



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

E.L.C CASE NO. 95 of 2010

EVANGELINE NYEGERA (Suing as the

Legal representative of FELIX M'KIUGU Alias

M'IKIUGU JEREMIAH M'RAIBUNI.....PLAINTIFF

VERSUS

GODWIN GACHAGUA GITHUI.....DEFENDANT

JUDGMENT

Background

1. The Plaintiff filed the instant suit against the Defendant on the 20/7/2010 seeking the following orders:-

i. A declaration by this Honourable Court that title No. ONTULILI/ONTULILI BLOCK 1 (KATHERI) 1229 was fraudulently and illegally acquired and as such it is null and void.

ii. A declaration by this Honourable Court that plot No. 862 (KATHERI) TIMAU is solely and rightly held by FELIX M'IKIUGU and a Title of Plot No. 862 (KATHERI) TIMAU registered in the name of FELIX M'IKIUGU (deceased) to issue.

iii. Costs of this suit and interest thereon

2. It is the plaintiff's case that he acquired the Plot No. 862 (KATHERI) TIMAU (hereinafter referred to as the subject parcel of land) christened Land No. ONTULILI/ONTULILI BLOCK 1 (KATHERI) 1229 by the defendant from one M'ANAMPIU M'RUTERE through a sale agreement dated 21st September, 1982, which land was acquired by the seller from a Land Buying company known as KATHERI FARMERS COMPANY LIMITED, in which he had shares and was allotted Plot Number 862. The plaintiff alleges that pursuant to his purchase the seller through a letter dated 22nd September, 1982 notifying them of the sale and requested them to register the land in the name of the Plaintiff. The plaintiff alleges that they immediately took possession and occupied the subject land as a family.

3. The Plaintiff alleges that in the year 1988, the defendant conspired with the directors of the company to have Plot No. 862 given a new number that is 281 with the intention of illegally depriving the Plaintiff ownership of the subject property, and they secured a title document and attempted to evict them. This necessitated the Plaintiff to file a suit on 13th September, 1989 that is Meru HCCC No. 276 of 1989, where they secured a temporary injunction which ran until 3rd December, 2009 when the suit was dismissed by the court suo moto for want of prosecution, that was a month after the purchaser who is the husband of the plaintiff had passed on. They allege that the defendant proceeded and secure a title for the subject property now known as Land No. ONTULILI/ONTULILI BLOCK 1 (KATHERI) 1229 which title she is seeking this court to cancel for fraud.

4. In response, the defendant filed their defence on 15th September, 2010 denying the plaintiff allegations. He averred that he acquired the subject parcel of land lawfully and for valuable consideration and denies that he was involved in any fraudulent dealings with officials of Katheri Farmers Limited and put the plaintiff to strict proof thereof. Additionally, he averred that the plaintiff has failed to connect between their parcel of land Plot No. No. 862 (KATHERI) TIMAU and his land No. ONTULILI/ONTULILI BLOCK 1 (KATHERI) 1229.

5. Further, the defendant contends that the plaintiff and her late husband have never occupied the subject property, and that his title is unimpeachable as it is first registration by dint of Section 143 of the Registered Land Act Cap 300.

6. The matter came up for hearing on 5th December, 2018 when only the Plaintiff attended court and gave evidence in the absence of the Defendant (this was the subject of the ruling of this court on 31st July, 2019). The Plaintiff called two witnesses in support of their case. **PW1**

Evangeline Nyegeri told the court that the deceased plaintiff herein Felix M'IKIUGU was her husband and that she brought the suit on behalf of the estate, she reiterated the plaintiff case stated hereinabove and produced their documents and requested the court to cancel the defendant title alleging that the same was acquired fraudulently. **DW2 M'Anampiu Rutere** in his testimony told the court that he had bought shares from Katheri Farmers Company Limited and was allotted Plot No. 862 which he later sold to Felix M'Ikiugu the plaintiff herein.

Submissions

7. Both parties herein filed their respective submissions. The Plaintiff's submissions were filed on 16th August, 2019 whereas the defendant's submissions were filed on 20th August, 2019.

8. The plaintiff in their submissions addressed two issues, the first one being on whether the defendant subject title to the property herein was procured fraudulently and illegally. In this regard they submitted that the defendant did not give the history or explain how his title was acquired and therefore urged the court to find the same fraudulently acquired. They submitted that PW2 acquired the land back in 1982 and for close to four decades the plaintiffs have been occupying and possessing the land and therefore how the defendant got his hands on the same defies logic. They submitted that the court has the power to rectify or amend or cancel title acquired by fraud under Section 80 (1) of the Land Registration Act 2012. In this regard they relied in the cases of **Samuel Odhiambo Oludhe & 3 Others Vs Jubilee Jumbo Hardware Ltd & Another (2018) e K.L.R** and **Elijah Makeri Nyange Vs Stephen Mungai Njuguna & Another (2013) e K.L.R**.

9. The second issue addressed by the plaintiff is on whether they have proved their claim against the defendant, and in this regard they submitted that they have proved their claim to the required standard and urged the court to issue the orders sought.

10. The defendant vide their written submissions addressed several issues. They submitted on the Locus Standi of the plaintiff herein to bring the suit on behalf of the deceased Felix M'Ikiugu, in this regard they submitted that she did not produce any document showing that she had filed for letter of administration and urge the court to dismiss the suit. They relied in the case of **Beatrice Wambui & 2 Others Vs Tabitha Wanjiku & 9 Others Nyahururu ELC No. 265 of 2017**.

11. Additionally, the defendant submitted that the instant claim is statute barred, and in this regard they submitted that the claim relates to action of alleged fraud committed between 1981 and 1988, which remain unproved and that 12 years have lapsed and therefore the claim ought to fail under **Section 7 of Limitation of Actions Act**. They rely in the case of **Haron Onyanja Vs The National Police Service & Another Kisii ELC No. 168 of 2016**.

12. Further, the defendant submitted on the fraud allegation, in which they submitted that the alleged conspiracy between himself and directors of Katheri Company has not been proved to the required standard which is above that of a balance of probabilities. In this, they relied in the case of **Kibiro Wagoro Makumi Vs Francis Nduati Macharia & Another (2018) e K.L.R**.

13. Furthermore, the defendant addressed the issue of burden proof, in which he submits that it has not been discharged to the required standards envisaged under Section 107, 108 and 109 of the Evidence Act, for instance they argue that the plaintiff has failed to establish a distinction between her parcel of land and the one registered in the name of the defendant. He argues that the Plaintiff ought to have called a surveyor to ascertain the location of the land and argued that each of the parties' parcel of land exists besides each other.

14. In respect to HCC No. 276 of 1989 in which the plaintiff had filed and was dismissed for want of prosecution, the defendant wonders why the plaintiff instead of reviving the said suit by setting aside the orders opted to file a new suit and they claim that there is more than meets the eye.

15. Moreover, they submitted that the documents presented by the plaintiff are photocopies and suspect and that they are not certified as required of secondary evidence under Section 68 (1) of the Evidence Act.

Issues and Analysis

16. I have considered the pleadings and the evidence on record and the parties respective submissions. The defendants have not called forth any evidence to rebut the evidence of the plaintiff.

17. Having considered the case herein, the following are the issues arising for determination, the first is whether the Plaintiff has the Locus to institute this suit, secondly whether this suit is time barred, third is whether the Plaintiff's documents ought to be admitted for being photocopies, fourth is on whether the Plaintiff has proved her case and finally what reliefs are available.

18. In respect to the issue of Locus standi of the Plaintiff to institute this suit and the allegation that no evidence was tendered confirming that the plaintiff obtained letters of administration to institute the instant suit, it is my finding that this ground has no basis considering the history of this suit and the various applications where one ended up in the Court Appeal pursuant to Civil Appeal No. 28 of 2016 and surprisingly the defendant never raised this issue and therefore he is estopped from raising it at this stage as he has all along operated on the knowledge that she has brought the suit on her capacity as the wife and the administrator of the estate of the deceased Felix M'Ikiugu, and therefore this ground has no basis and is rejected.

19. On whether the suit is time barred, **Section 7 of the Limitation of Action Act** as cited by the defendant provides that an action to recover land cannot be brought after 12 years, and the issue herein is whether 12 years lapsed before the plaintiff filed the instant suit. It is not disputed that the plaintiff filed HCC No. 276 of 1989 to challenge the defendant claim to the subject parcel of land and that the said suit was active until the 2009 when it was dismissed for want of prosecution and subsequently in the year 2010, the plaintiff filed the instant suit, therefore it is apparent that there was no lapse of 12 years before a claim was brought and I also find that this ground has no basis and is also rejected.

20. In regard to the defendant's challenge on the copies of the documents adduced by the plaintiff, it is imperative that the Court of Appeal in Civil Appeal Number 28 of 2016 between the parties herein over this issue, the court noted that the same can be adduced and the defendant granted an opportunity to cross examine on the same, however the defendants herein decided not to attend court during the hearing of the matter and therefore this allegation also fails.

21. On the issue on whether the plaintiff has proved her case. It is trite law that he who alleges must prove the allegations. **Section 107 (1) and (2) of the Evidence Act** provides that:

“1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

22. Similarly, **Sections 109 and 112** of the said **Act** provides as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

23. Additionally, In the case of ***Kirugi & Another Vs Kabiya & 3 others [1987] KLR 347***, the Court of Appeal held that:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.” Likewise, failure by the defendants to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

24. The Plaintiff herein has sought this court to cancel the defendant's title alleging that the same was fraudulently acquired, mainly on the basis that the defendant has failed to explain or give the history his title to the subject property alleging that the same was as a result of a conspiracy between the defendant and the directors of KATHERI FARMERS COMPANY LIMITED.

25. **Section 26 of the Land Registration Act, Act No.3 of 2012** gives this court the authority to cancel a title on the basis of fraud. It provides:-

“Section 26. (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”

26. Therefore to enable me cancel his title as sought by the plaintiff, I have to be convinced that the provisions of **Section 26 (1)** above have been met. The law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

27. On the first limb, it appears to me that the title of the defendant to the extent that it refers to the parcel of land occupied by the Plaintiff was obtained by fraud or misrepresentation. However, there is no evidence that the defendant was a party to the fraud or misrepresentation. I cannot therefore impeach his title by virtue of the provisions of **Section 26 (1) (a)**.

28. Is the title impeachable by virtue of **Section 26 (1) (b)**? First, it needs to be appreciated that for **Section 26 (1) (b)** to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of **Section 26(1) (b)** is to remove protection from an innocent purchaser or innocent title holder. It means therefore that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of **Section 26 (1) (b)** is to protect the real title holders from being deprived of their titles by subsequent transactions.

29. Therefore after analysing the Plaintiff's evidence, am convinced that she has proved her case on a balance of probability, she has established that she is the lawful owner of land Parcel No. **plot No. 862 (KATHERI) TIMAU**, having given the genesis and the history of their acquisition sufficiently. PW2 evidence is instrumental. The defendant on the other hand chose not to address how he actually acquired title to the subject property, and therefore on a balance of probability I find that the plaintiff has proved her case.

Conclusion

In conclusion I enter judgment in favour of the plaintiff and issue the following orders:-

1) A permanent injunction is hereby issued restraining the defendant from entering into, dealing or in any way interfering with the land parcel plot No. 862 (KATHERI) TIMAU.

2) A declaration that the title No. ONTULILI/ONTULILI BLOCK 1 (KATHERI) 1229 was fraudulently and illegally acquired and as such it is null and void.

3) A declaration that Plot No. 862 (KATHERI) TIMAU is solely and rightly held by FELIX M'IKIUGU and a Title of Plot No. 862 (KATHERI)-TIMAU registered in the name of FELIX M'IKIUGU (deceased) to issue.

4) The defendant to pay the costs of this suit.

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

.....

E.C. CHERONO

ELC JUDGE, KERUGOYA

READ, DELIVERED and SIGNED in open Court at Meru this 10th day of February, 2020.

.....

L.N. MBUGUA

ELC JUDGE, MERU

In the presence of: