



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MISCELLANEOUS APPLICATION NO. 99 OF 2012 (O.S)

FRANCIS MWITI M'ARITHI.....APPLICANT

VERSUS

MWENIA M'RIRIA.....1ST RESPONDENT

FESTUS MWOBOBIA KANAMPIU.....2ND RESPONDENT

JUDGMENT

1. The Application herein for determination is an Origination Summons dated 4th October, 2012 and filed on 9th October, 2012 where the Applicant seeks for the following orders:

- 1) Whether the Respondent in filing CMCC 188 of 2011 they did so with malicious intentions to defraud the applicant herein.**
- 2) Whether the so-called "Extracted Orders" purported to be dated 16/8/2011 was not a criminal forgery.**
- 3) Whether the Respondent did not commit a Criminal Offence by uttering the said forged "Consent Orders" to the Registrar for purposes of removing a caution Registered against the Title No. ABOGETA/U-KIUNGONE/872 by the applicant herein.**
- 4) That whether the court should peremptorily cancel the said title and restore the register of the said title as it had been before 3rd January, 2012.**
- 5) That the application would further pray for costs of this application.**

2. The grounds in support of the application are in the supporting affidavit sworn by the applicant on 4th October, 2012. The applicant avers that he is in occupation of Land **Parcel NO. ABOGETA/U-KIUNGONE/872**(hereinafter referred to as the subject property), which he alleges belonged to his late grandfather and left it to him in the year 1977 when he died, and that he filed for his succession vide HC SCC CASE NO. 52 OF 1995 where he was given letters of Administration to his estate, however when he went to the lands office in 1997 to register the grant, he discovered that the 1st respondent had forged the transfer of the land to himself and was registered as the proprietor thereof.

3. Subsequently, he avers that the 1st respondent sued him vide CMCC NO. 456 of 1998 alleging that he was a trespasser in the subject parcel of land, which case he alleges has never been prosecuted to date.

4. Additionally, he avers that in the year 2000 he filed a suit against the 1st Respondent and persons who assisted him commit the fraud that is HCC No. 88 of 2000, which suit is still pending in court. And that prior to filing the suit he lodged a caution on the subject property registered on **6/4/2000(entry No. 6 in the register)**.

5. Further to the above he avers that in 2002 the Respondent filed **NKUBU SRMCC NO. 32 of 2002** challenging his caution on the land above. The court in response stayed the proceedings until determination of his suit in HCC NO. 88 OF 2000 above.

6. In his case that pursuant to the above developments the Respondents conspired to defeat justice, where the 2nd Respondent filed Civil suit No. 188 of 2011 against the 1st Respondent claiming to have bought the subject property with the intention of reaching a consent to remove his caution, and that they indeed purportedly recorded a consent and extracted an order on 12/9/2011 for removal of the consent with the conspiracy of some court staff, as the Chief Magistrate denied the existence of such Order.

7. He avers that pursuant to the said extracted order, which he alleges is an outright fraud, the Respondent are in the process of transferring

the subject property to a third party. He prays the court to cancel the entries in the register and restore the land as it were before the alleged fraud.

8. In response to the application, the 1st Respondent filed a replying affidavit dated 29th July, 2013 and filed on even date. He averred that there was no malice in the filing of Meru CMCC NO. 188 OF 2011, stating that he was sued by the 2nd Respondent after he sold the subject land to him, and that the order dated 16/8/2011 are genuine, averring that the MERU CID investigated the matter and found that the same was signed by Hon. Kiarie wa Kiarie and the issue of forgery does not arise.

9. Additionally, he wondered why the applicant filed the instant application, yet the file in question that is civil suit No. 188/2011 is subsisting, arguing that the applicant ought to have filed an application therein. It is his position that the applicant has no evidence to prove fraud over the alleged consent order and that he is a busy body filing multiplicity of suits.

10. This matter came before this court on 22/11/2018 where directions were taken in the presence of both parties Counsels that the Instant Application be disposed of by way of affidavit evidence and written submission. The parties by the time of writing this ruling had not filed their respective submissions, and this court therefore is going to decide the matter based on the pleadings and documents on record.

Analysis and Determination

11. I have carefully considered the pleadings herein, and the history of the instant application, the issues raised by the parties and the documents therein, and in my view, the issue for determination is whether the Applicant has tendered evidence to support the orders sought.

12. The main contestation herein is whether the Respondents conspired in filing Civil Suit No. 188 of 2011 with a view of fraudulently removing the applicant's registered caution with the end result being depriving him of his claim on the subject parcel of land prior to the hearing and determination of his suit HCC NO. 88 of 2000.

13. The Land Registration Act under **Section 79** allows the Registrar to rectify the register or any instrument presented for registration in certain cases. Additionally, **Section 80** of the same Act allows the Court to direct the Registrar to rectify the Register by directing that any registration be cancelled or amended if the court is satisfied that the registration was obtained, made or omitted by fraud or mistake.

14. In the case of *Esther Ndegi Njiru & Another Vs Leonard Gatei (2014) e KLR*, the Court held in this regard that:-

“...My view therefore is that where fraud or mistake is proved even what would qualify to be a first registration would under the provisions of the Land Registration Act be liable to be rectified and/or cancelled”.

15. Additionally, in the case of *Mary Ruguru Njoroje Vs Samuel Gachuma Mbugua & 4 Others (2014) e KLR*, the Court held that:-

“... It is however upto the party seeking rectification to prove to the court's satisfaction that there has been fraud or mistake in the registration. In my view the mistake referred to under. Section 80(1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name and fraud.... The Court too has powers to order the rectification of the title or register in appropriate circumstances..... Registration vide the said Section refers and includes a title or entry in the registry or on the title itself”.

16. The 1st Respondent in his affidavit has denied the forgery allegation insisting that the Meru DCI after investigation did not find any fault. In addition, they filed List of witnesses and their respective statements, all of whom allegedly claim that the subject parcel land was given to the 1st Respondent vide an oral will made by his deceased grandfather, and that they witnessed the said oral will.

17. I have carefully perused the proceedings in Civil Suit No. 188 of 2011 herein and it is clear that the applicant was not aware of the suit and proceedings nor involved despite having a claim over the subject property which was the subject matter of the suit. The 1st Respondent hid this fact from the court putting doubts to the extracted orders therein. The recording of the consent in itself in my view is equally questionable.

Conclusion

The upshot of the foregoing is that after having carefully considered the pleadings herein and the annexures thereto, the responses to the pleadings, the Civil Suit No. 88 of 2011 and circumstances thereof and the relevant provisions of law, the Court finds that the Applicant has proved its case to the required standard. In the result therefore, the Court enters Judgment for the Applicant as prayed in his Originating Summons dated 4th October, 2012 and direct that the Registrar therein cancels the said title issued and restore the register of the said title as it had been before 3rd January, 2012, with costs being borne by the Respondents.

It is so ordered.

DATED and SIGNED at Kerugoya this 7th day of February, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

READ, DELIVERED and SIGNED in open Court at Meru this 26th, day of February, 2020.

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L.N. MBUGUA

ELC JUDGE, MERU

In the presence of: