



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 2 OF 2019

MURIITHI MUTHIKE (Suing as personal Representative

of the Estate of MUTHIKE UUKI GIKUNJU

Alias UKI GIKUNJU).....PLAINTIFF

VERSUS

GLADYS N. NYAWIRA.....1ST DEFENDANT

MARY N. MWANIKI.....2ND DEFENDANT

ALICE W. MUCETHA.....3RD DEFENDANT

JUDGMENT

BACKGROUND

In a plaint dated 25th January 2019, the plaintiff sought judgment jointly and severally against the defendants for the following orders:

- (a) A declaration that the registration of the 1st to 3rd defendants as proprietors of land parcel No. MUTIRA/KANGAI/431 was and is fraudulent, unlawful, null and void.***
- (b) An order for cancellation of 1st to 3rd defendants' tilte deed in respect of land parcel No. MUTIRA/KANGAI/431.***
- (c) An order for cancellation of entries 2 and 3 of the Land Register of land parcel No. MUTIRA/KANGAI/431.***
- (d) Costs and interest of the suit.***

In a Chamber Summons application dated 10th May 2019, the plaintiff sought leave to effect service of summons to Enter Appearance upon the defendants by way of Registered Post to the last known address. That application was heard Ex-parte and the Court upon hearing the Applicant Ex-parte and upon considering the materials placed before it, allowed the same as prayed. In an affidavit of service dated 1st October 2019 and filed on 3rd October 2019, the plaintiff through his advocate on record deponed how he effected service of summons to Enter Appearance and all Court processes upon the defendants. When the matter subsequently came up for directions, the Court confirmed that the defendants were duly served with summons to Enter Appearance and certified the case ready for hearing. The Court also directed that the case was to be heard Ex-parte. The matter was then fixed for hearing on 14th November 2019 when the plaintiff testified and closed his case.

PLAINTIFF'S CASE

In his sworn testimony, the plaintiff stated that he is the son of Muthike Uuki Gikunju Alias Uki Gikunju (deceased) who at all material times was the registered proprietor of land parcel No. MUTIRA/KANGAI/431 which they have always been farming together with the rest of his family. The plaintiff further stated that upon the death of their father, they filed a Succession Cause No. 47 of 2017 at Wanguru Law Courts. He further stated that the grant was issued and subsequently confirmed. When they went to register the grant at the Lands office, they discovered that the defendants had illegally, fraudulently and unprocedurally transferred the land into their names. He stated that at no time did his late father ever sold the suit land to the defendants or any other persons and that the Land Register does not indicate through which means the land was transferred from his late father's name to the defendants. He stated that the Land Registrar who is the 4th defendant could not provide any documents supporting the purported transfer to the defendants such as an application for consent from the Land

Control Board, consent and transfer instrument.

DEFENDANTS CASE

The defendants did not Enter Appearance or file defence to the plaintiff's claim.

ISSUES FOR DETERMINATION

The issues for determination are as follows:

- (1) Whether the defendants' title is impeachable?*
- (2) Whether the plaintiff has discharged his burden of proof on the required standard?*
- (3) Who shall pay the costs?*

ANALYSIS AND DECISION

I have considered the evidence adduced by the plaintiff Ex-parte. Even where claim is not denied, it is trite law that a claimant must prove his claim on the required standard. The plaintiff's claim is based on fraud and the standard of proof in such claim is slightly higher than the balance of probabilities but lower than beyond reasonable doubt. The plaintiff in his evidence stated that his late father Muthike Uuki Gikunju Alias Uki Gikunju was the registered proprietor of land parcel No. MUTIRA/KANGAI/431 and that after his demise on 5th May 2001, they filed Succession Cause No. 47 of 2017 at Wanguru Law Courts where a grant was issued and subsequently confirmed. When they presented the same to the Lands office, they discovered that the defendants had illegally, fraudulently and un-procedurally transferred the land into their names. He said that they have all along been in occupation of the suit land doing farming with the other members of his family and that at no time did their father sell the suit land to the defendants at all. The plaintiff also stated that they asked the Land Registrar Kirinyaga County to supply them the application for consent, the consent itself and all other legal instruments supporting the transfer of the suit land from their late father to the defendants but they could not provide.

What does the law say about the proprietor of land? **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 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 grounds of fraud or misrepresentation to which the person is proved to be a party;*
- (b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.*

My discernment of the law as given above is that the proprietor of a title to land is jealously protected in law unless the same was obtained unlawfully. The plaintiff in this case has challenged the procedure in which the defendants obtained the title to the suit land saying that no sale agreement was entered into, that no application for consent was sought and obtained from the Land Control Board. These averments given on oath have not been challenged or controverted by the defendants. I am satisfied that the plaintiff has proved that the defendants did not obtain the title to the disputed land legally and procedurally. A title that is obtained illegally, un-procedurally and in a corrupt manner is not protected by law. I find that the plaintiff has proved his case against the defendants on the required standard.

In the upshot, I enter judgment for the plaintiff against the defendants jointly and severally as follows:

- (1) A declaration be and is hereby issued that the registration of the 1st to 3rd defendants as proprietors of land parcel Number MUTIRA/KANGAI/431 was acquired illegally, un-procedurally or through a corrupt scheme.*
- (2) An order for cancellation of the 1st, 2nd and 3rd defendants' title deed in respect of land parcel No. MUTIRA/KANGAI/431 and reverting to the names of the original proprietor.*
- (3) An order for cancellation of entries No. 2 & 3 of the Land Register in respect of land parcel No. MUTIRA/KANGAI/431.*
- (4) The costs of this suit to be borne by the defendants jointly and severally.*

READ, DELIVERED and SIGNED in open Court at Kerugoya this 7th day of February, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:

1. Ms Ann Thungu holding brief for Mr. Ngigi for Plaintiff
2. Plaintiff – present
3. Defendant/Advocate – absent
4. Mbogo, Court clerk – present