



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC 47 OF 2017

GABRIEL MACHARIA NJOROGE - PLAINTIFF

VS

LAND REGISTRAR, MURANGA - 1ST DEFENDANT

TIRUS NYINGI NGAHU - 2ND RESPONDENT

JUDGMENT

1. The Plaintiff sued the Defendants as the administrator of the estate of the late Angelo Kanyuanjohi Macharia, the registered owner of the land parcel No LOC9/KIRURI/459 (original suit land) and the father of the Plaintiff. In 1989 the Plaintiff's father attempted to subdivide the suit land in to 3 portions but the process was not completed. The Plaintiff avers that in 1989 he used the original title to secure a loan in the sum of Kshs 200,000/- from Barclays Bank Limited.
2. His case is anchored on fraud. That the 2nd Defendant fraudulently subdivided the original suit land and registered himself as owner of one of the resultant titles for LOC9/KIRURI/1262 (suit land) without the estate of his father being succeeded nor discharging the charge.
3. The particulars of fraud are pleaded under para 8 of the Plaintiff.
4. In his amended Plaintiff filed on the 29/6/16 the Plaintiff's claim is for cancellation of any fraudulent transfer or entries in the register in respect of LOC9/KIRURI/459 and the land to revert to his father to enable the Plaintiff file a succession cause.
5. The 1st Defendant denied the Plaintiff's claim as well as the particulars of fraud.
6. In its amended statement of defence filed on the 3/11/16 the 2nd Defendant denied the Plaintiffs claim and in specific, the particulars of fraud as set out in para 8 of the Plaintiff. He contends that by the time the Plaintiff's father died in 1992 land parcel LOC9/KIRURI/459 had been subdivided into three portions to wit parcel No LOC9/KIRURI/1260, 1261 and 1262. That he purchased parcel No 1262 from Geoffrey Gachathi for a sum of Kshs 2.4 million.
7. Further he disclosed to the Court that the Plaintiff had filed a similar suit which is pending in the lower Court to wit SPMCC No 118 of 2010 and that the presence of this suit is an abuse of the process of the Court on account of resjudicata.
8. The Plaintiff led evidence and relied on his witness statement filed on the 27/10/14 as his evidence in chief. He stated that he is the legal representative of the estate of his late father Angelo Kanyuanjohi Macharia. That his father guaranteed him a loan which he secured from Barclays Bank Limited. The security was the original suit land. That he defaulted in payment and his father turned to the Plaintiffs cousin Anthony Githere to help repay the loan. In return his father allowed Githere to harvest the trees and tea bushes on the land so as to repay himself. That his cousin fell sick and died in 2000. It was his evidence that sometime in 2005 he got information that the original title had been subdivided into 3 portions and made inquiries at the lands office although he was informed that the green card was missing. That he reported the matter to the police whereupon investigations were carried out by the Directorate of Criminal Investigations and finally he was advised to file suit in Court. That no one was charged with any offence. That in 2010 his Advocate received a letter from the bank confirming that it was still holding the original title to parcel LOC9/KIRURI/459. That the title was yet to be discharged although the loan had been repaid.
9. In cross examination, he stated that his father died in 1992. That parcel LOC9/KIRURI/1262 was a subdivision of parcel LOC9/KIRURI/459. That it is his cousin Antony Githere who subdivided the original suit land without the knowledge and consent of his father. That the bank has not discharged the title.

10. PW2 – PC Kipsang Kirwa – a police officer then attached to Nyahururu Police Station informed the Court that he investigated the complaint in respect to fraud as raised by the Plaintiff. He presented the report and stated that his recommendations were that the Plaintiff should file suit for a civil remedy. That no charges were preferred against anyone, least of all, the Defendants. He stated that the subdivisions carried out by the Plaintiff’s cousin Anthony Githere Kirubi while the title was charged to the bank. That it was confirmed by the family of the Plaintiff that the late Anthony Githere cleared the outstanding loan in respect to the title.

11. DW1- Alice Gisemba, the Land Registrar Muranga stated that the subdivision of parcel LOC9/KIRURI/459 yielded three titles; LOC9/KIRURI/1260, 1261 and 1262. That currently LOC9/KIRURI/1262 is registered in the name of the 2nd Defendant. She produced the documents marked as DEX 1-10. She explained to the Court that the green card for parcel LOC9/KIRURI/459 was missing in the registry albeit efforts to trace the documents. That according to her records in the registry the Plaintiffs father completed the subdivision of the land in 1992 after which the title was closed and the resultant 3 titles were registered. That in 2008 the 2nd Defendant acquired the land after many other buyers before him.

12. DW2- Tirus Nyingi Ngahu adopted his witness statement filed on the 3/11/16 and informed the Court that he purchased the property in 2008. Prior to entering into agreement, he carried out due diligence which showed the land was registered in the name of George Gachathi. He paid the full purchase price and thereafter the suit land was transferred in his name. That he had no notice of any taint on the title nor third party claims. He took possession and commenced construction of his residence and other developments on the suit land measuring 5 acres. That two years later, the Plaintiff sued him in CMCC No 118 of 2010 at Murang’a. He avers that is when it came to his attention that the Plaintiff had used the original land to secure a loan upon which he defaulted and his father sought help from his nephew, Githere to repay the loan.

13. He informed the Court that he has been sued by the Plaintiff in respect to parcel No LOC9/KIRURI/459 despite being the 6th registered owner of LOC9/KIRURI/1262 having purchased the land from the 5th owner George Gachathi. That he obtained the requisite Land Control Board consent.

14. Parties filed written submission which I have read and considered.

15. Having considered the Pleadings, the evidence adduce at the hearing together with the written submissions of the parties the issues that crystalize for my determination are ; whether the Plaintiff has proved fraud on the part of the Defendants; whether the 2nd Defendant is a bonafide purchaser for value; who meets the costs of the suit.

16. According to the evidence and documents placed before this Court the suit land is a subdivision of parcel LOC9/KIRURI/459 which was registered in the name of Angelo Kanyuanjohi Macharia (deceased) who is the father of the Plaintiff. The subdivisions also yielded parcel Nos LOC9/KIRURI/1260 and 1261 registered in the names of the said Angelo Macharia in 1992. On the 19/5/92 parcel LOC9/KIRURI/1261 became registered in the name of Antony Githere Kanyuanjohi, the Plaintiff’s brother whilst parcel LOC9/KIRURI/1260 is still registered in the name of the Plaintiff’s father. It is the Plaintiff’s case that the said Angelo Macharia died in 1992 while the property was still charged with Barclays Bank. It is the Plaintiffs case that the 2nd Defendant and others through fraud subdivided parcel LOC9/KIRURI/459 and caused it to be registered in his name without his knowledge and that of his family and without the estate of the said Angelo Macharia being succeeded.

17. The 1st Defendant denied the Plaintiffs claim and states that the original land was subdivided first in 1974 and later in 1992 during the lifetime of the owner. It denied fraud.

18. The 2nd Defendants’ case is that by the time the Plaintiffs father died parcel LOC9/KIRURI/459 had been subdivided into parcels LOC9/KIRURI/1260, 1261 and 1262. That he purchased parcel LOC9/KIRURI/1262 from a George Gachathi and paid the purchase price in full with no notice of any third-party claims. That he took possession and has settled on the suit land with his family and even used the land to secure a loan facility with the Parliamentary Service Commission which encumbers the title todate.

19. Section 26 of the Land Registration Act provides two instances in which a title may be impeached; on ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.

20. The Plaintiff’s case is anchored on fraud and the particulars of fraud have been set out in para 8 of the Plaint. In the case of **R. G. Patel v. Lalji Makanji** (citation) the former Court of Appeal for Eastern Africa stated thus:

“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.”

21. In the case of **Ndolo –Vs- Ndolo (2008) 1 KLR (G&F) 742** the Court of appeal stated that:

“.....Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

22. The Plaintiff's invite to revoke title must be backed with solid proof of fraud given the right to property is protected under Article 40 of the Constitution and Section 26 of the Land Registration Act.

23. From the evidence on record parcel LOC9/KIRURI/459 was subdivided into 3 parcels during the lifetime of his father in 1992. The mutation on record shows that the same was registered on the 16/4/1992 and the three titles were registered on the same date in the name of the Plaintiff's father. PW1 informed the Court that his father died on the 10/9/92. The Plaintiff admitted that he defaulted in meeting the loan obligations on the title LOC9/KIRURI/459 forcing his father to seek the help of his cousin Anthony Githere Kirubi who in turn was given the land to farm in return. According to the green card parcel LOC9/KIRURI/1262 was transferred to Antony Kirubi on 19/5/92 during the lifetime of his father. It is on record that the suit land has changed hands severally and the 2nd Defendant is the 6th transferee as at 11/3/2008.

24. There is no evidence that the 2nd Defendant was a party to the subdivision of parcel no LOC9/KIRURI/459 in 1992. It is on record that the first subdivision by the Plaintiff's father in 1974 was not completed. The Plaintiff has admitted in para 9 of this judgement that the original parcel LOC9/KIRURI/459 was subdivided by the late Anthony Githere. If that be the case then he cannot turn around and accuse the 2nd Defendant in particular of subdividing the suit land.

25. In the course of the trial the 1st Defendant filed a list of documents which included the copies of documents from the land registry in respect to parcel LOC9/KIRURI/459 and its subdivisions. The Plaintiff unsuccessfully challenged the admission of the documents and he is being less candid when he claims that the 1st Defendant concealed documents in that respect.

26. PW2 led evidence that upon completion of the investigations he did not find any evidence to support any criminal offense in form of land fraud or any other and advised the Plaintiff to seek civil remedies in a civil suit.

27. It is the finding of the Court that the Plaintiff has not proved fraud against the Defendants at all. This issue is determined in the negative.

28. The 2nd question that the Court must determine is if the 2nd Defendant qualifies to be a purchaser for value without notice of any defect on the title.

29. In the case of **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR** the Court of Appeal expressed itself on the issue of a bonafide purchaser as follows;

“The Courts have indeed been consistent that a bona fide purchaser will not be bound by any interests of which he or she does not have actual, constructive or imputed notice, as long as he or she did reasonable due diligence before purchasing. See: **Moses Lutomia Washiali v Zephaniah Ngaira Angweye & another, Civil Appeal No. 139 of 2013.**

Bona fide purchaser, the Courts have maintained, is assured of protection, notwithstanding that previous dealings might be shown to have been mired in fraud. See **Dr. Joseph Arap Ngok V Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997.**

The Ugandan case of **Katende v. Haridar & Company Limited (2008) 2 E.A.173**, has been cited extensively with approval in many local decisions. It developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice:-

“..... it suffices to describe a bona fide purchaser as 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 that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

30. As regards the 2nd issue, the 2nd Defendant has placed evidence before the Court that he purchased the suit land from one George Gachathi in 2008 upon carrying out the necessary due diligence which confirmed that the said vendor had a good title. He adduced a copy of

the agreement of sale, Land Control board consent in respect to the conveyance of the suit land, a transfer interalia.

31. It is admitted by the Plaintiff that the subdivision was carried out in 1992 before the 2nd Defendant acquired the property through purchase from a third party. Based on the evidence adduced the Court is satisfied that the 2nd Defendant was not party to any fraud and that he purchased the property for value without any defect that it may have had. Indeed, he acquired the property from the vendor who had an apparent title. The meaning of the word apparent is visible, manifest obvious or ostensible. The 2nd Defendant acquired a good title from the vendor of the suit land. If there were any procedural gaps in the subdivision and registration of the suit land (which evidence has not been set out) then the 2nd Defendant is not shown to be a party to it.

32. An apparent title from the 2nd Defendant which in the absence of any defect was a good title. The Court is satisfied that the 2nd Defendant is such a bonafide purchaser for value without notice.

33. In the end the Plaintiff has not succeeded in proving his case. It is dismissed with costs to the Defendants.

34. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANGA THIS 27TH DAY OF FEBRUARY 2020.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Wagai HB for Kimwere for the Plaintiff

1st Defendant – Absent

Gacheru HB for Mulani for the 2nd Defendant

Irene and Njeri, Court Assistants