



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 43 OF 2016

JOAN JEPTOO NGENO.....PLAINTIFF

VERSUS

STEPHEN MUTHOKA JAMES

LAND REGISTRAR, MOMBASA.....DEFENDANTS

JUDGMENT

(Suit by plaintiff seeking a declaration that she is the rightful owner of the suit land; plaintiff residing in the USA and having title to the suit land; suit land purportedly sold and transferred to the 1st defendant by a person who claimed to be the plaintiff; clear that the alleged vendor, if at all she existed, was not the plaintiff, as the plaintiff was abroad at the time of the alleged transaction; the documents used to transfer the land also being forgeries; no good title transferred to the 1st defendant; 1st defendant's title is cancelled; title restored back to the plaintiff)

1. Through a plaint which was filed on 22 March 2016, the plaintiff asserted that she is the owner of the land parcel MSA/MN/BLOCK 2/264 (the suit land) having acquired title in the year 2003. She pleaded that sometimes in February 2016, when she sent her son to pay rates, she discovered that the title was now in the name of the 1st defendant. It is her case that the title of the 1st defendant is fraudulent. In this suit, she wants orders of cancellation of the 1st defendant's title, a declaration that she is the rightful owner of the suit land, a declaration that the 1st defendant is a trespasser, and a permanent injunction to restrain the 1st defendant from the suit land.

2. The 1st defendant filed defence where he inter alia pleaded that through a sale agreement dated 4 February 2016, he purchased the suit land through his wife, one Mwanahamisi Ali Magendo at a consideration of Kshs. 2,500,000/=. The vendor, whom he believed to be the plaintiff, then delivered to him the original title document and the requisite documentation needed to transfer the land to him. The land was then transferred to him.

3. In her evidence, the plaintiff testified inter alia that she resides in the United States of America (USA) where she has been working for the last ten years as a registered nurse. She denied having sold the suit property to the 1st defendant or ever having met Mwanahamisi Ali Magendo (Ms. Magendo). She testified that she was not even in Kenya in February 2016. She stated that before February 2016, she was last in the country in May – July 2016, and thereafter, she returned on 25 May 2016 and went back to the USA on 13 June 2016. She produced her passport to prove this fact. She could see that the sale agreement relied upon by the 1st defendant bore her name as vendor with Ms. Magendo as purchaser. She pointed at the signature therein and testified that the same was not her signature. She further referred to the transfer of lease instrument and the photograph affixed thereto and she was categorical that the same was not her photograph. She stated that the signature in the transfer instrument was also not her signature. The documents showed that they were signed before an advocate by name of Shimaka N. Leonard (Mr. Shimaka), and she stated that she has never met him, and neither was she in the country on 4 February 2016, when the documents are said to have been attested before the said advocate. She also pointed at the Identity Card (ID) used to transfer the land to the plaintiff and stated that the same was not her identity card. She had her original identity card in court for comparison and she observed that the serial number is different, the date of birth is different, and division (the locality) was different. The photograph in the ID was also different from that in her ID. She pointed to the date of issue of her ID which is in the year 1996 and differentiated it with that displayed by the 1st defendant which was issued in the year 2014. There was an acknowledgement of money that the 1st defendant had listed as part of his documents and she denied ever receiving any money. The spousal consent used to transfer the property to the 1st defendant was also put to her. It indicated that the vendor's husband is deceased. She testified that her husband is very much alive and lives with her in the USA. She denied signing the affidavit on spousal consent before an advocate by name of Daniel M. Ngonze. She testified that she has the original title deed and she has been keeping it in the USA for the last 10 years. She proceeded to make it available to the court.

4. DW-1 was Ms. Magendo. She stated that she is wife to the 1st defendant. She testified that they wished to purchase a plot and they met one Patrick, a land broker, who informed them that there is a plot for sale in Miritini. He took her to the land and she liked it. They did a search

on 1 February 2016 which revealed the name Joan Jeptoo Ngeno. Patrick said that he will get her. On 4 February 2016, Patrick took her to the offices of Mr. Shimaka, whom she had not previously met. She herself was accompanied by one Recho, from the law firm of M/s Apollo Muinde & Company Advocates. The vendor was there accompanied by a person who was introduced as her brother. The person identified as Joan Jeptoo Ngeno (the vendor) gave her the Certificate of Lease and ID. She said she has no husband and her children were very young. She swore an affidavit to that effect. She said she is selling the land as she wished to go back to her original home. They agreed at the price of Kshs. 2,500,000/=. Ms. Magendo wanted them to go to the bank but the vendor said it is not necessary and she was paid in cash. A sale agreement was then drawn. She was given the vendor's documents which she produced as exhibits. They then paid stamp duty and got title in the name of the 1st defendant. After some time, she went to the plot and found some people on the land and this case was later filed. She believed that they bought the land properly. She stated that the person who sold to her the land was not the person who testified as the plaintiff, whom she has never seen before.

5. PW-2 was the 1st defendant. He is an employee of the Kenya Revenue Authority. He repeated his wife's evidence that they got the plot through Patrick. He then came and signed the transfer forms. He never met the vendor as it was his wife who was in charge of the transaction. Title was later issued in his name. He was questioned on how his wife had so much money in cash and he stated that they have a joint account and she could withdraw it. Interestingly, he acknowledged that though the sale was for Kshs. 2,500,000/= he paid stamp duty on the sum of Kshs. 1,500,000/= which is what was noted in the transfer form. He however was quick to state that his role was only to sign the documents and it was his wife and law firm who dealt with the rest.

6. No evidence was offered on behalf of the 2nd defendant.

7. I invited counsel to file written submissions which they did and I have taken these into account before arriving at my decision.

8. I have assessed the evidence. There is no doubt that the owner of the suit land is known as Joan Jeptoo Ngeno. I have no doubt in my mind that this Joan Jeptoo Ngeno, who is the owner of the suit property, is the plaintiff and is the person who testified as PW-1. It follows that it is only she who could sell the property. It is however apparent that somebody either passed herself off as Joan, or it could be that this "vendor" is fictitious and never existed in the first place. I cannot quite tell which between the two is factual, but what is clear as the light of day, is that the correct Joan Jeptoo Ngeno, never sold this land to the 1st defendant or to Ms. Magendo. The correct Joan Jeptoo Ngeno was not in the country when the sale agreement was made or when the transfer instruments were executed. She never gave out her title deed for purposes of transfer for she had it all along. Her correct ID card was never used as what was used to transfer the land to the 1st defendant was a fraudulent ID. Even the photograph used in the transactions was not her photograph. It is clear therefore that a fraud was perpetrated with the sole aim of disentitling the plaintiff of the suit land. If at all there was ever another Joan Jeptoo Ngeno, that person was a fraud.

9. I said that I have my doubts as to whether such vendor ever existed and my reasons for saying so is that no phone number of this person was ever given, the said Patrick, who has only one name, was never called as a witness, and I also find it curious that a sum of Kshs. 2,500,000/= was paid in cash without any evidence of a bank withdrawal. Why would a KRA employee who is expected to know about bank regulations, accept to pay this amount of money in cash yet it exceeds Kshs. 1,000,000/= for which a bank transfer would be required? It just doesn't add up to me. There are so many questions that one may ask about the purported transfer to the 1st defendant. What is however not in doubt is that the transaction purporting to transfer the title to the suit land to the name of the 1st defendant was a fraudulent transaction. It cannot be allowed to stand.

10. Counsel for the 1st defendant made submissions that his client was a bona fide purchaser for value. I have already stated my doubts on that. But even if he was innocent, he acquired title from a person who had nothing to transfer to him. Pursuant to the provisions of Section 26 of the Land Registration Act, 2012, the title of the 1st defendant cannot be protected as it was acquired through a fraudulent transaction, or through mistake, misrepresentation or a corrupt scheme. The fraud may very well have involved the 1st defendant, but it doesn't matter, even if it did not. His title is still tainted with illegality.

11. That being the case, I do proceed to cancel the title of the 1st defendant. I do proceed to declare that it is the plaintiff who is the rightful owner of the suit land. The 1st defendant has no title to the suit land and he is hereby barred from selling, charging, leasing, or in any other way, enter into any dealings or dispositions over the said land. In addition, 1st defendant or anybody acting on his agency has no right to be on the suit land and a permanent injunction against the 1st defendant and/or his agents is hereby issued.

12. The land records have to be restored back to the name of the plaintiff and I order that the register be rectified by cancelling out the name of the 1st defendant and reinstating the name of the plaintiff as the proprietor of the suit land. No dealings should be registered in the register of the suit land with the title that is held by the 1st defendant, or any other person other than the plaintiff. It would in fact serve well if the 1st defendant surrendered his title deed to the office of the Land Registrar for the same to be destroyed and I order him to do so forthwith and no later than 14 days from today.

13. Any rates or land rent records should, if altered, also revert back to the name of the plaintiff and any entries in favour of the 1st defendant should be cancelled.

14. The plaintiff will have the costs of this suit jointly and/or severally against the defendants, for if the 2nd defendant was keen, he/she would have seen that the documents being used to transfer the title to the 1st defendant are different from the records that are expected to be in the parcel file.

15. Judgment accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 11th day of March, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mrs. Abdulrahim holding brief for Mrs Mwangi for the plaintiff.

No appearance on the part of M/s Apollo Muinde & Partners Advocates for the 1st defendant.

Mrs Waswa present for the 2nd defendant.

Court Assistant; David Koitamet.