



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA

ELC CASE NO. 350 OF 2017

WILFRED WAWERU KARINGAPLAINTIFF

VERSUS

LENNY KANINI KAMAU.....DEFENDANT

JUDGEMENT

By a Plaint dated 15th March 2017, the Plaintiff has sought for Judgment against the Defendant for the following orders:-

- a. A declaration that the transfer to the Defendant of land parcel No. Lari/Maingi/T.156, was null and void.**
- b. An order cancelling the registration of the Defendant against the title No. Lari/Maingi/T.156.**
- c. Transfer of the said land to the Plaintiff.**
- d. Costs of the suit**
- e. Any other relief as to this Honorable Court may appear just to grant.**

In his Statement of Claim, the Plaintiff averred that **he is the owner and in occupation of Land Parcel No. Lari/Maingi/T.156. That through Civil Suit No. 2736 of 1995**, he obtained Judgment against one Joseph Muigai Macharia, for the transfer to him of the said land Parcel No. Lari/Maingi/T.156. He further averred that on or about the 12th August 2016, he presented documents of transfer to the Land Registrar, Kiambu and discovered that the Defendant had been registered as proprietor in place of the said Joseph Muigai Macharia.

It was his contention that he had acquired this land as against the said Joseph Muigai Macharia, by adverse possession and accordingly, no good title could have been passed to the Defendant by the vendor one Joseph Muigai Macharia, and that the said Joseph Muigai Macharia, could not transfer the land to the Defendant since it was subject to an ongoing suit.

The Defendant entered appearance and filed a Statement of Defence dated 4th May 2017, and averred that he is the one who has been in occupation since 1996, having bought the said land from Joseph Muigai Macharia, and a title deed issued on 27th December 1995, and that he was not made a party to Civil Suit No.2736 of 1995, despite being the registered owner and in occupation.

It was his contention that the orders sought in Civil Suit No. 2736 of 1995, had no legal basis as the land was already registered in his name and the plaintiff never produced the greencard to ascertain ownership.

The Plaintiff filed a Reply to Defence dated 10th July 2017, and reiterated the contents in the Plaint.

On 3RD July 2017, the case proceeded for hearing ex parte despite the Defendant having been duly served.

PLAINTIFF'S CASE

PW1- Wilfred Waweru Karinga, adopted his witness statement dated 15th March 2017, and his list of documents as exhibit No.1. He testified that the Court in Kiambu ruled that the land is his and the vendor sold the land to the Defendant herein and disappeared. It was his further testimony that the said Defendant had defied the Court order. Further, that the Executive Officer was directed to sign the transfer documents. However, the Land Registrar told him that the land was registered to a third party.

It was his further testimony that he went back to Court and obtained another Court Order where the Land Registrar was directed to register the said land in his favor.

On cross examination, he testified that the Defendant herein was not a party in Civil Suit No. 2736 of 1995. However, the Defendant in Civil Suit No.2736 of 1995, transferred the land before the said case was over. He further testified that Lenny Kanini obtained the title on 27th December 1995, while the Kiambu Case was concluded on 4th May 1999 and that he came to learn later that the land was registered in the name of the Defendant. Further, that the Defendant bought the land fraudulently and he has sued him personally as he is in possession.

On Re-examination, he stated that one Joseph Muigai Macharia sold the land while the Kiambu case was still ongoing. He further testified that he entered the land in 1962, and in 1995, he was evicted from the suit land by Lenny Kanini.

The Plaintiff closed his case and the Defendant was given the last chance on 3rd July 2019, to appear and give testimony but he failed to do so. Nonetheless, his Advocate filed an Application dated 21st November 2020 to cease acting, which was allowed as an unopposed.

The Plaintiff filed written submissions on 18th February 2020 through the Law Firm of **G.M Muhoro Advocates** and submitted that there is no way the Defendant would have assumed a good title, while the person he bought the land from did not have a good title. He relied on the case of ***Suleiman Rahemtulla Omar&Another v Musa Hersi Fahiyeh&5 others (2014) eKLR.***

This Court has now carefully considered the Pleadings in general, the available evidence, the written submissions and relevant provisions of law and the main issues for determination are:

1. Who between the Plaintiff and the Defendant is the rightful owner of land parcel Lari/Maingi/T.156.

2. Whether the plaintiff is entitled to the reliefs sought

Who between the Plaintiff and the Defendant is the rightful owner of land parcel Lari/Maingi/T.156?

Though the Defendant filed a statement of Defence, he did not adduce any oral evidence in support of his claim and therefore all the averments in his Defence remains just mere allegations as averments in pleadings are not evidence. In this instant therefore, the Plaintiff's evidence remained uncontroverted. See the case of ***Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR***, where the Court cited the case of ***Janet Kaphiphe Ouma & Ano....Vs...Marie Stopes International (Kenya), Kisumu HCC No.68 of 2007***, and held that:-

“In this matter apart from filing its statement of Defence, the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations....Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same.”

However, it is still trite that he who alleges must proof See the **Evidence Act Section 107** which states:-

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Further, uncontroverted evidence, is not automatic evidence, as the law places on the Plaintiff the obligation of proving its case.

The Court has carefully looked at the Judgement entered on 4th May 1999, the Order dated 8th December 2006, and the Order dated 10th November 2015, in Civil Suit No. 2736 of 1995, and concludes that the same were never Appealed against or set aside and therefore, they remain valid Court orders.

The Court further notes that the Defendant title was issued on 27th December 1995, having bought the same from Joseph Muigai Macharia for a consideration of Kshs. 65,000/= and on the same day, a transfer was signed in the presence of an Advocate. This Court fails to understand how the Defendant still went ahead and conducted transactions while Civil Suit No. 2736 of 1995, was pending and later on title deed and all other subsequent documents issued in his favor by the Land Registrar. In the case of ***Ashmi Investment Limited v Riakina Limited & Another [2017] eKLR*** the Court held that;

“Before delving into the dispute, the court notes that the Plaintiff went ahead to process the title deed which was issued on 4/3/2015, while this suit was pending in court. The court agrees with the observation made in the case of *Rose Wakanyi Karanja & 3 Others* (Suing as the legal representatives of the Estates of the late *Walter Karanja Muigai*) V. *Geoffrey Chege Kirundi*, Civil Appeal No. 172 of 2010 that parties should not deal with the Suit Property when it is the subject of contentious litigation pending in court.”

Justice demands that neither party to a suit should alienate his interest in the **Suit Property**, during the pendency of the suit, so as to defeat the rights of the other party.

The Defendant ought not to have processed the title over the Suit Property while **Civil Suit No.2736 of 1995**, was pending. This action was intended to defeat the rights of the Plaintiff.

Having found that the Judgement and resultant Orders of the Court in **Civil Suit No.2736 of 1995**, were never set aside or Appealed against, and no evidence has been placed in this Court to prove the contrary, this Court therefore finds and holds that the transfer of the suit land to the Defendant was not proper.

Whether the plaintiff is entitled to the reliefs sought

The Plaintiff had sought for amongst other prayers that the Court declares that **the transfer to the Defendant of land parcel Lari/Maingi/T.156, was null and void**. This Court has already found and held that the manner in which the suit property was transferred to the Defendant was not proper and therefore the title held by the said Defendant must be impeached.

Further the Court has also come to a conclusion that the title held by the Defendant was not valid and therefore **Joseph Muigai Macharia**, could not transfer any good title to the Defendant during the pendency of **Suit No.2736 of 1995**.

Therefore, *this Court holds and finds that the Plaintiff has discharged the onus of proving his case on the required standard of balance of probability*. Since the court already came to a conclusion that there was no due process in which the title was issued to the Defendant, there would therefore be no reason as to why the same should not be cancelled. Section **80 (1) of the Land Registration Act provides that:-**

“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.”

The Upshot of the foregoing is that the title held by the Defendant is illegal and the same ought to be cancelled. Further, the Court declares the Plaintiff as the rightful owner of the suit property.

Having now carefully considered the available evidence herein, the cited authorities and relevant provisions of the law and the written submissions the Court finds that the Plaintiff has discharge the burden of proving his claim on a balance of probability and consequently the court enters Judgement for the Plaintiff against the Defendant as prayed in the Plaint dated **15th March 2017** in terms of **prayers no (a), (b), (c) and (d)**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF JULY 2021

L. GACHERU

JUDGE

29/7/2021

Court Assistant – Dominic

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. G. M. Muhoro for the Plaintiff

No appearance for the Defendant

L. GACHERU

JUDGE

29/7/2021