



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 320 OF 2011

JOHN ELIAS KIRIMI.....PLAINTIFF

VERSUS

MARTIN MAINA NDERITU.....1ST DEFENDANT

NAIROBI CITY COUNCIL.....2ND DEFENDANT

MARGARET WANJIRU NGARACHU.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

JUDGEMENT

1. By an Amended Plaintiff dated 2/10/2013, the Plaintiff filed a suit seeking for the following orders:-
 - a) *A declaration that the purported issuance of a lease by the 2nd Defendant to the 1st Defendant is illegal, null and void ab initio.*
 - b) *A declaration that the lease initially held by the 1st Defendant over L.R. No. Nairobi/Block 83/14/504 is illegal, null, void, incapable of conferring any proprietary interests to any party and therefore incapable of transfer to any other party including the 3rd Defendant.*
 - c) *A declaration that the purported transfer by the 1st Defendant to the 3rd Defendant in respect of LR No. Nairobi/Block83/14/504 dated 24/09/2009 is illegal, null and void ab initio.*
 - d) *A declaration that the Plaintiff John Elias Kirimi is the lawful and legal proprietor of LR No. Nairobi/ Block 83/14/504 to the exclusion of any other person.*
 - e) *An order of permanent injunction restraining the 3rd Defendant whether by herself, her servants, agents and/or employees from ingressing, trespassing, carrying on any construction or erecting structures, carrying out any operations and/or activities of any nature or doing any such nature of things whatsoever on the Plaintiffs parcel of land known as Nairobi Block 83/14/504 situated in umoja innercore.*

f) An order compelling the 3rd Defendant to vacate from L.R No. Nairobi/Block 83/14/504 forthwith and in default thereof an eviction order to issue.

g) An order directed to the 4th Defendant to forthwith cancel and expunge all references in the register relating to the 3rd Defendant in respect of LR No. Nairobi/Block 83/14/504.

h) Costs of this suit.

EVIDENCE

Plaintiff's case

2. PW1- John Elias Karimi: When the case came up for hearing, the plaintiff reiterated the averments contained in his plaint and produced the documents contained in his list of documents filed on 29/06/2011 being the first list of documents, 17/09/2020 being the supplementary list of documents and 9/11/2020 being the further supplementary list of documents. 19th May, 2016 as JEK Exh 2 all in one bundle. He also relied on his witness statement recorded and filed in court on 22/09/2020.

3. Upon being cross examined by counsel for the 2nd, 3rd and 5th defendants, he stated that he was not the one who was allocated the property in 1978 but one Kariuki Wainaina Wakagwe who then transferred the land to Grace who in turn sold it to the Plaintiff. He indicated that he had never paid any rates neither has he received any demand note from the Nairobi City Council who is the 2nd Defendant. He stated that any time he went to pay rates the 2nd Defendant never gave him any information but instead put road blocks to prevent him from paying.

4. He acknowledged that the 2nd defendant gave him a lease in 1999 (JEK Exh 2(First Bundle of Documents) but maintained that there was fraud in issuance of a lease and registration of the suit property in the names of the 1st Defendant perpetuated by the office of the Nairobi City Council (2nd Defendant).

5. He however did not file any complaint with the Police since when he went to the Ministry of Lands the Registrar clarified that the suit property was registered in his name. Further he avers that he complained to the City Council and he was never asked to surrender his registration documents.

6. When he raised the issue of double registration of the suit property he asked Nairobi City Council to clarify but he avers that Nairobi City Council only wrote to this advocate asking that they should be given time to investigate.

7. He also produced in his bundle of documents an agreement dated 20/05/1991 between Nairobi City Council and Mr. Kariuki Wainaina Wakagwe who was the original allottee of the land in question. Further he produced the allotment dated 31/08/78 to Kariuki Wainaina and subsequently to Grace who sold it to the Plaintiff.

8. Upon being cross examined by counsel for the 3rd defendant, he stated that he has never paid any rates due to the road blocks and that the City Council has never sent him any letter demanding for rates. Further that the City Council has no right to revoke his title.

9. In re-examination, the plaintiff reiterated that he has never received any document for rates from the 2nd Defendant. Further that since the Registrar had confirmed his ownership of the suit property the letter that was sent from the Registrar's office to Nairobi City Council sought to know who was the genuine owner of the suit property.

10. PW 2- Gildine Karani: Upon being cross examined by counsel for the 2nd, 3rd and 5th defendants the Registrar confirmed that she had the records from the office and these were authentic. She further averred that from her records they had the Plaintiff as the registered owner of the suit property. She never

produced any copies but stated that the files were being digitalized and the particulars being entered in the new system.

11. She stated that the 2nd Defendant wrote a letter on 4/05/2010 from the District Land Registrar Nairobi and from the letter the author seems to be suggesting that there are two titles to the suit property. Further that where there is a challenge on ownership the Registrar usually relies on the Nairobi City Council to confirm real ownership.

12. She however testified that she did not have a copy of an official search but she cast doubt on a copy of official search referred to by the Counsel for 3rd Defendant and stated that she needed to confirm the Genuity of the search document the Counsel was referring to.

13. When cross-examined by the Counsel for the 5th Defendant she reiterated that the Ministry of Lands relied on the 2nd Defendant whenever they came across cases of double registration. At the same time she stated that the Nairobi City Council wrote to the Ministry of Lands on 5/05/2010 stating that the owner of the suit property was Martin Maina Nderitu but the office did not act on the same since the records in the office show the owner as the leasee of 11/05/1999 who is the Plaintiff. She concluded by stating that when they find a double situation they normally consider the first title as usually the one to carry the day.

14. In re-examination PW2 stated the system of digitalization which was ongoing had been updated and the rightful owner of the suit property is John Elias Kirimi. She also reiterated that in practice because there are many double allocations they assume that the 1st Registration is the rightful owner and so it supersedes 2nd Registration.

15. P.W.2, Gildine Karani (had testified before PW1 since they had other engagements) Assistant Land Registrar attached to Ardhi House at Chief Land Registrar, produced the title and copy of lease. In her evidence she produced the certificate of lease and stated that it is the first document presented before the Registrar for registration. She produced the County Council Lease dated 11/05/1999 registered in the name of John Elias Karimi of P.O. Box 59800 Nairobi. (Plaintiff).

16. She stated that upon registering a lease the proprietor is issued with certificate of lease and the lessor in the document she produced was Nairobi City Council. The Lease she produced was for 99 years from 1/04/78 less three days and the lease she produced was registered in the name of the Plaintiff she averred.

17. The Registrar further stated that from the records she had there is was no any other certificate of lease because what she produced is what she found on record. She produced this as JEK Exhibit 2 containing Certificate of Lease and The Lease.

The Defence case

18. When the case came up for Defence hearing the 3rd Defendant relied on their defence dated 16/06/2015, her witness statement dated 18/06/2015 and her list of documents dated 7/07/2015 and her supplementary list of documents dated 20/09/2021. She called one witness, her mother and attorney through the power of attorney registered on 5/08/2011.

19. DW1- Grace Gacambi Ngarachu: The 3rd defendant informed the court that she asked here advocate to conduct a search and confirm ownership of the suit property. When this was done she got to know that there was a dispute they however paid a deposit and when the title was brought to them they paid the balance. She avers that they did all the due diligence and Martin who is the 1st Defendant gave the all the documents. They paid Martin Kesh 550,000 as a down payment and later paid the whole Kesh 1 million.

20. The DW 1 testified that they have built a flat on the land since they finalized the process and obtained the approval of City Council for the construction.

21. Upon being cross examined by counsel for the plaintiff, she stated that she bought the suit property

from Martin Maina Nderitu the 1st Defendant. She stated that she has not filed any claim against 1st Defendant because she was satisfied with their transaction. She stated that they paid 1st Defendant in full though they did it in instalments. They also paid for stamp duty of Kesh 40,000 and then Kesh 35,000. On the transfer document it shows that they paid Kesh 1 million in total.

22. She averred that a Counsel by the name Mr Mungala is the one who signed the documents of transfer and that she was not aware who the lawyer worked for but that the 1st Defendant had said that he had a lawyer they both could use. She was not aware that the lawyer worked for the Nairobi City Council. She stated that she was aware there was a dispute concerning the suit property and that there was someone else claiming the land.

23. In re-examination, she stated that in the letter she was referring to was signed by the Town Clerk Mr. Godfrey Mate and not Mr Mungala as she had earlier testified about a Counsel who acted for both of them. Her prayer was that the case against the 3rd Defendant be dismissed.

24. She informed the court that she has paid all her rates and KRA every rates every month and any taxes she is required to pay.

25. The 1st and 2nd closed their case without calling any witness.

SUBMISSIONS

26. At close of hearing, parties to the suit filed submissions which I have read and considered. I find the sole issue for the court's determination to be whether the plaintiff has made up a case for being granted the orders sought or any of them.

27. With regard to that question, reference is made to the document produced as Pexbt 27 in which the 1st defendant states that the lease registered by the 2nd defendant did not originate from its offices. In other words was a forgery and on account of that fact, submitted that the 3rd defendant did not acquire a good title to the suit property. In support of that contention, reference is made to the case of **Arthi Highway Developers Ltd v. West End Butcheries Limited & 6 others (2015)e KLR** where the Court of Appeal *inter alia* stated:-

“66. We have found already, on evaluation of the recorded evidence, that fraud was committed both at the registry of companies as well as the Lands office. The consequence is that West End did not divest its registered interest in the disputed land which was not an equitable one. It was the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. The trial court held, following previous court decisions, that an innocent holder of legal Title to land cannot be dispossessed of that interest by a fraudster, and that Section 23 protects “Title issued to a purchaser upon the transfer or transmission by the proprietor thereof”. Those decisions are the Alberta Mae Gacie case (supra) and the Iqbal Singh Rai case (supra) which emanated from the High Court. With respect, we are persuaded by the reasoning in those cases as it accords with the law.

Furthermore, the protection accorded by law in the event of fraud, is to a “bona fide purchaser without notice” and even then, only against equitable interests. We have seen the definition of “bona fide purchaser” from Black’s Law Dictionary and from the Katende case (supra). The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. Snell’s Principles of Equity (supra) illustrate the issue, thus:-

“An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.

The doctrine. A legal right is enforceable against any person who takes the property; whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B's right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser's conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails."

It is also stated therein that "the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests". So that, even if the issue of bona fide purchaser arose in this matter which, in our finding, it did not, we are not satisfied that the evidence tendered by Arthi supports a credible finding that it was a bona fide purchaser of the disputed land.

It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.

The upshot is that the decision of the trial court was right in principle and correct in law and we uphold it. We also uphold the various orders issued by that court."

28. Although the plaintiff complained about the unlawful dealings with the suit property, the 2nd defendant carried investigations but never informed the Plaintiff of its findings.

29. Based on the decision in the case of **R.G Patel vs. Lalji Makani** cited in the case of **Gladys Wanjiru Ngacha vs. Theresa Chepsaat & 4 Others (2013)e KLR** where the Court of Appeal held that allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than a mere balance of probabilities is required and that it is not enough for the appellant to have pleaded fraud. The Plaintiff ought to have tendered evidence that proved the particulars of fraud it is reiterated that the plaintiff has not proved the pleaded fraud against the 1st and the 2nd defendant either to the required standard of law or at all.

30. On whether the 3rd defendant acquired a good title to the suit property, because of the evidence adduced in this case to the effect that the lease used to register the suit property did not originate from the 1st defendant, it is submitted that the 3rd defendant did acquire a good title to the suit property.

31. In his submissions, the 3rd defendant points on the basis of the due diligence they conducted in respect of the suit property, which showed that the seller was indeed the registered proprietor of the suit property, the 3rd defendant purchased the suit property for valuable consideration.

32. Arguing that they did what they were required to do before purchasing the suit property, which is to search the register of the suit property, the 3rd defendant points out that the search revealed that the seller was the registered proprietor of the suit property and that their title was not encumbered.

33. They contend no evidence of wrongdoing was adduced against the 3rd defendant who gave cogent evidence in support of her claim that she is the holder of a lawful certificate of lease.

34. It is contended that apart from the registrar showing the plaintiff in entitlement to the suit property as the registered proprietor of the suit property, there is no other register showing the plaintiff as the registered proprietor of the suit property.

35. Maintaining that she is an innocent purchaser for value without notice of the 3rd defendant's interest,

if any in the suit property, the 3rd defendant submits that the plaintiff claim, if any, lies elsewhere, not getting the suit property which already lawfully vests in her.

36. Issues for determination.

a. Who is the bona fide owner of the suit property?

b. Who should bear the costs of the suit?

Analysis and Determination

a. Who is the bona fide owner of the suit property?

37. The bone of contention in this matter revolves around double allocation and duplicity of titles. The Plaintiff has a title to the suit land, so does the 1st Defendant. The question to determine therefore is not who the registered owner of the suit land is, but which title should be impeached.

38. The Land registrar is the custodian of Land records and any enquiry as to the validity or ownership of any land reference is usually approved by the Land Registrar and or his representatives. The Assistant Chief Land Registrar has taken the position that there is a county council lease registered in the Plaintiff's name on 11/05/1999 and also stated that there were two titles in respect to the suit property. The second title was issued on 02/05/2002.

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

“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.”

40. In the case of **Joseph Arap Ng'ok vs Justice Moiyo Ole Keiwua [1997] eKLR** the Court of Appeal stated thus:

“It is trite law that such title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of the title document pursuant to the provisions of the Act under which the property is held”.

41. In the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009**, the Court of Appeal held 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 would not be noted in the register’.

42. The Plaintiff has submitted that he did not comply with the conditions set out to crystalize his interest on the suit property even though he went through the requisite legal process to obtain ownership of the same. He alleges that he did not pay for the rents and rates as he never received any rates demand from

the 2nd Defendant.

43. Additionally, it is trite law that allegations of fraud must be proved. In the case of **Benson Wandera Okuku vs Israel Were Wakho (2020) eKLR** the courts stated as follows: -

“15. And what about the standard of proof? The Plaintiff said he has proved the case on a balance of probability. Is that the standard required in law? Certainly NOT. The law has been clear along. In RG Patel vs Lalji Makanji (1957) EA 314 the court expressed itself as follows: -

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

“16. In Jennifer Nyambura Kamau vs Hampherey Nandi (2013) eKLR, the court of appeal sitting at Nyeri emphasized that fraud must be proved as a fact by evidence, and, more importantly that standard of proof is beyond a balance of probabilities. This is the same position found in Koinange & 13 Others vs Nyati (1984) EA 425, Gudka vs Dodhia CA No 21 of 1980 and Richard Ekwesera Onditi vs Kenya Commercial Finance Co. Ltd: CA No 329 of 2009, Nairobi”.

44. The Plaintiff did not adduce any evidence in respect of the allegations of fraud levelled against the Defendants. He who alleges must proof. Evidence of fraud must be proved beyond a balance of probabilities.

45. In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR** Tunoi JA stated that: -

“It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts”

46. I find that the Plaintiff has failed to discharge his burden of proving fraud on the part of the Defendants. He has also failed to prove collusion between the 1st and 2nd Defendant.

47. I find that in the absence of proof of fraud on the part of the Defendants, the Plaintiff cannot be said to have succeeded in his claim. I find that his right was extinguished when he failed to comply with the conditions set out in the letter of offer. I find that he has failed to prove his case as against the Defendants on a balance of probabilities. He is not entitled to the reliefs sought in the amended plaint. The suit is dismissed with costs to the Defendants.

b. Who should bear the costs of the suit?

48. Costs generally abide the outcome of the suit. See **Judicial Hints on Civil Procedure, 2nd Edition** by Justice Kuloba (as he then was), where “event” is taken to mean the result of all the proceedings incidental to the litigation and **Section 27 of the Civil Procedure Act** which also provides that the generally accepted principle is that costs follow the event.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF DECEMBER, 2021.

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MOGENI J.

JUDGE

IN THE PRESENCE OF

MR. B. KAREMI HOLDING BRIEF FOR MR. KAMANDE FOR THE PLAINTIFF

MR. OCHIENG B FOR THE 2ND DEFENDANT

MS NGARACHU THE 3RD DEFENDANT IN PERSON

NO APPEARANCE FOR THE 4TH DEFENDANT

VINCENT OWUOR COURT ASSISTANT