



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT HOMA BAY
ELC CASE NO 27 OF 2021
(FORMERLY MIGORI ELC CASE NO. 70 OF 2018)

ELVINE LEWARE MACAGER.....PLAINTIFF

-VERSUS-

LAND REGISTRAR, MIGORI.....1ST DEFENDANT

MAURICE OTEMA KADIL.....2ND DEFENDANT

AGRICULTURAL FINANCE CORPORATION.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

A. INTRODUCTION

1. The central property in dispute in the present suit is the parcel of land known as LR No. Suna East/Wasweta 1/921 measuring approximately Zero Decimal One Hectares (0.1 Ha) in area (The suit property herein). It is a sub division of land Title No. Suna East/Wasweta 1/755 (The original land). The same is located in Migori County and contained in Registry Map Sheet Number 13.
2. Currently, the suit property is registered in the name of the 2nd defendant with effect from 13th October, 2014. Previously, it was registered in the name of Ochieng Orwa, Thomas Aristarco Gwara, Doris Atieno Gwara (Deceased herein) and the Plaintiff, Elvine Leware Macager as at 15th July 1973, 22nd July 1974, 13th July 2000 and 11th August 2014 respectively.
3. The plaintiff is represented by the firm of S N Otinga Advocates. Previously, he was represented by M/S Lusweti and Nabutola Company Advocates.
4. The 1st defendant and the 4th defendant herein are unrepresented.
5. The 2nd defendant is represented by the firm of Kerario Marwa and Company Advocates.
6. The 3rd defendant is represented by Rashid Ngaira Advocate.
7. Originally, this suit was lodged at Kisii Environment and Land Court. Later, it was transferred to Migori Environment and Land Court where I heard the same and the parties closed their respective cases awaiting their submissions. On 4th of October 2021, Kullow J directed that the matter be transferred to and placed before me at this station for directions following my transfer to this court station.
8. Thus, the suit was placed before me on 15th November, 2021 when Mr H O Bunde held brief for Mr Otinga, learned counsel for the plaintiff, Ms Opar held brief for Mr Ngaira, learned counsel for the 3rd defendant while the 2nd defendant was present. So, this court ordered and directed that the instant determination be rendered on this date and the plaintiff's counsel to notify the 1st defendant's counsel and the 2nd defendant's counsel accordingly.

B. THE GIST OF THE PLAINTIFF'S CASE

9. The plaintiff originated this suit by way of a plaint dated 27th November 2014 (Fast Track) and amended on 1st March 2018 seeking the orders infra;

a. A declaration that the 1st Defendant acted unlawfully when he nullified the Plaintiff's title by rectifying the register of No. **Suna East /Wasweta 1/921** on the 26th August, 2014 and the decision is therefore null and void.

b. An Order directing the Registrar of Lands, Migori to cancel the entries number 12,13,14 and 15 in the proprietorship section of the register of the parcel of land known as **Suna East/Wasweta 1/921** and entry number 3 and 4 in the encumbrance section of the same parcel of land.

bb . A declaration that the Plaintiff is the lawful, legal, absolute and registered owner of the property **Suna East /Wasweta 1/921**.

c. A permanent injunction to restrain the 2nd Defendant whether by himself , agents, servants or third parties from selling, transferring, charging, leasing, constructing, or in any other manner interfering with the parcel of land known as **Suna East/Wasweta 1/921**.

cc. A declaration that the Plaintiff is entitled to compensation, damages and/or indemnity pursuant to the mistake and or fraud on the part of the Registrar of Lands.

d. Costs and interest.

e. Any other Order of reliefs as the Honourable Court deem just and fair to grant.

10. Concisely and precisely, the plaintiff laments that in the month of June 2014, she was informed that one Doris Atieno Gwara (The Deceased herein) intended to sell her piece of land namely the suit property. The plaintiff was interested in the suit property and expressed the same to the deceased and upon conducting due diligence including search at Migori Land Registry, he confirmed that the suit property was registered in the name of the Deceased. By an agreement dated 5th August 2014, the plaintiff purchased the whole suit property from the deceased at Kshs. 2,000,000 only and he got registered as it's proprietor with effect from 13th of August 2014. However, on 26th of August 2014, the 1st defendant nullified the plaintiff's title without following due process further to a purported complaint lodged by the 3rd defendant. It therefore, it precipitated the instant suit.

11. In his testimony, the plaintiff (PW1) relied on his statement dated 1st March 2018 as part of his evidence. He also relied on his list of documents dated 1st March 2018 annexed to the amended plaint (PExhibits 1 to 10).The documents include; agreement for sale dated 5th August 2014 (P.Exhibit 2), copy of title deed of the deceased (P.Exhibit3), copy of title deed of PW1 (P.Exhibit 6) and a certified copy of green card of the suit property (P.Exhibit 10).

12. Learned counsel for PW1 filed submissions dated 29th September 2021 on 14th October 2021 where reference was made to the reliefs sought in the plaint, facts of the case and evidence including PExhibits 1 to 10. Counsel framed three (3) issues for determination, among them, whether the 1st defendant's cancellation of the plaintiff's title was lawful and whether PW1 is entitled to the reliefs sought in the amended plaint. Counsel submitted that the action of the 1st defendant thereof was unlawful as PW1 was not notified accordingly. Counsel submitted that PW1 is entitled to the reliefs sought in his amended plaint. To buttress the submissions, counsel relied on **sections 79 (2) and (4), 81, 82 and 83 of the Land Registration Act, 2016 (2012), Article 47 (1) and (2) of the Constitution of Kenya, 2010 as well as Section 4 (1), (2) and (3) of the Fair Administrative Action Act** alongside the case of **Multiple Hauliers East Africa Limited-vs-Attorney General and 10 others (2013) eKLR** as regards the right to fair administrative action and the case of **Antonie Kubando Murunga-vs-Attorney General and 3 others (2017) eKLR** on indemnity.

C. THE 1ST DEFENDANT'S CASE IN BRIEF

13. The 1st defendant was duly served but failed to file a statement of defence in this suit. Besides, on 11th July 2019, Mr Otinga and Mr Mabonga learned counsel for the plaintiff and the 3rd defendant respectively prayed for summons to issue to the 1st defendant to attend court to shed some light over the issues in this suit, to produce the record in respect of the suit property and to be examined thereof during hearing of the suit in the interest of justice. Accordingly, the court issued the summons further to **Sections 1A, 1B, 3, 3A, 60 of the Civil Procedure Act Chapter 21 Laws of Kenya as read with Order 16 Rule 6 and Order 18 Rules 3 and 11 of the Civil Procedure Rules, 2010.**

14. On 27th November 2019, the 1st Defendant, Philip Makini (DW1) attended court pursuant to the summons. He told the court, among others, that he was aware of the suit property and that it's green card shows that the same was registered in the name of the 2nd defendant and that title deed was issued to him on 14th October 2014. He produced in evidence, the green card and a copy of the parcel file of the suit property (1st DExhibits 1 and 2 respectively).

15. The 1st defendant did not file any submissions in the instant suit.

D. THE 2ND DEFENDANT'S CASE IN BRIEF

16. The 2nd Defendant (DW2) denied the plaintiff's claim and urged the the court to dismiss the same with costs. He premised his testimony on his statement dated 6th July 2015 as part of his evidence. Further, he relied on his list of documents of even date (2nd DExhibits 1 to 11). He stated, inter alia, that on 17th March 2014, at Migori Town, he bought the suit property in a public auction whereby he was the highest

bidder and it was subsequently transferred to him by the 3rd defendant. That he is in possession of the suit property which is registered in his name and he has the relevant documents.

17. His counsel filed a two (2) paged submission dated 11th November 2021. Counsel submitted that the 3rd defendant advanced a loan to the deceased who was the registered proprietor of the suit property at the material time and a charge was registered on the property in favour of the 3rd defendant. That the deceased failed to repay the loan hence the 3rd defendant advertised the suit property for sale under its statutory powers and the 2nd defendant bought it through public auction. That transfer and registration of the suit property in the name of the 2nd defendant could not be effected as the same had been fraudulently registered in the name of PW1. That the 1st defendant had absolute powers to rectify the register of the suit property under sections 26 and 79 (2) and (4) of the Land Registration Act, 2012 even before the amendment of the same Act in the year 2016.

E. THE 3RD DEFENDANT'S CASE IN BRIEF

18. The 3rd defendant denied the plaintiff's claim and sought its dismissal with costs. DW3, Christopher Kimulwa, a Credit officer of the 3rd Defendant anchored his evidence on his statement dated 22nd November 2019. He also relied on a list of documents dated 29th July 2015 and duly filed herein on 31st July 2015 (3rd DE Exhibits 1 to 22). He stated in part that the deceased took a loan from the 3rd defendant, defaulted in payment of the same thus, ran into arrears in excess of kshs. 173,000/= between the years 2006 and 2009. That the deceased was issued with notices to pay the loan in full in vain until DW1 bought the suit property at a public auction as the original title thereto had held by the 3rd defendant by virtue of loan facility.

19. On 18th November 2021, learned counsel for the 3rd defendant filed submissions dated 12th November 2021 providing brief facts of the plaintiff's case inclusive of the orders sought in the amended plaint, the 3rd defendant's facts of the case and identified a single issue for determination namely whether the 1st defendant's cancellation of the plaintiff's title was lawful. Counsel submitted that the proprietor (the deceased) had by fraud, caused the 1st defendant to re-issue a title to her in respect of the suit property and that the process of investigation including notification of the affected parties was done by the 1st defendant before the nullification of the title in question. That Section 79 (2) and (4), section 4 (1) (2) and (3) and Article 47 (all supra) were complied with thereof. To reinforce the submissions, counsel relied on **Geothermal Development Company Limited-vs- Attorney General and 3 others (2013) eKLR, Standard Chartered Bank Kenya Ltd-vs-Intercom Services Ltd and 4 others (2014) KLR and Heptula-vs-Noormohamed (19840 KLR 580**, among others.

F. THE 4TH DEFENDANT'S CASE IN BRIEF

20. The 4th defendant was duly served as revealed in the affidavits of service sworn on 28th January 2019 and 10th July 2019 by the plaintiff's counsel and as shown in the court proceeding of 11th July 2019 and 27th November 2019. However, the 4th defendant failed to enter appearance and or file a statement of defence herein.

G. POINTS FOR DETERMINATION

21. It is settled law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see the Court of Appeal decision in the case of **Galaxy Paints Ltd-vs-Falcon Grounds Ltd (2000) 2EA 385** and restated in the case of **Great Lakes Company (U) Ltd-vs-Kenya Revenue Authority (2009) KLR 720**.

22. I have thoroughly considered the parties' respective pleadings, the testimonies of PW1, DW1, DW2 and DW3 as well as the rival submissions inclusive of all the authorities cited therein. In that regard, I am of the considered view that the issues that flow therefrom for determination are whether;

- a) The 1st defendant's cancellation of the plaintiff's title deed in respect of the suit property was lawful, and
- b) The plaintiff is entitled to the orders sought at the foot of his amended plaint herein.

H. ANALYSIS AND DISPOSITION

23. The plaintiff contended that the suit property was registered in his name as revealed at paragraph 2 hereinabove. Under **section 2 of the Land Registration Act, 2016 (2012)**, the term "Title" means-

"A certificate of title in the prescribed form issued under section 30"

24. It is common baseline that there was sale of the suit property between the deceased and PW1. Clearly, the deceased was the vendor while PW1 was the purchaser of the suit property as disclosed in P.Exhibit 2.

25. The 1st defendant and the 3rd defendant asserted that sale of the suit property by the 3rd defendant to DW2 was by way of public auction as the deceased had failed to comply with the terms of the loan advanced to her by the 3rd defendant, That the said sale could not be completed as the deceased and PW1 had fraudulently over the property. transferred the suit property to PW1 as the charge was subsisting.

26. It is noteworthy that rectification of the register was carried out by the 1st defendant pursuant to **Section 79 of the Land Registration Act, 2016 (2012)**. As provided for thereunder, the 1st defendant had the discretion to rectify the register or instrument presented for

registration on ground of fraud.

27. In the process of investigation as envisaged in subsection 4 (a) of section 79 (supra), the 1st defendant issued notices namely Ref No. MIG/LR/VOLV/83 dated 11th September 2014 and Ref No. MIG/LR/5/VOL.V/76 dated 26th August 2014 which are included in 3rd DExhibits 1 to 22. The notices are also shown at paragraphs 15 and 16 of the statement of DW3 which is part of his evidence.

28. Furthermore, during cross examination by the Plaintiff's counsel, DW1 stated thus;

"...summons for nullification of title herein were issued accordingly.."

29. Moreover, PW1 admitted that the suit property was encumbered at the material time. His statement at paragraph 11 reads;

"I am not aware of how the late Doris Gwara discharged the property. According to the green card, the discharge was registered as entry number 2 in the encumbrance section on 25th July 2013. This is way before I got any interest in the land"

30. In the case of **Munyu Maina-vs-Hiram Githiha Maina 2013 eKLR**, held;

"...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.....and the registered proprietor must go beyond the instrument and proof the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances....." (Emphasis added)

31. Fraud and misrepresentation are grounds of impeaching a certificate of title as noted in **Kuria Kiarie & 2 others vs Sammy Magera 2018 e KLR**; see also section 26 of the Land Registration Act, 2016 (2012).

32. The plaintiff's complaint is that he was not accorded his rights under Article 47 of the Constitution and section 4 (1) (2) and (3) of the Fair Administrative Act (supra). That the 1st defendant did not follow due process in the nullification of his title in regard to the suit property

33. In the case of **Re Hebtullah Properties Ltd (1976-80) 1 KLR 1195 at 1209**, it was noted:

" The Tribunal had a duty to hear the landlord on the objection. There was in the opinion of the court a violation of the audi alteram partem rule (right to be heard).

34. It is established law that it is the duty of the court to ensure that the parties are duly served with the necessary papers in a matter. That the parties have the liberty to appear or decline to do so; see **Ogada-vs Mollin (2009) KLR 620** .

35. On that score, was due process followed by the 1st defendant in this suit? Indeed, notices were issued to the plaintiff, the deceased and the 3rd defendant by the 1st defendant as discerned at paragraph 27 hereinabove.

36. **Article 40 of the Constitution of Kenya, 2010** anchors the right to property. It has been demonstrated that the 1st defendant acted within the confines of **Articles 10, 47 and 232** of the same Constitution in the cancellation of the title of the plaintiff.

37. Notably, in **National Bank of Kenya Ltd-vs-Shimmers Plaza Ltd (2009) KLR 278 at 283**, it was held that an injunction is an equitable remedy. That it's duration is at the sole discretion of the trial judge and depends on the circumstances of each case.

38. In **Nguruman Ltd -vs-Jan Bonde Nielsen and 2-others 2014 KLR**, the Court of Appeal concluded that it must be borne in mind that the foundation of the jurisdiction to issue injunctive orders vests

- a) The probability of irreparable injury
- b) The inadequacy of pecuniary compensation and
- c) Prevention of the multiplicity of suits

39. Section13 (7) (a) Environment and Land Court Act, 2015 (2011) provides for this court's mandate to issue permanent preservation orders. Permanent injunctions are included thereunder.

40. I have taken into account, inter alia, Multiple Hauliers, Antonie, Geothermal, Standard Chartered cases (supra). My considered view is that the plaintiff has not met even the threshold in the celebrated case of **Giella vs Cassman Brown & co. Ltd 1973 EA 358** regarding injunctive remedies, among others.

41. In the obtaining scenario, there was an encumbrance in the form of the subsisting charge between the 3rd defendant and the deceased over the suit property at the time the deceased purportedly sold the suit property to PW1. Therefore, the purported sale was illegal.

42. In the case of **Scott-vs Brown Doering McnABE & CO (3) (1892) 2QB 724**, the court stated:

“ No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract which is illegal-Ex turpi causa non oritur actio.”

43. The evidence on record firmly point at an illegality committed by plaintiff and the deceased in regard to transfer and title deed in favour of the plaintiff in respect of the suit property. So, The action taken by the 1st defendant was rational and lawful. Bearing in mind sections 107 to 110 of the Evidence Act Chapter 80 Laws of Kenya, the plaintiff has failed to prove his claim against the defendants on a balance of probabilities and he is not entitled to the reliefs sought at the foot of the amended plaint.

44. Wherefore, the instant suit generated by way of a plaint dated 27th November 2014 and amended on 1st March 2018, be and is hereby dismissed with costs to the respondents

45. It is ordered accordingly.

Judgment delivered, dated and signed at Homa-Bay on this 29th day of November 2021.

G.M.A ONG'ONDO

JUDGE

In the presence of;

2nd Defendant-Present in person.

Court Assistant: Okello.

G.M.A ONG'ONDO

JUDGE