



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA

ELC CASE NO. 74 OF 2014

PENINAH MUTHONI WANJOHL.....1ST PLAINTIFF

PAUL WACHIRA NDEGE.....2ND PLAINTIFF

VERSUS

GRACE MUTHONI NJEJE.....DEFENDANT

JUDGMENT

INTRODUCTION

The Plaintiff instituted this suit vide a plaint dated 11th March 2014 where they seek the following orders:-

- a. Nullification of transfer of L.R KABARE/NYANGATI/4800, KABARE/NYANGATI/4802 .
- b. Costs of this suit.
- c. Any other or further relief as this Honourable Court may deem fit to grant.

The defendant filed a statement of defence and counter-claim dated 4th September 2014 in which she counter-claimed against the plaintiffs for:-

- a. Eviction of the plaintiffs, their agents and/or servants from land parcel Numbers KABARE/NYANGATI/4800 and 4802.
- b. A permanent injunction restraining the defendants by themselves, their agents and/or servants from re-entering, alienating or interfering with the defendant's right and land parcel Number KABARE/NYANGATI/4800 and 4802.
- c. Costs.
- d. Any other or better relief that the Court may deem fit to grant.

After confirming compliance of directions under *Order 3, 7 and 11 of the Civil Procedure Rules*, the Court certified the case as ripe for hearing and set down the suit for hearing.

PLAINTIFFS CASE

PW1 was Paul Wachira Njege who testified on oath and stated that the defendant is his step-mother who is the first wife of his father. He stated that his mother is the second wife. He further stated that the suit property is registered in his name as the sole proprietor after it was given to him by his father Njege Mwaniki in the year 2006. The father later passed on in the year 2013. He produced a title deed of the suit land as Plaintiff **Exhibit No. 1**. He got the title deed in the year 2009. The suit property was a resultant portion after sub-division of the original land parcel No. KABARE/NYANGATI/2390.

The original land parcel No. KABARE/NYANGATI/2390 was sub-divided into parcels Nos. KABARE/NYANGATI/4796, 4798, 4799, 4800 and 4802. Thereafter, his father (deceased) transferred parcel No. KABARE/NYANGATI/4802 into his name and he was issued with title deed. He later came to discover that his land was transferred by unknown persons to the defendant herein who is his step-mother. He

stated that he lives on the suit land and that he did not see nor served with any proceedings from the Land Disputes Tribunal No. 8 of 2008.

PW2 was Peninah Muthoni Wanjohi who is a resident of Kimbimbi, Nyangati Sub-location and the 2nd plaintiff in this case. She testified that her husband is William Wanjohi (deceased) who was the son of Njege Mwaniki who is her father-in-law. Her father-in-law had two wives. The first wife is Grace Muthoni who is the defendant herein. The 2nd plaintiff further stated that her father-in-law Njege Mwaniki was the legal owner of land parcel No. KABARE/NYANGATI/2392 which he sub-divided into five resultant portions being land parcels No. KABARE/NYANGATI/4796, 4798, 4799, 4800 and 4802. Thereafter, her father-in-law transferred land parcel No. KABARE/NYANGATI/4800 into her name and was issued with a title deed. However, she came to discover that the land she was given was transferred to the defendant herein. As regards to a case before the Land Disputes Tribunal, the 2nd plaintiff stated that she is not aware of the same as she was not served with any Court summons or any Court processes. She produced the title deed as an Exhibit in this case.

DEFENDANT'S CASE

The Defendant, Grace Muthoni Njege testified as DW1 and referred to her witness statement recorded on 7/5/2018 which she adopted in its entirety. In her witness statement, the defendant stated that she got registered as proprietor of land parcel No. KABARE/NYANGATI/4800 and KABARE/NYANGATI/4802 pursuant to a Court order issued by the Senior Resident Magistrate Court in Arbitration Cause No. 8 of 2008 (Wanguru) and Misc. Application No. 88 of 2008 (Wanguru). She further stated that after the land was transferred to her, she sold land parcel No. KABARE/NYANGATI/4800 vide a sale agreement dated 27th July 2014 to one Beth Wamuyu Mukinyukia at a cost of Ksh. 900,000 which she paid in full. She contends that the transfer(s) of the title Number KABARE/NYANGATI/4800 and 4802 were above board as all statutory formalities were adhered to. She seeks to have the plaintiff evicted from the suit properties and a permanent injunction be issued in accordance with her counter-claim.

LEGAL ANALYSIS AND DECISION

I have considered the pleadings, the evidence by the parties and the documents produced as Exhibits. I have also considered the submissions by their counsels and the applicable law.

The plaintiffs in their plaint are seeking nullification of transfers of the suit properties L.R. No. KABARE/NYANGATI/4800 and KABARE/NYANGATI/4802 on grounds of fraud. The particulars of fraud are set out in paragraph 5 of the plaint. The defendant on the other hand is seeking an order of eviction and permanent injunction against the plaintiffs from the two parcels of land L.R. No. KABARE/NYANGATI/4800 and 4802.

A claim based on fraud are serious allegations which the claimant must prove. The standard of proof in a claim based on fraud is higher than the ordinary civil claims but lower than beyond reasonable doubt. That was the reasoning by the Court of Appeal in the case of **R.G. Patel Vs Lalji Makanji (1957) E.A. 314** where it was held as follows:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

A similar position was taken in the case of **Central Bank of Kenya Ltd Vs Trust Bank Ltd & Others C.A. No. 215 of 1996** where the Court of Appeal held thus:-

“The Appellant made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case”.

Other than setting out particulars of fraud in the plaint, the plaintiffs have not demonstrated how the alleged fraud was perpetrated/committed by the defendant. The plaintiffs in their particulars of fraud have simply stated that the defendant caused the transfer of land without the consent of the registered owners or otherwise their legal representatives. The plaintiffs also averred that the defendant has transferred the land to herself and/or acting as proxy to defeat the end of justice. The plaintiff did not show how the defendant perpetrated these particulars of fraud in their evidence. **Sections 107 and 109 of the Evidence Act Cap. 80 Laws of Kenya** places the onus of prove upon a party who wishes the Court to believe in his evidence unless the law provides otherwise. The two sections provides as follows:-

“107(1)

Whoever desires any Court to give judgment as to any legal right of liability dependent on the existence of facts which he asserts must prove that those facts”.

109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

The defendant in her evidence adopted her witness statement dated 7th May 2018. According to her, she got registered as the proprietor of the suit properties land parcels No. KABARE/NYANGATI/4800 and KABARE/NYANGATI/4802 pursuant to the Court orders of the Senior Resident Magistrate's Court Arbitration Case No. 8 of 2008 and Miscellaneous Application No. 88 of 2009, Wanguru. Thereafter, she sold land parcel No. KABARE/NYANGATI/4800 to one Beth Wamuyu Mukinyukia vide a sale agreement dated 27th July 2014 at a consideration of Ksh. 900,000/= which she paid in full. The defendant was also referred to her list of documents dated 7th May 2018 containing 13 items which she produced in her evidence. The first item produced as Plaintiff **Exhibit No. 1** is a decree in respect of an Arbitration Case No. 8 of 2008 between Grace Muthoni Njege the defendant herein and one Njege Mwaniki Njege who was registered as proprietor of land parcels No. KABARE/NYANGATI/4800 and land parcel No. KABARE/NYANGATI/4802 which were among the

resultant sub-divisions of the original land parcel No. KABARE/NYANGATI/2392. The award by the Mwea Land Disputes Tribunal according to the said decree was as follows:-

“(2) Portions of land known as KABARE/NYANGATI/4800 and KABARE/NYANGATI/4802 be and are hereby awarded to Grace Muthoni Njege the Plaintiff herein”.

In another cause filed in the case referred herein, before the Principal Magistrate’s Court in Wanguru being Misc. Application No. 88 of 2009, the Court made the following orders:-

“1. That the District Land Registrar – Kirinyaga to show cause why parcels of land known as KABARE/NYANGATI/4800 and KABARE/NYANGATI/4802 should not be registered and titles issued in the names of the Applicant GRACE MUTHONI NJEJE.

(2) That the DISTRICT LAND REGISTRAR Kirinyaga is hereby compelled by an order of this Honourable Court to register titles KABARE/NYANGATI/4800 and KABARE/NYANGATI/4802 in favour of GRACE MUTHONI NJEJE.

(3) That the costs of this application has been provided for”.

Pursuant to the orders issued by the Wanguru Magistrate’s Court which were produced as evidence in this Court, the 1st defendant was registered as proprietor of the two parcels of land No. KABARE/NYANGATI/4800 and KABARE/NYANGATI/4802 on 5th December 2012 respectively. The defendant also produced an application for consent and the consent itself for Mwea Land Control Board marked as D. Exhibits 3 & 4 respectively. These Exhibits are clear evidence that the suit lands parcels No. KABARE/NYANGATI/4800 and 4802 were transferred and duly registered in favour of the defendant, Grace Muthoni Njege in accordance with the law.

I believe the plaintiffs had no issue with the process of transfer or the instruments of transfer including the application for consent and the consent from the Mwea Land Control Board or the Land Registrar who effected the transfer in favour of the defendant otherwise they would have joined them as parties in these proceedings.

The other issue relates to the transfer of the suit property land parcel No. KABARE/NYANGATI/4800 from Grace Muthoni Njege to Beth Wamuyu Mukinyukia for a consideration of Ksh. 900,000/=. A sale agreement, dated 24th July 2014, a letter of consent, a title deed in favour of the said Beth Wamuyu Mukinyukia and a certificate of official search were produced as Defence Exhibits 8, 9, 10 & 11 respectively. I am satisfied that she followed the due process and obtained all the relevant statutory requirements before either acquisition and/or transfer of the suit property to one Beth Wamuyu Mukinyukia. The said Beth Wamuyu Mukinyukia who is the registered proprietor of land parcel No. KABARE/NYANGATI/4800 as per the certificate of official search dated 4th August 2018 is the absolute owner according to the current land records.

Despite dangling title deeds for the suit properties L.R. No. KABARE/NYANGATI/4800 and KABARE/NYANGATI/4802, the plaintiffs did not go further to produce any certificate of official search indicating that they are the current owners according to the land records. The plaintiff did not also demonstrate how they acquired the two parcels of land from the registered owner Njege Mwaniki Njege including the application for consent and the consent itself from the Land Control Board. Once the acquisition of title is under challenge, any person seeking to be considered as the absolute proprietor of such land must produce evidence to proof acquisition and ownership of the same. The plaintiffs in this case have only produced title deeds as ownership documents. Those titles in my view are only prima facie evidence of ownership but are not evidence of absolute ownership. The plaintiffs should have gone further to demonstrate how they acquired the same.

DECISION

In view of the matters aforesaid, I find and hold that the plaintiffs claim as against the defendant has not been proved to the required standard. The same is hereby dismissed. As regards the counter-claim, I am satisfied that the defendant has demonstrated that she acquired the two parcels of land No. KABARE/NYANGATI/4800 and KABARE/NYANGATI/4802 lawfully and procedurally and that the two titles are absolute. In the final analysis, I enter judgment in the following terms:-

- 1. The plaintiffs’ suit fails and the same is hereby dismissed.**
- 2. The defendant’s counter-claim has been proved to the required standard and the same is allowed.**
- 3. The plaintiffs, Peninah Muthoni Wanjohi and Paul Wachira Njege by themselves, or their agents and/or servants are hereby evicted from land parcels No. KABARE/NYANGATI/4800 and 4802 respectively.**
- 4. A permanent injunction is hereby issued restraining the plaintiffs by themselves, their agents and/or servants from re-entering, alienating or interfering with the defendant’s right on land parcels No. KABARE/NYANGATI/4800 and 4802.**
- 5. Since the plaintiffs and the defendants are close family relations and in order to promote cohesion and co-existence between family units, I order each party to bear her own costs.**

JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN KERUGOYA THIS 22ND DAY OF OCTOBER, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Maina Mwangi holding brief for Ngigi for Defendant

2. Plaintiff/Advocate – absent

3. Kabuta, Court clerk – present.