



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 282 OF 2016

JANE NJERI KABURUNGO(Suing As Administrators of The Estate of Dedan

Kageni Kaburungo.....PLAINTIFF

=VERSUS=

ROSE WANJIRU KARATU.....1ST DEFENDANT

GULF ENERGY LTD.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

JUDGEMENT

1. By a plaint dated 23rd March 2015.The Plaintiff seeks judgment against the Defendants jointly and severally for:-

a) A permanent injunction do issue against the 1st and 2nd Defendants, her agents, servants, employees or in any manner restraining her from trespassing, transferring, selling, conveyancing, charging, leasing or in any way from dealing with plot No. N/B 117/33.

b) A declaration that the deceased Dedan Kageni Kaburungo is the legal owner of the plot NO. N/B/117/33 a mandamus order to the 3rd Defendant to revoke the title deed held by the 1st Defendant and issue a title deed to the estate of the deceased Dedan Kageni Kaburungo.

c) Cost of the instant suit and interest at court rates.

d) Any further relief as the Honourable court may deem fit to grant in the circumstance.

2. The 1st Defendant filed a memorandum of appearance but failed to file a defence. The 3rd Defendant did not file a memorandum of appearance nor a defence.

The 2nd Defendant's case

3. The 2nd Defendant filed a statement of defence dated 11th June 2012.It contended that it is presently registered as the lessee to the property known as NAIROBI/Block 117/33 which was obtained vide purchase and transfer from the previously registered lessee-MWM but since she was suffering from mental illness, MMM and MWM had been appointed as Guardians and managers of the of her estate pursuant to the provisions of Mental Health Act, Chapter 248,Laws of Kenya.

The Plaintiff's evidence

4. PW1, Jane Njeri Kaburungo the Plaintiff testified on 2nd July 2019.She told the court that Plot No.117/33 belonged to her late husband; she produced his share certificate and stated that she has not seen any other share certificate over the suit plot except her late husband's. She took possession of the plot and constructed a house but it was demolished by the 1st Defendant.

5. She stated that she reported the matter to the chief, to Kamiti farmers Limited and to Directorate of Criminal Investigations who conducted

investigations and MWM wrote a statement in the subsequent criminal case against where the 1st Defendant was the accused person and stated that the suit plot was not hers. MWM stated that the plot was not hers.

6. When cross-examined on the signatures on the verifying affidavit and her statement, she stated that she normally thumbprints.

7. She also stated that the 2nd Defendant is the one who demolished her house and is the one in possession of her plot and that when she reported to the chief, the chief told her that the matter was in court.

8. When re-examined; she stated that she is the one who has brought the claim to court but her advocates prepared the court documents on her behalf.

9. PW2; Simon Njuguna Njoroge testified on 23rd March 2021. He adopted his witness statements dated 10th November 2010 and 11th January 2011 as part of his evidence. He told the court that he is the chairman of Kamiti Farmers Company from 2004. He stated that Dedan Kaburungo bought a half acre plot from the company and he was issued with a share certificate and his name was placed in the register. He later fell ill and passed on.

10. He stated that his wife obtained a grant and went to the company offices to follow up on the plot and she was issued with a letter confirming that Dedan Kageni Kaburungo was owner of the plot but she has not been issued with a title as it appears that someone else was registered as the owner of the plot No.117/33 yet it belongs to Dedan Kaburungo thus MW has never owned it.

11. When cross-examined, he stated that he has confirmation that he is the chairman of Kamiti Farmers Company since 2004 but it is not in court. He also stated that shareholders would get four (4) plots each but Dedan Kaburungo bought one plot as he was not a shareholder. He further stated that he got the share certificate issued to Dedan Kageni from the company and that the register shows the plot he was allocated but that record is with the company lawyer.

12. When referred to his statement dated 11th January 2011 where he stated, "there were directors who wanted to eject us out of office..." his answer was that the directors worked as a team. He also stated that she knew MWM as she was a shareholder of Kamiti Farmers Company Limited but he does not know how she was registered of as owner since the plot was bought by Dedan Kaburungo.

13. When referred to the replying affidavit of the Michael Chege, he stated that he knew Michael Chege as a director of Kamiti Farmers Company Limited but does not agree with his averment that, "Allotment to Dedan Kageni was by mistake.."

14. When re-examined, he stated that Michael Chege is not witness in this case and that he has already resigned as chairman.

15. PW3; Daniel Nderitu Githinji adopted his witness statement dated 21st January 2011. When cross-examined, he stated that he was a director of Kamiti Farmers Company Limited from 7th February 2004 to 2011 when a dispute was filed in court with respect to the directorship.

16. He stated that plot No.117/33 belonged to Dedan Kageni Kaburungo by the time he became a director thus he was not there at the time of purchase. She also stated that she knew MWM who was a shareholder but he could not recall the plots she was allocated. He stated that she denied any knowledge of the title allocated to her in respect of the suit property in the presence of the chief and when she was still of sound mind.

17. PW4; Margaret Muthoni Kanake a former Assistant Commissioner of Lands testified on 2nd June 2021. She adopted her witness statement dated 17th March 2011 as part of her evidence in this case.

18. When cross-examined, she stated that she retired in 2013 as Assistant Commissioner of Lands. She stated that even though there was a power struggle with the directors of Kamiti farmers, there were no two groups of directors at a time and that there were no competing lists of owners as only one list was issued but she realized one Rose Wanjiru Karanja had collected the lease in respect of the suit property and she reported to Directorate of Criminal Investigations who put in a restriction so that buyers would be cautioned.

19. When re-examined, she stated that the restriction placed by police was to warn buyers that there was a problem.

The 2nd Defendant's Evidence

20. DW1; Dinah Katema testified on 2nd June 2021. She told the court that she was the 2nd Defendant's legal counsel. She adopted her witness statement dated 16th June 2016. She stated that there was no relationship between the Plaintiff and the 2nd Defendant as the registered owner of the suit property was MWM. She added that the 2nd Defendant conducted due diligence and established that there was an encumbrance on the title as a restriction had been placed by the Directorate of Criminal Investigations.

21. She further stated that the 2nd Defendant approached MWM through her daughters who had a court order to act on her behalf and through H. Kago Advocates who represented the sellers, the restriction by Directorate of Criminal Investigations was lifted and the buyers were notified. They confirmed that it was lifted by undertaking a second search on the title.

22. The 2nd Defendant then purchased the property and a Transfer was effected in its favour though the first transfer had been rejected on grounds that the guardians had no power to sell the property. She further stated that H. Kago, the vendor's advocate went back to court and

obtained a clarification that the guardians could sell the suit property. The second transfer was successful.

23. When cross-examined; she stated that the sale agreement was entered into on 3rd June 2015 and that at the time, the guardians had no authority to sell as they had only the order dated 22nd December 2014 and the order to sell was issued on 9th December 2015. She also stated that there is a petrol station erected on the suit property and that the 2nd Defendant was an innocent purchaser for value as it was not aware of the Plaintiff's claim and it conducted its due diligence.

24. At the close of the evidence parties tendered written submissions.

The Plaintiff's Submissions

25. The Plaintiff's submissions are dated 16th June 2021. Counsel for the Plaintiff submitted that the following issues arose for determination:-

a) Did the Plaintiff's husband acquire the suit property from Kamiti farmers LTD in the year 2000?

b) Is the 2nd Defendant an innocent purchaser for value without notice?

c) Has the Plaintiff demonstrated that she is the widow and beneficiary of the Estate of Dedan Kageni Kaburungo and as such is she entitled to the prayers sought in her plaint?

d) Who should bear the costs of this suit?

26. Counsel for the plaintiff submitted that the plaintiff had led evidence to show that her late husband; Dedan Kageni Kaburungo acquired the suit property from Kamiti Farmers Company Limited in the year 2010. He cited PW2 and PW3's evidence which demonstrated that a clearance letter was sent to the commissioner of lands stating the ballot number, share certificate number, parcel number, the area of the land and even the map sheet number but the only reason Dedan Kaburungo was not registered according to PW4'S testimony was that there was an unclear registration in the name of the 1st Defendant.

27. Counsel also submitted that the 2nd Defendant is not an innocent purchaser for value because it had a duty to probe the title held by the 1st Defendant and find out that it was acquired lawfully.

28. He added that DW 1 told the court that a search on the title revealed that there was a restriction registered by the Director of criminal investigation and that finding should have prompted the 2nd Defendant to probe further.

29. He further submitted that DW1'S testimony that it entered into a sale agreement with guardians of the MWM before the guardians obtained an order to sell the suit property could be construed that the circumstances under which the 2nd Defendant acquired the suit property were fraudulent and fraught with illegalities and the 2nd Defendant was aware of those circumstances.

30. He submitted that the 2nd Defendant's title is impeachable under Section 26 of the Land Registration Act. He cited the case of **Esther Ndegi Njiru & Another v Leonard Gatei [2014] eKLR** where the court held that; "**Whereas the law respects and upholds sanctity of title, the law also provides for situations when title shall not be absolute and indefeasible**".

31. He also submitted that the court should investigate the root of the 2nd Defendant's title and make a finding that the 2nd Defendant could not have acquired a better title than the one held by the person who sold it to them. He relied on the case of **Marion Wanjiru Njoroge v Margaret Wambui Njau & 6 Others [2006] e KLR** and the case of **Hubert L. Martin & amp; 2 others v Margaret J. Kamar & amp; 5 Others [2016] e KLR**. He added that the death certificate and letters of administration of the estate of Dedan Kageni Kaburungo is sufficient proof that the Plaintiffs the widow and beneficiary of the aforementioned estate.

The 2nd Defendant's submissions.

32. They are dated 27th July 2021. Counsel submitted that the following issues arose for determination:

a) Whether the Plaintiff has established her case on a balance of probabilities?

b) Whether the 2nd Defendant is an innocent purchaser for value?

c) What orders are deserving in the present matter?

33. On the issue whether the Plaintiff has established her case, counsel submitted that to challenge sanctity of title, the Plaintiff was required to meet the threshold in Section 26(1) of the land Registration Act No.3 of 2012 but her evidence was lacking and it is therefore not enough to challenge the title issued to the 2nd Defendant.

34. He submitted that there were wrangles amongst the leadership of Kamiti Farmers Company Limited which might have ultimately led to the rise of conflicting interests but there is no evidence to prove which faction had the legitimate authority to undertake subdivision and

titling and further no evidence that any Defendant took part in the fraud alleged.

35. He further submitted that even though PW2 and PW3 told the court that they were officials of Kamiti Farmers Company Limited, they did not produce any evidence to prove that allegation. He added that given that PW2 admitted that there were factions within the leadership of Kamiti Farmers Company Limited which claimed authority to undertake the titling process, it was important to show that they were legitimate officials. He added that this court was faced with the question leadership of Kamiti Farmers Company limited in **Gatei wa Nganda v Kamiti Farmers Company Limited & 4 others [2019] e KLR** and it had made an inference that Simon Mbugua Njuguna; PW2 herein was not an official of Kamiti Farmers Company limited, it was crucial that PW2 and PW3 established whether they were officials.

36. He also submitted that the Plaintiff ought to have availed the register of members that was submitted to the ministry of lands for the purpose of titling since there could have been a conflicting register bearing the name of MWM, survey maps drawn upon the instructions of the company to demonstrate that what used to be plot 40 which was allegedly balloted to the plaintiff's husband is the same as the suit property.

37. He submitted that the Plaintiff failed to establish the nexus between plot No.40 and the suit property Nairobi /Block117/133 balloted by the late Dedan Kageni Kaburungo(deceased).

38. He submitted that the 2nd Defendant went to great lengths to ensure that not only was the transaction above board and the title valid, but also the law was sufficiently followed.

39. On the issue whether the 2nd Defendant is an innocent purchaser for value, he submitted that the 2nd Defendant had met the criteria of a bona fide purchaser pronounced in **Katende v Harider & Company Limited** cited in **Lawrence Mukiri v Attorney General & 4 Others [2013] e KLR** therefore it qualifies for the protection accorded to a bona fide purchaser for value without notice as set out in **Shimoni Resort v Registrar of Titles & 5 others [2016] e KLR**.

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

(i) Whether the Plaintiff has established ownership of the suit property.

(ii) Whether the title issued to the 2nd Defendant was obtained lawfully and procedurally.

(iii) Whether the 2nd Defendant is an innocent purchaser for value without notice.

(iv) Is the Plaintiff entitled to the reliefs sought?

(v) Who should bear costs of this suit?

41. It is the Plaintiff's case that her late husband Dedan Kageni Kaburungo brought the suit property from Kamiti Farmers Company Limited. She produced the share certificate as exhibit P3a and the ballot as exhibit P3b as exhibit in this case. She also produced a letter dated 9th June 2010 from Kamiti Farmers Company Limited confirming that Dedan Kageni Kaburungo had been allocated Plot No 117/33. She told the court she put up a house on the suit property but the same was demolished by the 1st Defendant. she made a report to the chief who wrote a letter. She produced it as exhibit P4. She later made a report to the Directorate of Criminal Investigations who recorded a statement from MWM. She also reported the matter to Kamiti Farmers Company Limited as per the letter produced as exhibit P6.

42. PW2, Simon Njuguna Njoroge the Chairman of the company told the court Dedan Kageni Kaburungo bought a half an acre plot from the company and he was given a share certificate. His name was placed in the register. He told the court that MWM had not been allocated Plot No 117/33. When he was cross examined by the 2nd Defendant's counsel he stated that he did not have any proof in court that he was the Chairman of the company. He also told the court that Dedan Kageni Kaburungo bought one plot as he was not a shareholder of the company. He was issued with a share certificate. He admitted that the register would confirm who was allocated which plot but he did not have the said register in court. He said it was with the company lawyer. He also admitted that there were wrangles amongst the directors at the time.

43. He confirmed that Michael Chege was a director of the company. The said Michael Chege had sworn an affidavit earlier that the allocation to Dedan Kageni Kaburungo was a mistake. PW2 stated that he did not agree with that position but the averments were made by a director of the company. PW1 confirmed that MWM was a shareholder of the company and each shareholder was to get four (4) Plots.

44. PW3, Daniel Nderitu Githinji said he was a director of the company from 2004 until 2011 when a dispute as to directorship was taken to court. He stated that the dispute was as to who were the genuine directors of the company. He stated that David Kageni bought the plot from the company before he became a director. He also confirmed that MWM was a shareholder of the company though he could not tell which parcel were allocated to her. He also confirmed that MW was issued with a title deed for the suit property but it was collected by someone else. He claimed MW disowned the suit property in his presence. There is however an affidavit in court to show that MW was mentally ill. He said MW was accompanied by her son.

45. PW4, Margaret Muthoni Kanake an Assistant Commissioner of Lands told the court that the list she got from the company showed David Kageni had been allocated he suit property. She admitted on cross examination that the same plot had been allocated to MW. She also admitted that at the time there were issues as regards directorship of the company. She also admitted that other people other than the true

owners had been given land. She confirmed there was a power struggle amongst the directors.

46. It was her evidence that someone by the name Rose Wanjiru Karanja collected the lease that had been issued to MW and that she wrote to the company to explain who Rose Wanjiru Karanja was. She further stated that she did not register an inhibition on the said title but kept the file under lock and key. She also stated that a restriction was placed by the Directorate of Criminal Investigations but no caveat was registered.

47. From the foregoing, it was clear that MWM was a shareholder of the company and was entitled to four plots. PW2, PW3 and PW4 could not tell the court which parcel had been allocated to her. David Kageni Kaburungo was not a shareholder.

48. It is alleged he bought one plot and was issued with a share certificate. No sale agreement was produced in court to confirm that he bought the said plot. No register of all members was produced before court to show who had been allocated which plot. There were wrangles amongst the directors of the company which dispute ended up in court. PW2 and PW3 though they claim David Kageni had been allocated the plot, could not prove the same. In the absence of the register I find that the Plaintiff has failed to establish that her late husband was the owner of the Plot No 117/33 ("the suit property") she therefore cannot claim the same.

49. DW2 Dinah Katema, told the court she was the legal counsel of the 2nd Defendant at the time of the transaction. She told the court that the registered owner of the suit property was MWM. That the 2nd Defendant did due diligence and noted that a restriction had been placed by the Directorate of Criminal Investigations. The 2nd Defendant dealt with the daughters of MWM who were her guardians. The said guardians, MW and MMM had approached the court as their mother was of unsound mind. Under Section 27 of the Mental Health Act, a Manager appointed under the Act, cannot transfer a property by sale without special permission of the court. It is the 2nd Defendant's case that it was H. Kago Advocates who were acting for the vendor in the transaction got this permission. The orders issued on 9th February 2015 enabled the guardians of MWM to execute the sale agreement. The sale agreement between them and the 2nd Defendant is dated 3rd June 2015. It is also the 2nd Defendant's case that the transfer in its favour could not be registered at first because the restriction placed on the title by the Directorate of Criminal Investigations. The said restriction was later lifted and the transfer in favour of the 2nd Defendant was effected and registered. It is the 2nd Defendant's case that it is in possession of the suit property and there is a petrol station on site. That it did due diligence before buying and did not encounter the Plaintiffs claim through registration.

50. Section 26 (1) of the Land Registration Act 2012 provides that:-

“(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.”

I find that the Plaintiff has not placed any material before this court to challenge the title issued to the 2nd Defendant. The 2nd Defendant have demonstrated what steps they took in the acquisition of the suit property. The Plaintiff has failed to establish any fraud or misrepresentation, or that the certificate of title was acquired illegally or through corrupt scheme.

51. According to **Black's Law Dictionary 10th Edition**:- Fraud is defined as:-

“Fraud consists of some deceitful practice or willful device, resorted to with interest 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, as applied to contracts, is the cause of one error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to one party or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of guilty, properly includes all acts, omissions and concealments which involve breach of legal or equitable duty, trust or confidence firstly reposed, and are injurious to another, or by which an evidence and unconscientious advantage is taken of another”.

I agree with counsel for the 2nd Defendant's submission that there were wrangles amongst the directors of the company which might have led to conflicting interests. Further that no evidence was led to prove which faction had the legitimate authority to undertake subdivision and titling and further that no evidence was led to show that the 2nd Defendant was part of any fraud. Allegations of fraud must be pleaded and must be proved. I find that the title held by the 2nd Defendant was issued lawfully and procedurally without any taint of illegality.

52. On the other limb I find that the 2nd Defendant is an innocent purchaser for value without notice of the Plaintiff's claim. PW4, retired Assistant Commissioner of Lands confirms that there was no caveat registered against the title. That there was only restriction placed by the Directorate of Criminal Investigations. The 2nd Defendant has demonstrated the steps that were undertaken to remove the said restriction. In the case of **Lawrence Mukiri vs Attorney General & 4 Others [2013] eKLR** the Court relied on the Uganda case of **Katende vs Haridar & Company Limited** which pronounced what amounts to a *bonafide* purchaser for value:-

“.....a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:-

- (i) he holds a certificate of title;*
- (ii) he purchased the property in good faith;*
- (iii) he had no knowledge of the fraud;*
- (iv) the vendors had apparent valid title;*
- (v) he purchased without notice of any fraud;*
- (vi) he was not party to any fraud”.*

I agree with the 2nd Defendant’s counsel submissions that the 2nd Defendant undertook the purchase of the suit property lawfully, in good faith and without notice of any fraud.

53. Similarly, in the case of **Shimoni Resort vs Registrar of Titles & 5 Others [2016] eKLR** it was held that:-

“Section 26(1) (a) and (b) of the Land Registration Act, 2012 was enacted after the promulgation of the Constitution 2010, and clearly provided the title of a bona fide purchaser cannot be impugned unless the title holder is proved to have been a party to the fraud or misrepresentation that led to the registration of the title. In my view, the most appropriate interpretation of Article 40(6) of the Constitution would be that it would apply to a defrauder and there would be no intention to deprive an innocent buyer of his property. Thus Article 40(6) of the Constitution in my considered opinion would only apply to registered owners who are found to have acquired the properties unlawfully. It is such a property that would not be protected under Article 40 of the Constitution. He property in the hands of a bonafide purchase would be protected even if it is shown that at some point in the past before the bona fide purchaser acquired the property the same had been fraudulently transacted.”

54. The upshot of the matter is that the Plaintiff has failed to prove her case on a balance of probabilities as against the Defendants. She is not entitled to the reliefs sought.

55. Accordingly, the Plaintiff’s suit is dismissed with costs to the 2nd Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 25TH DAY OF NOVEMBER 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kingori for Mr. Kimani for the Plaintiff

Mr. Mwango for Mr. Sisule for the 2nd Defendant

No appearance for the 1st and 3rd Defendants.

Steve - Court Assistant