



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1066 OF 2013

JOHN KARUGA WAHINYA.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

THE LANDS REGISTRAR THIKA.....3RD DEFENDANT

ECOSE SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED.....4TH DEFENDANT

RUTH WANGARI.....5TH DEFENDANT

JUDGEMENT

1. By a plaint dated 3rd September 2013 the plaintiff's seeks judgment against the defendants jointly and severally for:-

(a) An order of injunction restraining the 4th and 5th defendants by themselves or their servants, and/or agents or person claiming through or under them from occupying, disposing, alienating or otherwise disrupting or interfering with the plaintiff's possession, occupation and enjoyment of all that parcel of land known as Ruiru/Ruiru East Block 3/1634 until this case has been heard and finally determined.

(b) A declaration that the second title issued to the 4th defendant is illegal and consequently that the plaintiff is the rightful legal owner of all that piece of land known as Ruiru/Ruiru East Block 3/1634.

(c) An order directing the 2nd defendant do cancel the registration of the parcel of land reference number Ruiru/Ruiru East Block 3/1631 to the 4th Defendant and reinstate the registration of the same of the plaintiff.

(d) An order for delivery of vacant possession of the said Ruiru/Ruiru East Block 3/1634.

(e) General damages for loss of use of the said Ruiru/Ruiru East Block 3/1634.

(f) Costs of this suit.

(g) Such further or other relief as the honourable court may deem fit and just to grant.

2. Upon being served with copies of plant and summons to enter appearance the 1st – 3rd defendants entered appearance on 17th September 2013 through Muthoni Kimani, Senior Deputy Solicitor General. They also filed a statement of defence dated 12th April 2019.

3. The 4th and 5th defendants entered appearance on 26th September 2013 through the firm of M/S Okenyo Omwansa Associates. They also filed a statement of defence dated 18th November 2013.

4. The plaintiff filed a reply to the 4th and 5th defendants' statement of defence on 6th March 2014.

The Plaintiff's Case

5. Land Reference No, Ruiru/Ruiru East Block 3, the mother title was granted to Mwalimu Investment Company Limited by the late President Jomo Kenyatta. The same was sub-divided into several plots by a survey deed plan dated 2nd October 1990. As a result of the subdivision, Mary Njeri Karuga was allocated Plot Numbers Ruiru/Ruiru East Block 3/1643 and Ruiru/Ruiru East Block 3/1647.

6. On 23rd April 1991, the said Mary Njeri Karuga, sold to the plaintiff Ruiru/Ruiru East Block 3/1643 measuring approximately 3.636 hectares at Kshs.50,000/- per acre. The transfer was registered at the Kiambu Land Registry in favour of the plaintiff. He was issued with a title deed on 24th February 1992.

7. The plaintiff continued to enjoy possession and ownership of the said land until 7th January 2011, when the 5th defendant fraudulently purported to sell the land to the 4th defendant for Kshs.4,050,000/- knowing very well that she was not the registered proprietor of the suit property.

8. The particulars of fraud against the 5th defendant are given in paragraph 14 of the Plaintiff as:-

(a) Entering into an illegal sale agreement with the 2nd defendant for the sale of the said suit property.

(b) Receiving consideration of Kshs.4,050,000/- in various installments with full knowledge that she was not the legal absolute proprietor of the suit property.

(c) Unlawfully obtaining consent to transfer the said property.

(d) Unlawfully transferring the said property while knowing very well that the said transfer was illegal and fraudulent since the said property was owned by the plaintiff at all times.

9. Upon being informed that there were trespassers on the suit property the plaintiff proceeded to Thika Land Registry and found that his title had been fraudulently cancelled and registered in the name of the 4th defendant on 17th February 2011. The particulars of fraud by the 2nd and 3rd defendants are given in paragraph 16 of the plaintiff as:-

(a) Unlawfully and irregularly cancelling the plaintiff's title to the suit property without valid documentation or authority of the plaintiff.

(b) Unlawfully and irregularly registering the 3rd defendant as the proprietor of the suit property while knowing the same to be illegal.

(c) Refusing, ignoring, failing or neglecting to cancel the 2nd title unlawfully issued to the 4th defendant and failing to revert the same to the plaintiff.

10. The plaintiff has at all times been the registered owner of the suit property. By reason of the wrongful and unlawful cancellation of the plaintiff's title to the suit property, the plaintiff has suffered loss and damage.

The 1st – 3rd Defendant's Case

11. The records at the Thika Land Registry shows that the Green Card in respect of the suit property was opened on 28th April 2008 and registered in the name of Ruth Wangari Macharia and a title deed was issued. The suit property was subsequently transferred to Ecosave Savings and Credit Cooperative Society Limited and a title deed issued on 17th February 2011.

12. The Land Registrar Thika acted based on the documents regularly lodged for registration and which documents were in compliance of the law and the Registrar was not complicit in any alleged fraud, negligence or misrepresentation.

The 4th and 5th Defendants' Case

13. The Plaintiff has never had any proprietary interest or any interest known in law and any claim of the plaintiff enjoying possession and ownership of the suit land are merely illusory. The 5th defendant denies that particulars of fraud and states that the laid down process of land registration was duly complied with. The 2nd and 3rd defendants effected a lawful registration after being satisfied that the prerequisites of registration were followed.

Evidence of the Plaintiff

14. PW1 John Karuga Wahinya testified on 27th October 2016. He adopted his witness statement dated 3rd September 2013 as part of his evidence in this case. He told the court that he bought the suit property from Mary Njeri Karuga in 1991. The sale agreement is dated 23rd

April 1991. He was issued with a title deed on 24th February 1992. He produced the documents in the plaintiff's list of documents dated 3rd September 2013 as exhibits P1-P12. He further stated that he discovered on 24th February 2011 that the suit property had been fraudulently registered in the name of the 4th defendant. He denied that he was a trespasser on the suit land as the land is his. He prays that the prayers in the plaint be allowed.

15. When he was cross examined by Mr. Kamau for the 1st – 3rd defendants, the plaintiff told the court they did not seek consent from the Land Control Board though the land was agricultural. He also admitted that the map he had produced for the area was not authenticated. He also stated that he had not fenced the suit property but the 4th defendant put up a fence. Further that he had no search to confirm ownership of the land before he bought from Mary Njeri Karuga.

16. When he was cross examined by Mr. Omwansa for the 4th and 5th defendants, he admitted that he had no consent from the Land Control Board. He said he took possession of the land in 1992 -1993. He also stated that he had no acknowledgement from the seller that she had received the purchase price. He also stated that he made a report to the police when he learnt of the trespass but he does not know how far the investigations went.

17. PW2, Mary Njeri Karuga, adopted her witness statement dated 7th February 2017. She told the court that she sold the suit property to the plaintiff. That she bought the same from George Kimathi Mugenyu. That initially it was Plot No 2593 and measuring approximately (8) acres. She stated that she bought the same for Kshs.120,000 and sold it to the plaintiff for Kshs.400,000/-. She said after this she wrote a letter to Mwalimu Investment Company Limited requesting that the suit property be transferred to the plaintiff.

18. She further stated that she was later surprised when she was asked to report to CID Headquarters on Kiambu Road where she was shown another title deed in the name of Ruth Wangari Macharia. When she was cross examined by Mr. Kamau for the 1st – 3rd defendants she said she was paid Kshs.400,000/- in cash by the plaintiff. She said she bought it in 1989 and sold in 1991.

19. When cross examined by Mr. Omwansa for the 4th – 5th defendants, she told the court that she had no documents to show that she bought it from George Mugenyu. She also stated that she does not know how George Mugenyu got the land but it had already been surveyed. She said she was not issued with any share certificate. She also admitted that she had no documents to prove she conducted a search. She admitted there was an alteration where Plot No 2593 was written. She also stated that she did not know whether the suit property was in Thika or Kiambu.

20. PW3, James Mwarari Gatome a licenced surveyor, confirmed that he signed the survey plan dated October 1990. He adopted his witness statement dated 13th March 2017. He confirmed that the suit property is one of the parcels on the survey map. That after doing the survey he presented the map to the Director of Surveys. When cross examined by Mr. Kamau he confirmed that he was given instructions to undertake the survey by Mwalimu Investments Company Limited. He said his assistant undertook the survey under his directions. He also admitted that he did not play any role in the allocation or balloting for the plots.

21. When cross examined by Mr. Omwansa, he told the court that he supervised a team of five who were taking measurements. He also stated that the letter giving them instructions was in his office.

Evidence of the 1st – 3rd Defendants

22. DW3, Robert Mugendi Mbuba testified on 1st July 2019. He told the court that he is the Land Registrar based at Ruiru Land Registry. He adopted his witness statement dated 22nd April 2019 as part of his evidence in this case. He also produced the documents in the 1st – 3rd defendants' bundle of documents dated 12th April 2019 as exhibits D1-D18 respectively. He further stated that the caution by John Karuga (plaintiff) was not registered.

23. When cross examined by Mr. Mereka for the plaintiff, he told the court the plaintiff's title on the suit property was not registered. Further that there was no corresponding registration documents to reflect John Karuga as the owner of the suit property. He also admitted that Thika Land Registry was opened on September 1996. He also stated that the green card for the suit property was not missing but was in the name of Ruth Wangari Macharia. He also confirmed that from the records the land had no title prior to the year 2008.

24. When cross examined by Mr. Omwansa for the 4th and 5th defendants he confirmed the records at the Thika Land Registry show that the 4th defendant is the owner of the suit property having bought from Ruth Wangari Macharia. He also stated that no documents could have been lost while on transit from Kiambu to Thika Land Registry as there is always armed escort. Further that there is no pending investigation in respect of the suit property and a restriction that had been placed by DCI was removed.

Evidence by the 4th and 5th Defendants

25. DW1 Nimrod Ombuki Ondari the Secretary of the 4th defendant testified on 16th May 2019. He adopted the witness statement of Samson Onchiri, the Chairman dated 18th November 2013. He stated that he has been a member of the 4th defendant since 4th December 2007 and he understands the transaction in respect of the suit property.

26. He confirmed that they bought the suit property from Ruth Wangari Macharia (the 5th defendant) in January 2011 for Kshs.4,050,000/-. The 4th defendant had Kshs. 2 Million while the rest of the purchase price came from Cooperative Bank. They did a search which confirmed the 5th defendant was the registered owner of the suit property. That they sought consent for Land Control Board and followed the necessary procedures culminating in the registration of the 4th defendant as the registered owner. He further relied on the 4th and 5th defendants list of

documents dated 18th November 2013. The documents were produced as exhibit D19-D23 respectively.

27. When cross examined by Mr. Mereka he told the court that he could not tell if there were transactions in respect of the suit property between 1990 and 2011. He also stated that the plaintiff's title is similar to theirs'. He also stated that they are in possession of the suit property.

28. When cross examined by Mr. Kamau, he stated that the suit property was not fenced when they purchased it. That after purchase they fenced it and have been in possession to date. He also stated that he has never been called to record any statement with the police. Further that the land has now been subdivided amount members of the 4th defendant although no title deeds have been issued. He also stated that Cooperative Bank had earlier misplaced the original title deed. The loss was published on the Kenya Gazette and there were no objections by any party after the gazettement. He told the court that there was no parallel registration in respect of the suit property.

29. D.W.2 Ruth Wangari Macharia, the 5th defendant herein testified on 1st July 2019 as she told the court that she sold the suit property to the 4th defendant for Kshs.4,050,000/-. She said she acquired the land from Mwalimu Investment Company Limited in 1985 and paid by instalments upto the year 1990-. She got a title in 2008. She stated that all the necessary steps were followed before she transferred the suit property to the 4th defendant.

30. When cross examined by Mr. Mereka she said she had not seen the map dated 2nd October 1990. She denied that she forged a title for the suit property. She also denied that she took advantage of her husband's position to get the suit property. She also denied that the suit property belonged to John Karuga (Plaintiff).

31. When cross examined by Mr. Kamau, she stated that she bought from Mwalimu Investment Company Limited but had misplaced the documents. She said she made payments through the offices of Mwalimu Investment Company and it was responsible for processing the title. She also stated that she was not in a hurry to get the title as she had bought the land for investment purposes. When cross examined by Mr. Omwansa, she stated that she did due diligence before buying from Mwalimu Investment Company.

32. At the close of the oral testimonies the parties tendered final written submissions.

33. The plaintiff was given an opportunity on several occasions to put in final submissions but it appears he did not. As at the time of writing this judgment, the plaintiff's submissions are not on record.

The 1st – 3rd Defendants Submissions

34. They are dated 9th September 2019. They raise three issues for determination. They are:-

(i) Whether the plaintiff is the rightful owner of Ruiru/Ruiru East Block 3/1643.

(ii) Whether there was any fraud by the 1st, 2nd and 3rd Defendants.

(iii) Whether the prayers sought by the plaintiff should be granted.

35. The plaintiff has produced a title dated 24th February 1992. However, there are no corresponding records at the land registry to show that indeed the land was registered to the plaintiff. Every land must have a parcel file in which all records relating to the land are kept and recorded. Any transfer must be recorded in the green card held by the land registrar being the custodian of such records. They have put forward the case of **Samuel Kamere vs Land Registrar, Kajiado [2015] eKLR**.

36. The plaintiff has not produced any evidence that the defendants in question participated in any fraud. The burden of proving that there was any fraud was with the plaintiff. They have relied on Section 109 of the Evidence Act (Cap 80 Laws of Kenya).

37. The burden of proof is even higher in allegations of fraud. A mere statement by the plaintiff that there was fraud would not be sufficient to discharge his obligation to prove this fact on a standard higher than a balance of probability. They have put forward the case of **John Mbogua Getao s Simon Parkoyiet Mokare & 4 Others [2017] eKLR**.

38. There is no evidence tendered before this honourable court to show that there was fraud. They have put forward the case of **Kinyanjui Kamau vs George Kamau Njoroge [2015] eKLR**.

39. The plaintiff is not entitled to any of the prayers sought. The plaintiff has not been able to prove any of the facts alleged hence the prayers sought should not be granted. They have put forward the cases of **Caltex Oil (Kenya) Ltd vs Rono Ltd [2016] eKLR; Sammy Mwangangi & 10 Others vs Commissioner of Lands & 3 Others [2018] eKLR**.

40. The prayers sought can only be granted if the plaintiff had provided sufficient evidence to show that he is the rightful owner of the suit property. There is evidence to show that the registration of the property in favour of the 5th defendant was done procedurally. They pray that the plaintiff's suit be dismissed with costs to the 1st to 3rd defendants.

The 4th and 5th Defendants Submissions

41. They are dated 26th August 2021. They raise two issues for determination. They are:-

(i) Who is the rightful owner of the subject property.

(ii) Whether the plaintiff has demonstrated any fraud on the part of the defendant?

42. The 4th defendant has produced a paper trail on how it purchased the subject property. The plaintiff only produced a title deed dated 24th February 1992. He (plaintiff) did not produce any corresponding documents in proof of the procedure employed to acquire the land. Every registered land must have a parcel file in which all transactions and records relating to that specific land are contained and recorded.

43. The 3rd defendant's (Land Registrar) statement is that the green card to the subject property was opened on 28th April 2008 and registered in the name of the 5th defendant, Ruth Wangari Macharia.

44. The 4th defendant's title is traceable from the 5th defendant who bore the first registration which is recognizable under law. They have relied on **Section 26(1)** of the Land Registration Act 2012 and the case of **Kogo Flats Ltd vs Sammy Cheruna & Another; ELC 41 of 2014**.

45. The plaintiff has not proved fraud on the part of the 4th and 5th defendants hence his claim of ownership of the subject property must fail. They have relied on **Section 109** of the Evidence Act.

46. The evidence of the Land Registrar Robert M. Mbuba DW3, concludes the issue of ownership of the suit property. He stated that he relied on the records at Thika Land Registry, which records were in favor of the 4th defendant herein.

They pray that the plaintiff's case be dismissed with costs.

Analysis and Determination

47. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the respective parties and the authorities cited. The issues for determination are:-

(i) Whether the plaintiff is the rightful owner of Ruiru/Ruiru East Block 3/1643.

(ii) Whether there was any fraud by the defendants?

(iii) Is the plaintiff entitled to the reliefs sought?

(iv) Who should bear costs of this suit?

48. It is the plaintiff's case that he bought Land parcel No Ruiru/Ruiru East Block 3/1643 hereinafter referred to as "the suit property" from Mary Njeri Karuga. He produced a sale agreement between him and the said Mary Njeri Karuga dated 23rd April 1991 as exhibit P2 in this case. The said agreement is handwritten and is witnessed by Bernard Z. Karuga. The said plot is described as Plot No 2593. The same was sold to the plaintiff at Kshs.50,000 per acre. The total acreage of the suit property is not given.

49. There is a letter dated 23rd April 1991 to Mwalimu Investment Company by the said Mary N. Karuga requesting that it effects transfer in favor of the plaintiff. It is not clear if the said letter was received by the said company. There is also an acknowledgement of the purchase price by the seller. There is title deed issued to the plaintiff on 24th February 1992. The approximate area given is 3.636 hectares and is shown in Registry Map Sheet No 6. The same is issued by Kiambu Land Registry. The plaintiff admitted that no Land Control Board Consent was sought and obtained before the transfer was effected in his favour.

50. PW2 Mary Njeri Karuga said she sold the suit property to the plaintiff. Further that she had bought the same from George Mugenyu who had been allocated Plot NO 2593. She however had no documents to confirm this. She said she did not know how George Mugenyu acquired the land. She said she was paid in cash by the plaintiff.

51. PW3 James Mwarari Gatome confirmed he undertook survey of the whole parcel. He said the suit property is one of the parcels in the survey map. He however said he was not involved in allocation or balloting of the plots.

52. DW3 Robert Mugendi Mbuba a Land Registrar told the court that from the records at the land registry the green card for the suit property was opened on 28th April 2008 and registered in the name of Ruth Wangari Macharia, the 5th defendant.

53. The plaintiff has produced a title deed issued on 24th February 1992 but there are no corresponding records at the land registry to show that the land was registered in his favour. It was the evidence of DW3 that any transfer must be recorded in the Green card held by the land registrar as the custodian of such records.

54. In the case of **Samuel Kamere vs Lands Registry, Kajiado [2015] eKLR**, it was held that:-

“In totality, despite the reference to the various registration documents, it is remarkable that the only documents that were available for scrutiny by the trial court were the plaintiff’s original title dating back to 5th April 1991, the appellant’s title issued upon registration of the transfer, and the Land Register.

Other than these documents, there is nothing to show why the appellant’s name was entered on the Land Register, or on what basis the registration was effected.

Without any documents to support the registration of the appellant as the proprietor of the suit property, the appellant failed to discharge the evidentiary burden of proof as required, and the only conclusion that we can reach on a balance of probabilities is that, since the appellant has not proved or shown the root of his purported title, he could not acquire title to the sit property, which in any event, was incapable of passing to him upon the registration of the purported transfer.

From the above authority it was incumbent upon the plaintiff to demonstrate the root of his title in the absence of the records at the land registry.

55. DW3 told the court that the land is now registered in the name of the 4th Defendant. The title in respect of the 4th defendant was issued on 17th February 2011. It was the evidence of DW3 that all the necessary steps were followed before the suit property was registered in the name of the 4th defendant. The 4th defendant’s title can be traced back to the 5th defendant, who was the initial owner of the suit property. It goes without saying that the registration in favour of the 5th defendant was the first registration, then protected by Section 27 of the Registered Land Act, Cap 300 (repealed).

56. The 4th defendant is now the registered owner of the suit property. Section 24 of the Land Registration Act, 2012 provides that:-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the Act provides that:-

“1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

57. I find that the plaintiff is not the rightful owner of the suit property given that there are no records on the Lands Registry to support his claim.

58. It is the Plaintiff’s case that the 2nd and 3rd defendants unlawfully and irregularly cancelled the plaintiff’s title to the suit property without valid documents or authority from the plaintiff. I have gone through the evidence of the plaintiff and I find that no evidence was adduced to show that the defendants participated in any fraud or that there was any fraud. In the case of **John Mbogua Getao vs Simon Parkoyiet Mokare & 4 Others [2917] eKLR**, it was held that:-

“The standard or burden of proof where fraud is alleged in civil matter has been held in decided cases to be of higher than the ordinary standard of balance of probabilities....proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud... The appellant’s case is simply devoid of evidence showing or imputing fraud or irregularity against the respondents as the trial court correctly found”.

59. The Plaintiff stated that the records relating to the suit property might have been lost while being transferred to Thika Land Registry from Kiambu Land Registry. DW3, however, was categorical that no documents would be lost as the whole exercise was aided by armed escort. In the case of **Kinyanjui Kamau vs George Kamau Njoroge [2015] eKLR**, it was held that:-

“In the case, fraud cannot be imputed on the part of the respondent by the mere fact that the record in relation to the subject property was missing at the Land Registry. To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding”.

I find that the plaintiff was not able to prove fraud on the part of the 2nd and 3rd defendants.

60. Similarly, the plaintiff accused the 5th defendant of unlawfully obtaining transfer of the suit property and unlawfully transferring it to the 4th defendant while knowing it belonged to the plaintiff. The 5th defendant explained to the satisfaction of the court how she acquired the suit property from Mwalimu Investment Company Limited. Her evidence was not challenged, even by claims by the plaintiff's counsel that she took advantage of her husband's position in the company to get the said plot. This was unsubstantiated.

I also find that the allegations of fraud against the 5th defendant have not been proved to the required standard.

61. The 4th defendant is now the registered owner of the suit property. DW1 told the court that they are in possession of the same and that it had been subdivided to members who are utilizing their portions though the title deeds have not been issued.

62. It is on record that the transaction in respect of the suit property was reported to the Directorate of Criminal Investigations. They placed a restriction on the title pending investigations. The said restriction was later removed by the Directorate of Criminal Investigations. There is no mention of what became of the investigations. None of the defendants was charged with any offence.

63. I find that the plaintiff is not entitled to the reliefs sought in the plaint as he failed to establish fraud on the part of the 2nd, 3rd and 5th defendants.

64. In conclusion, I find that the plaintiff has failed to prove his case as against the defendants on a balance of probabilities. The suit is dismissed with costs to the defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2021.

.....

L. KOMINGOI

JUDGE

IN THE PRESENCE OF:-

NO APPEARANCE FOR THE PLAINTIFF

MR. KAMAU FOR THE 1ST, 2ND, AND 3RD DEFENDANTS.

NO APPEARANCE FOR THE 4TH AND 5TH DEFENDANTS

STEVE - COURT ASSISTANT