land was sold whilst the High Court in appeal No HCCA 642 of 2003 was in process. This would raise issues in relation to the doctrine of lis pendens. During the active prosecution, in any Court of competent jurisdiction of a contentious suit or proceedings in which a right to immovable property is directly or indirectly in question, the property cannot be transferred or dealt with in any other way so as to affect the rights of any other person which may be made except with the authority of the Court. This doctrine was enacted in the now repealed ITPA section 52 is a common law doctrine which is applicable in our jurisdiction. Its main objective is to maintain status quo over the suit property which is a subject of a pending suit. The idea is to prevent defeating the rights of the decree holder of the suit. The transaction is subject to questioning as to the bonafides of the parties involved. It is clear that it was transferred during the pendency of the Appeal and without the permission of the Court.

(A) Whether the 3rd Respondent is a purchaser for value without notice.

23. As to whether the 3rd Respondent is a bonafide purchaser for value without notice, The Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR pronounced itself on the doctrine of bonafide purchaser for value without notice, it commenced off by definition as outlined in Black's law Dictionary 8th Edition as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

24. The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner.

25. For one to be a bonafide purchaser for value without notice, he must be such person who made all the necessary and relevant enquiries in respect of the land he desires to buy and such efforts could not reasonably access any information that adversely affects the land. In the case of the 3rd Respondent the following matters are on record which he has accepted in his affidavit; a). There was a suit No CMCC No 696A of 2009, Thika b). his dealing in the land involved person being the administrators who had knowledge of the case stated in a) and HCCA 642 of 2003, Nairobi and in his own affidavit at Para 11 he admits knowledge of the appeal pending and finally the issuance of an order by the Court served on the Land Control Board at which he was a party for consent in the transaction relating to the suit land. All these factors put together do not give qualifications to the 3rd Respondent as a bonafide purchaser for value without notice.

B; Whether the Applicant is entitled to the orders sought

26. The basis of the application is that there is a judgement by the High Court in Case No. 642 of 2003. Excerpts of the said judgement stated as follows;

“.....The registration of the land in dispute in the name of Simon Wagacha cannot be faulted. The suit in the lower Court by the Respondent should have been dismissed. This appeal is allowed by setting aside the judgment of the lower Court in its entirety...”

The Court determined that the suit land was sold by Nganga Muchara to Simon Wagacha Kinuthia. That Vide a Succession Cause No 1552 of 2002 the suit land was vested to the appellants (read Plaintiff) and that that grant had not been revoked. It is annexed to the application and marked PKW 4(b). The said judgment has not been appealed, set aside, vacated and/ or varied. It is alleged that the 1st Respondent has despite request by the Applicant refused and or failed to effect registration in the manner giving effect to the judgement stated above. In such a case the applicant is justified to approach the Court for appropriate orders. Despite the 1st and 2nd Respondents having been served with the suit documents in this case, they have not filed any response thereto. The Court takes it that the 1st and 2nd Respondents have admitted the applicant's case.

27. The Applicant has succeeded in his claim against the Respondents. Ideally the Costs follow the event.

28. In the upshot the Court makes the following orders;

- a). The Notice of Motion dated the 23.6.2017 is allowed as prayed.
- b). The 1st, 2nd and 3rd Respondent shall pay the costs of the application to the applicant.

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

J G KEMEI

JUDGE