



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 473 OF 2013

(FORMERLY HCC No. 47 OF 2012)

JANE NJERI MAINA.....PLAINTIFF

VERSUS

MARTIN MUIRURI GITHINJI..... 1ST DEFENDANT

STANLEY KIPKOECH SIELE..... 2ND DEFENDANT

LANDS REGISTRAR,

DISTRICT LAND REGISTRY, NAKURU..... 3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

JUDGMENT

1. This suit was filed in the High Court on 24th February 2012. It was later transferred to this court and given the present case number. The plaintiff underwent amendments resting with the further amended plaintiff filed on 9th March 2016.

2. The plaintiff averred that Kung'u Manini, her father, was allocated plot number 114 by Kiamunyi Farm Company Limited and that he later transferred his interest in the plot to her. That she made the requisite payments and was issued with a certificate of lease for title number Njoro/Ngata-Block 1/470 (the suit property) on 18th April 1985. That upon conducting a search at the land registry on 10th February 2012, she discovered that the land had been registered in the name of the 1st defendant on 20th December 2006 and subsequently in the 2nd defendant's name on 24th August 2007. She further averred that the transfer to the 1st defendant and subsequently to the 2nd defendant were fraudulently and unlawfully obtained.

3. The plaintiff therefore prayed for judgement against the defendants for:

a) An injunction restraining the 1st and 2nd defendants whether by themselves, their servants, employees, agents, beneficiaries, or otherwise howsoever from entering, trespassing upon, dealing in, selling, transferring, disposing of, alienating, developing, letting out or in any way undermining the plaintiff's title or interfering with the plaintiff's possession and use of all that parcel of land known as Njoro/Ngata-Block 1/470.

b) All those Certificates of Lease and/or titles created in the name of Martin Muiruri Githinji, Stanley Kipkoech Siele and/or any entries on the register of the property subsequent to the plaintiff's title to all that parcel of land known as Njoro/Ngata-Block 1/470 be cancelled.

c) The register for all that parcel of land known as Njoro/Ngata-Block 1/470 be restored and rectified.

d) General damages for fraud and trespass.

e) Costs

f) Interests on (d) and (e) above

g) Such further or other relief as this honourable court would deem fit to grant in the circumstances hereof.

4. The 1st defendant neither filed a defence nor participated in the proceedings.
5. The 2nd defendant stated in his statement of defence that he purchased the suit property from the 1st defendant after conducting a search which showed that the 1st defendant was the registered owner. He denied all other averments in the plaint and urged the court to dismiss the plaintiff's suit with costs.
6. The 3rd and 4th defendants filed a statement of defence in which they denied the plaintiff's allegations.
7. At the hearing, the plaintiff testified that she is the proprietor of the suit property having been issued with a Certificate of Lease dated 18th April 1985. That her father acquired the said parcel as a shareholder of Kiamunyi Farm Co. Ltd and that he transferred his share to her through a letter dated 24th May 1975. The plot was initially known as plot No. 114. She added that upon making the requisite payments, she was issued with the Certificate of Lease. That she still has the original title to the suit property, that she is in occupation and that she has never sold the plot to anyone. She also stated that she conducted a search on 10th February 2012 upon which she discovered that the suit property had been transferred to the 1st defendant on 20th December 2006 and then to the 2nd defendant on 24th August 2007. Among other documents, she produced a copy of Certificate of Lease dated 18th April 1985 and a copy of white card in respect of the suit property.
8. The plaintiff's case was then closed.
9. The 2nd defendant, Stanley Muiruri Githinji testified as DW1. He stated that he bought the suit property from the 1st defendant at a purchase price of KShs 600,000 through a sale agreement dated 23rd August 2007. That at the time of the purchase, the 1st defendant had an original of a certificate of lease which indicated him as the owner and that the land was transferred to him upon the purchase and a title issued to him on 24th August 2007.
10. The 2nd defendant further testified that in the year 2012 he received a letter from an advocate claiming that the land belonged to the plaintiff herein. He added that he conducted a search on 31st October 2012 which showed that the land belonged to him and also obtained a copy of the green card for the parcel. He produced a copy of a transfer from 1st defendant to himself dated 23rd August 2007 and added that upon buying the land, he used it from 2007 to around 2018 when someone ploughed it. Regarding the plaintiff's title, he stated that he did not know about its authenticity.
11. The 2nd defendant then closed his case.
12. Lastly, Raymond Gitonga, a Land Registrar at Nakuru Land Registry, testified as the sole witness for the 3rd and 4th defendants. He produced a certified copy of the white card in respect of the suit property and stated that the land was first registered in the name of the plaintiff on 18th April 1985. That it was transferred to the 1st defendant on 20th December 2006 and later to the 2nd defendant on 24th August 2007. He added that there is no entry in the white card showing if a title document was issued to the plaintiff and that he was thus not in a position to confirm if any title was issued to her.
13. Mr Gitonga added that the land registry normally requires a transfer from both parties before effecting transfer and that since the suit property is a leasehold, a consent to transfer was needed together with a receipt for stamp duty, registration fees and surrender of the old title before a transfer could be registered. That since his records do not indicate that a certificate of lease was issued to the plaintiff, the land registrar could register a transfer by the plaintiff without requiring production of the original title. He added that apart from the white card, the land registry did not have any other document in relation to the suit property and that he could not find any document in relation to the transfer from the plaintiff to the 1st defendant and from the 1st defendant to the 2nd defendant.
14. The 3rd and 4th defendants' case was then closed. Since the 1st defendant did not attend court and was not represented despite service, his case was also closed.
15. Parties were then ordered to file and exchange written submissions. The plaintiff and the 3rd and 4th defendants duly filed their written submissions. No submissions were filed by the 2nd defendant.
16. The plaintiff in her submissions pointed out that the 2nd defendant testified that he entered into an agreement for sale of land on 23rd August 2007 and on the same day, they signed a transfer and the next day a certificate of lease was issued in his favour. That the 2nd defendant did not produce any records as to payment of stamp duty, registration fees or clearance of rates and rent.
17. While relying on the case of **Hubert L. Martin & 2 others versus Margaret J. Kamar & 5 others [2016] eKLR**, the plaintiff submitted that she was registered as the first proprietor of the suit property on 1st April 1985 and was issued with a certificate of lease on 18th April 1985 and that no evidence had been produced to demonstrate how the suit property was transferred from the plaintiff to the 1st defendant and from the 1st defendant to the 2nd defendant. The plaintiff also submitted that the 2nd defendant did not exercise due diligence before allegedly purchasing the suit property from the 1st defendant and therefore his certificate of title is fraudulent and ought to be cancelled. The plaintiff relied on the case of **Gitwany Investment Limited Versus Tajmal Limited & 3 others [2016] eKLR** and submitted that the plaintiff had established the root of the title and that the suit property was not available for sale or transfer to the 1st and 2nd defendants.
18. She also submitted that two titles cannot exist on the same parcel of land and that the certificate of title issued to the 1st and 2nd defendants ought to be cancelled and the register restored. She concluded her submissions by praying for damages for fraud, trespass and

costs of the suit.

19. The 3rd and 4th defendants in their submissions identified two issues for determination: whether there was fraud in the issuance of title to the 1st and 2nd defendant and whether the plaintiff is entitled to the orders sought. On whether there was fraud in the issuance of title to the 1st and 2nd defendants, they submitted that the plaintiff had not submitted any evidence to show that the 2nd defendant's certificate of title was issued fraudulently. They relied on **Section 26 of the Land Registration Act** and submitted that the plaintiff did not produce in court the original title that is allegedly in her possession and therefore she had no evidence in support of her claim. That the 3rd defendant testified in court that based on the green card produced in court, the plaintiff was never issued with any certificate of lease as no entry to that effect was made. They concluded their submissions by arguing that the plaintiff had failed to establish any fraud on the part of the 3rd and 4th defendants and she is therefore not entitled to the orders sought.

20. I have considered the pleadings, evidence and submissions herein. The issues that arise for determination are whether any of the defendants' certificate of title were fraudulently or unlawfully obtained and whether the plaintiff is entitled to the reliefs sought.

21. The plaintiff alleges fraud and illegality on the part of the defendants in the transfer of the suit property from the plaintiff to the 1st defendant and then on to the 2nd defendant. **Black's Law Dictionary** defines fraud 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. ... 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.

22. Thus, fraud is a serious allegation that has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR** and **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**.

23. There is no dispute that the plaintiff became the registered owner of the suit property on 18th April 1985. The land registrar confirmed as much in his testimony and produced a white card to support that position. During her testimony, the plaintiff showed to the court the original of the certificate of lease that was issued to her in respect of the suit property. She was adamant that she never transferred the property to anyone else.

24. It is equally not in dispute that the 1st defendant became the registered proprietor of the suit property on 20th December 2006 and that the 2nd defendant became the registered proprietor thereof almost half a year later on 24th August 2007. The 2nd defendant maintains that he purchased the property from the 1st defendant. As noted earlier, the 1st defendant neither filed a defence nor participated in these proceedings. No evidence has been offered as to the circumstances in which the property was transferred from the plaintiff to the 1st defendant.

25. Both the plaintiff and the 2nd defendant have titles in respect of the suit property. None of the defendants lodged any counterclaim. Thus, the plaintiff is challenging the 2nd defendant's title and the root thereof. The Court of Appeal stated in the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR** as follows:

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.

26. Under **Section 26 of the Land Registration Act**, the court is required to accept a certificate of title as proof of ownership. Nevertheless, a title can be nullified if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme. The section provides:

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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

27. The 2nd defendant's case is that he purchased the suit property from the 1st defendant through a sale agreement dated 23rd August 2007 and that the consideration was KShs 600,000 which he paid in cash. He was then issued with a certificate of lease at lighting speed, the very next day, on 24th August 2007. When parties are transacting at arm's length and conducting the due diligence expected of an innocent

purchaser for value, it is hardly possible or even normal to execute a sale agreement one day, pay the entire purchase price on the date of the agreement and obtain title the next day. Besides the astonishing speed, other aspects of the transaction that are wanting include absence of evidence of valuation for stamp duty, lack of evidence of payment of stamp duty and as well as payment of registration fees and fees in respect of the title document. Further, since the transaction has been questioned, one would expect that evidence of actual movement of the sum of KShs 600,000 such as its source and ultimate destination be availed. No such evidence was offered. Needless to emphasise, the 2nd defendant can only have a good title if the 1st defendant passed to him a clean title.

28. From the material on record, both the plaintiff's and the 1st defendant's certificates of lease were issued under the **Registered Land Act** (repealed) which was in force at the time. The common lessor in both documents was the Government of Kenya. **Section 48** of the Act required a consent be obtained from the lessor prior to any transfer. Indeed, both leases had express restrictions in terms of the section. The section provided as follows:

Upon the registration of a lease containing an agreement, express or implied, by the lessee that he will not transfer, sub-let, charge or part with possession of the land leased or any part thereof without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with section 110, has been produced to the Registrar...

29. The land registrar who testified confirmed that the registry always insists on such a consent prior to registering any transfer of a lease. No such consent was produced both in respect of the alleged transfer from the plaintiff to the 1st defendant and from the 1st defendant to the 2nd defendant. In fact, absolutely no documentation was produced to support the purported transfer to the 1st defendant. The land registrar suggested that a transfer could have been registered from the plaintiff to the 1st defendant without need to produce the plaintiff's title for cancellation. Even assuming that that was possible, and I do not share the registrar's views, how could the registry effect a transfer to the 1st defendant without a transfer document and in the absence of the consent required under **Section 48** of the **Registered Land Act** (repealed)?

30. Despite being confronted in open court with both the plaintiff's and the 2nd defendant's original title documents, and in the absence of any records supporting the transfer in favour of the 1st defendant, the land registrar astonishingly insisted that the 2nd defendant obtained a good title. On my part, I harbour no doubt in my mind that the 1st defendant's title and by extension the 2nd defendant's title were acquired illegally and unprocedurally. That alone is sufficient ground to warrant nullification of the 2nd defendant's title and the entries that support it.

31. In the face of all the questions about the root of his title, the 2nd defendant did nothing to demonstrate that the 1st defendant had any good title that he could pass to him. He was content with emphatically waving his questioned title document. That, as has often been held, is neither enough or helpful. Thus, the first issue for determination as to whether any of the defendants' certificate of title was fraudulently or unlawfully obtained is answered in the affirmative: both the 1st and the 2nd defendants' titles were obtained unlawfully and fraudulently.

32. In view of the foregoing discourse and there being evidence on record that the plaintiff is in possession and has developed the property by erecting a perimeter wall, I am satisfied that the plaintiff has made a case for an injunction and for cancellation of the 2nd defendants' title and the entries that support it. Regarding the prayer for general damages for fraud and trespass, no specific sum was suggested in submissions. I am thus not persuaded that I should award any amount under that head.

33. In the result, I enter judgement against the defendants jointly and severally as follows:

a) All those Certificates of Lease and/or titles created in the name of Martin Muiruri Githinji and Stanley Kipkoech Siele and/or any entries on the register of the property subsequent to the plaintiff's title to all that parcel of land known as Njoro/Ngata-Block 1/470 be and are hereby cancelled.

b) The register for all that parcel of land known as Njoro/Ngata-Block 1/470 be restored and rectified as above.

c) An injunction is hereby issued restraining the 1st and 2nd defendants whether by themselves, their servants, employees or agents from entering, trespassing upon, dealing in, selling, transferring, disposing of, alienating, developing, letting out or in any way undermining the plaintiff's title or interfering with the plaintiff's possession and use of all that parcel of land known as Njoro/Ngata-Block 1/470.

d) The plaintiff shall have costs of the suit.

e) Interest on (d) above at court rates.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF SEPTEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered through Microsoft Teams video link in the presence of:

Mr Kariuki for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd defendant

No appearance for the 3rd and 4th defendants

Court Assistant: E. Juma