



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 72 OF 2016

SAMUEL GITARI NGIRIRA.....PLAINTIFF

VERSUS

JUDITH WAMBUI MUTHIKE (Sued as the Legal Representative of the Estate of

JOHN IRUNGU WAGAKE).....1ST DEFENDANT

ELIAB MWANGI MWANYEKI..... 2ND DEFENDANT

JUDGMENT

Summary of Facts

By a plaint dated 27th May 2016, the Plaintiff herein filed suit against the 1st and 2nd Defendants for illegally and fraudulently transferring land reference number Mwerua/Kabiriri/1772 (hereinafter referred to as the suit land) unto themselves. It is the Plaintiff's case that he was originally the proprietor of Mwerua/Kabiriri/334 which he subdivided into two portions sometimes around December of 2000. That at the time of the subdivision, the Plaintiff did not have the necessary finances to undertake the process and that he got the required funds from one John Irungu Wagake (deceased). That the subdivision yielded two parcels of land: Mwerua/Kabiriri/1771 and Mwerua/Kabiriri/1772. That as security for the monies advanced, the Plaintiff gave the original title deed for Mwerua/Kabiriri/1772 to John Irungu Wagake (deceased) to hold. That at the beginning of the year 2002, John Irungu Wagake (deceased), expressed interest in purchasing the suit land although no formal agreement was entered into. In the meanwhile, it is the Plaintiff's case that he allowed John Irungu Wagake (deceased) to farm on the land even as the negotiations for the purchase progressed. Unfortunately, the said John Irungu Wagake was involved in a fatal road accident on 7th October 2001, before the contract for the sale of land was drawn up. The Plaintiff thus states that he allowed the deceased's wife, the 1st Defendant herein to continue cultivating the land. That sometime in 2015, the Plaintiff noticed that the 1st Defendant had stopped cultivating the land and in her place, strangers were the ones carrying out farming on the suit land. That upon conducting an official search, the Plaintiff discovered that the suit land had been registered in John Irungu Wagake (deceased) name on 17th January 2001 and had later been transferred by the 1st Defendant to the 2nd Defendant. For these reasons, the Plaintiff approached court seeking the following reliefs:

- a. A declaration against the two Defendants that the Plaintiff is the legal owner of all that piece of land known as Land Parcel No. Mwerua/Kabiriri/1772 and he be registered as such;*
- b. A declaration that the sale and or transfer of the parcel of land No. Mwerua/Kabiriri/1772 from the 1st Defendant to the 2nd Defendant is unlawful and fraudulent and an order for cancellation of the 2nd Defendant's title;*
- c. An order of eviction be issued against the 2nd Defendant, his servants and/or agents from Land Parcel No. Mwerua/Kabiriri/1772;*
- d. A permanent injunction to restrain the 1st and 2nd Defendants from entering into, fencing, building, selling, transferring and/or in any way interfering with the Plaintiff's lawful use of Land Parcel No. Mwerua/Kabiriri/1772;*
- e. Costs of the suit;*
- f. Any other relief that the court deems fit to grant.*

On 10th October 2016, the Plaintiff prayed and was granted a temporary injunction against the 2nd Defendant restraining him from transferring, selling, charging alienating and/or otherwise disposing of the suit land or any part thereof pending hearing and determination of the main suit.

The 1st Defendant entered appearance on 13th July 2016 and filed her statement of defence on 28th July 2016. She stated that she is the wife of John Irungu Wagake who passed away on 7th October 2001. That on 11th August 2011 she was granted letters of administration of the estate of her deceased husband and the same were confirmed on 29th June 2012. She denied the averments made by the Plaintiff in his plaint and stated that there was a sale agreement concluded between her deceased husband and the Plaintiff for the sale of the suit land on 19th July 2001. That pursuant to the sale agreement which was written in Kikuyu and a translated copy provided to court, the Plaintiff acknowledged receipt of Eighty-Seven Thousand shillings (Ksh. 87,000/=) being the consideration for the sale. In a further statement filed on 27th July 2018 the Plaintiff avers that prior to his demise, her husband and the Plaintiff had obtained consent for the transfer from the Land Board and had also executed the necessary transfer documents. That she, on 17th January 2002 instructed a surveyor to present the transfer documents for registration, which registration was effected and a title deed issued on 5th December 2002. That as an administrator of the estate of the deceased, she was registered as a proprietor of the suit land on 14th February 2013 after which she entered into a sale agreement with the 2nd Defendant to transfer the land to him.

The 2nd Defendant entered appearance on 13th July 2016 and filed his defence on 2nd August 2016. He denied the allegations of fraud contained in the Plaint and that notwithstanding he was an innocent purchaser for value. He avers that he observed all the statutory requirements prior to having the suit land registered in his name. He averred that he entered into a sale agreement on 10th March 2011 with the 1st Defendant for the sale of the suit land at a consideration of Six Hundred Thousand Shillings (Ksh. 600,000). That at the time of the sale, she was the administratrix of the estate of the deceased. He presented the signed sale agreement, acknowledgement of settlement of the purchase price and title document in which he was registered as a proprietor on 8th May 2013. The green card entry reveals that the transaction was duly supported by the necessary **RL 19 and RL 7 Forms** under the **Registered Land Act, Cap 300** (repealed).

On 1st March 2021 before court, the parties were directed and consented to filing submissions within 14 days thereof. The judgement date was scheduled for 14th May 2021. As at the date of writing this judgement, none of the parties had however filed their submissions.

Issues for Determination

- 1. Whether the transfer of the suit land from the Plaintiff to the 1st Defendant was marred by fraud.**
- 2. Whether the 2nd Defendant's proprietorship of the suit land ought to be cancelled.**

Legal Analysis and Opinion

The court has evaluated the rival pleadings and taken into consideration the evidence tendered.

It is not in dispute that the Plaintiff was the original owner of Mwerua/Kabiriri/334 which he subdivided into two portions sometimes around December of 2000 into Mwerua/Kabiriri/1771 and Mwerua/Kabiriri/1772. It is not contested that the Plaintiff gave to the 1st Defendant's deceased husband an original title deed to Mwerua/Kabiriri/1772, the suit land herein. It is also not contested that the suit land was transferred by the 1st Defendant to the 2nd Defendant. It is agreed that the current registered proprietor of the suit land is the 2nd Defendant.

The gist of the Plaintiff's dispute is the movement of the title over the suit land from himself to the 1st Defendant's deceased husband. He imputes fraud in the manner in which the transfer was registered and the subsequent title issued without his knowledge or consent.

It is trite law that allegations of fraud are considered serious accusations, requiring the asserting party to prove, to a standard above a balance of probabilities the existence of the allegations. At **page 427** in **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition** quoting with approval the cases of **Wallingford Vs Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune Vs Occident [1889] 1 Lloyd's Rep. 305, 308, Lawrence Vs Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 Ch.D. 473 at 489**, it is stated that:-

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

The Court in **Christopher Ndaru Kagina Vs Esther Mbandi Kagina & another [2016] e KLR** cited with approval the case of **Paragon Finance Plc Vs D.B Thakerar & Co**, where the court stated as follows:

“...It is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome.”(underline, mine).

It is the Plaintiff's case that although there were discussions around the sale of the suit land to the deceased, no agreement was entered into to that effect. It would also appear that the Plaintiff did not receive any consideration. The 1st Defendant has however provided to court a sale

agreement duly translated from Kikuyu to English. The agreement was made on 19th July 2001. In it, the Plaintiff acknowledges the receipt of Thirteen Thousand Shillings (Ksh. 13,000) from the deceased on 19th July 2001 being the deposit of the sale of land. On 25th July 2001, the Plaintiff signed against a receipt of a further Fourty One Thousand shillings (Ksh. 41,000). Again on 26th July 2001 the deceased gave an additional Ten Thousand shillings (Ksh. 10,000). On 27th July 2001, a further payment of Seventeen Thousand Shillings (Ksh. 17,000) was made bringing the total to Eighty-One Thousand Shillings (Ksh. 81,000). A further Six Thousand Shillings was given by the deceased to the Plaintiff on 19th September 2001, bringing the final total to Eighty-Seven Thousand Shillings (Ksh. 87,000). The receipts were countersigned by the Plaintiff every time. From the foregoing, the facts seem to contradict the allegations of fraud levelled against the 1st Defendant.

It is the Plaintiff's further contention that the registration of the suit land in the deceased's name was done after his death. While that is true from the register entries, the 1st defendant has explained that since payment had been made and the transfer duly executed, she merely presented the same to the registry for registration. Although at this point she ought to have disclosed that her husband was deceased, it is noted that it is not until 2012 that she was able to be confirmed as an administratrix.

The upshot of the analysis then is that the high threshold of fraud required to be satisfied has not been achieved, owing to the foregoing details that are more consistent with the 1st Defendant's innocence. Having so found, and bearing in mind that the 2nd Defendant has provided a sale agreement for the transaction dated 10th March 2011 for a consideration of Six Hundred Thousand Shillings (Ksh. 600,000); had satisfied himself at the time the deceased was the registered owner and the 1st Defendant a lawfully appointed administratrix; and is supported by the green card entries that the transaction was duly supported by the *necessary RL 19 and RL 7 Forms under the Registered Land Act, Cap 300* (repealed), his proprietorship is protected by the doctrine of indefeasibility of title. See **Section 26 of the Land Registration Act (No. 3 of 2012)**

“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.’

In **Civil Appeal No. 246 of 2013 between Arthi Highway Developers Limited Vs West End Butchery Limited and Others**, the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court pronounced itself thus:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

On the premises, the Plaintiff has failed to prove his case on a balance of probabilities and the suit is therefore dismissed. It is the Court's view that the temporary injunction issued on 10th October 2016 is no longer tenable and the same is hereby discharged. The costs of this suit shall be borne by the Plaintiff. It is so ordered.

JUDGMENT READ, SIGNED AND DELIVERED PHYSICALLY IN OPEN COURT AT KERUGOYA THIS 23RD DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Asimwe holding brief Ms Kimani

2. Ms Wangechi Munene

3. Kabuta – Court clerk.