



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 23 OF 2015

SAMUEL MUTUGI NDAI.....PLAINTIFF

VERSUS

DAVID CIUMA NJAMBOYA1ST DEFENDANT

ANGERIOUS NJERU MWANIKI.....2ND DEFENDANT

REGISTRAR OF TITLES,

KERUGOYA LAND REGISTRY.....3RD DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff vide a plaint dated 2nd March 2015 sought the following orders:

- (a) The title and entries to the 1st defendant and then the 2nd defendant of L.R. No. KABARE/NYANGATI/4211 be and are hereby cancelled by the order of this Court and the same to revert to the original owner the plaintiff and the certificate of title be issued by the 3rd defendant to the plaintiff.***
- (b) The plaintiff be paid General Damages.***
- (c) Any other relief the Court may deem just and expedient.***
- (d) Costs of the suit.***

The plaintiff's plaint was accompanied by a verifying affidavit, list of documents and witness statements. The plaintiff also filed a Notice of Motion contemporaneously with the plaint under certificate of urgency seeking an equitable relief of an injunction pending the hearing of the suit. On 5th May 2015, the 1st and 2nd defendants filed their joint statement of defence and counter-claim and sought to have the plaintiff's suit dismissed and in its place enter judgment in favour of their counterclaim for the following orders:

- (a) Eviction of the plaintiff, his agents and/or servants from land parcel No. KABARE/NYANGATI/4211.***
- (b) A permanent injunction restraining the plaintiff, his agents and/or servants from entering,***

alienating or interfering with the plaintiff's right of land parcel No. KABARE/NYANGATI/4211.

(c) The 1st defendant be compensated to the value of land parcel No. LAIKIPIA TIGITHI MATANYA BLOCK VI/1387 (THOME IV) and the cost of the developments being carried out thereon.

(d) Costs of this suit and interest thereon.

(e) Any other or further relief that this Court may deem fit to grant.

On 27th May 2015, the plaintiff filed a reply to Defence and Defence to counter-claim denying the same and sought to have it dismissed with costs. On 19th July 2016, the 3rd defendant through the Hon. Attorney General filed their defence also denying the plaintiff's allegations of any wrong doing and sought to have the suit dismissed as against her.

PLAINTIFF'S CASE

The plaintiff was referred to his two statements dated 2nd March 2015 and 1st September 2015 respectively which he adopted in his evidence. He stated that he came to know the 1st defendant in 2015 after he agreed to exchange with him his shamba with another shamba. He stated that his children had given him problems at home and he told them that he was going to look for another land. He agreed with the 1st defendant to look for him another land so that he can exchange. Their agreement was verbal and not in writing. However, the 1st defendant did not get him another land as they agreed. In 2016, he realized that his land had been taken by the 1st defendant. He reported to the area Chief and the Village Elder. The 1st defendant was called by the area Chief but he failed to attend. He was not aware that David transferred his land to a third party. He came to learn with surprise that the 1st defendant did not only transfer the land to himself but also transferred the same to a third party.

PW2 was Margaret Wanja Mutugi who is the wife to the plaintiff. She was referred to her statement which she recorded on 2nd March 2015. She said that she was aware that the suit land parcel No. KABARE/NYANGATI/4211 was to be exchanged with another land that was to be given by the 1st defendant but there was no land given to them. She also stated that they were not given money by the 1st defendant. The witness also stated that there was no any written agreement between her husband and the 1st defendant in respect of their verbal agreement to exchange land. She stated that her husband (plaintiff) gave out the title to the 1st defendant when he was drunk to look for another land to exchange but the 1st defendant did not come back until they saw someone who wanted them to vacate from their land. She then went to the area Chief who called the 1st defendant and the person who had sought to have them move out of their land. The 1st defendant and the man who wanted them move out did not honour the summons to go the Chief's office. She then decided to seek advice from a lawyer. The witness stated that according to the green card produced in evidence as Plaintiff's Exhibit No. 1, the transfer of the suit land from her husband to the 1st defendant is indicated as a gift. The plaintiff also produced a copy of title deed for the suit property L.R. No. KABARE/NYANGATI/4211 as Plaintiff's Exhibit No. 2.

DEFENDANT'S CASE

The 3rd defendant closed their case. The 1st and 2nd defendant also failed to attend Court during the hearing and their case was equally closed.

ISSUES FOR DETERMINATION

The appropriate issues for determination are as follows:

(1) Whether the 1st defendant acquired the suit property L.R. KABARE/NYANGATI/4211 legally, procedurally and without corrupt scheme?

(2) Whether the 1st defendant complied with the terms and conditions under the Law of Contract Act Cap. 23 Laws of Kenya?

(3) Whether the transfer of the suit property from the 1st to the 2nd defendant is tainted with illegality and irregularity?

(4) What are the appropriate orders to issue?

(5) Who shall bear the costs of this suit?

ANALYSIS AND DECISION

I have considered the vivo voce evidence by the parties and their witnesses, the submissions by counsels and the applicable law. The plaintiff is challenging the manner in which the 1st defendant obtained the registration of the suit property in his favour. He stated that they agreed with the 1st defendant to get him an alternative parcel of land to exchange with his land parcel No. KABARE/NYANGATI/4211 but the 1st defendant never came back to him until someone came to ask him to vacate from his land claiming that the land belonged to him. He stated that he had given the 1st defendant his title to get him an alternative land to exchange with his land but he never came back to him. The plaintiff produced the green card as Plaintiff's Exhibit No. 1 indicating that the plaintiff was first registered as proprietor of the suit land on 3/9/2002 and was issued with title deed on 3/10/2002. On 28/2/2010, the land was transferred to the 1st defendant David Ciuma Njamboya as a gift and a title issued on 8/2/2011. On 11/7/2014, the land was transferred to Angerous Njeru Mwaniki the 2nd defendant for a consideration of Ksh. 100,000/=. Though the defendants filed defence denying the plaintiff's claim, they did not prefer any evidence in Court explaining how they acquired the disputed parcel of land. Where a title has been challenged, the proprietor of such a title has a duty to demonstrate before Court that such title is not tainted with any illegality, procedural irregularity or corrupt scheme.

Section 26 (1) of the Land Registration Act (No. 3 of 2012) states as follows:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon 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, un-procedurally or through a corrupt scheme”.

The testimony of the plaintiff and his witness together with the documents adduced in evidence has not been challenged and/or controverted. In particular, the green card produced as Plaintiff's Exhibit No. 1 in the 3rd entry shows that the 1st defendant acquired the suit property L.R. No. KABARE/NYANGATI/4211 as a gift. I find that the 1st defendant did not acquire the title to the suit property legally, procedurally and without corrupt scheme. The acquisition of the title is tainted with illegality and such title cannot gain any protection from a Court of law.

Whether the 1st defendant complied with the special terms and conditions of sale under the Law of Contract Cap. 23 Laws of Kenya?

Section 3 of the Law of Contract Act states as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless:

(a) The contract upon which the suit is founded:

(i) Is in writing.

(ii) Is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party”

The plaintiff has testified on oath that he did not sell or gift the 1st defendant with his land and that they only entered into a verbal agreement with the 1st defendant to exchange his land with an alternative land which the 1st defendant was to provide. There is no evidence that the 1st defendant complied with **Section 3 of the Law of Contract** in the acquisition of title to the suit property.

Whether the transfer of the suit property from the 1st defendant to the 2nd defendant is tainted with illegality and/or irregularity?

I have already made a finding that the acquisition of title to the suit property L.R. No. KABARE/NYANGATI/4211 was tainted with illegality, procedural irregularity and corrupt scheme. It therefore follows that the 1st defendant had no good title to pass to the 2nd defendant. By implication, the 2nd defendant’s title is a nullity and of no legal effect.

What are the appropriate orders to issue?

The upshot of my finding is that the plaintiff has proved his claim against the defendant on the required standard. The issue on damages has not been proved to the required standard and the same is disallowed. The upshot of my analysis is that the plaintiff succeeds and judgment is hereby entered against the defendant jointly and severally as follows:

(1) The title and entries to the 1st defendant and then the 2nd defendant of L.R. No. KABARE/NYANGATI/4211 be and are hereby cancelled and the same to revert back to the plaintiff SAMUEL MUTUGI NDAI and a certificate of title to be issued by the 3rd defendant herein.

(2) The costs of this suit shall be borne by the 1st and 2nd defendants jointly and severally.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 14th day of February, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:

1. M/S Githaiga holding brief for Mr. Kahuthu for Plaintiff
2. Mbogo, Court clerk – present

3. *Defendants/Advocate – absent*