



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 56 OF 2018

(Formerly Nairobi ELC No. 300 of 2016)

MARY WANJIKU NJOROGEPLAINTIFF

VERSUS

ESTHER MUTHONI KARAYA (Suing as the administratrix of the estate of

YUSUF MBURU NJOGU – Deceased)DEFENDANT

JUDGMENT

By a Plaint dated the 30th March, 2016, the Plaintiff prays for judgment against the Defendant for:

- a) That a permanent injunction do issue to restrain the Defendant, their agents, servants, and/ or employees from any way interfering with the Plaintiff quiet possession of suit land known as Plot No. 145/ 4 now Block II/825 Ngong.
- b) A permanent injunction restraining the Defendant/ Respondent whether by himself, his servants, agents or at all from entering, trespassing, causing developments in whatever form, causing excavations/ trenches, cutting and felling trees, flowers, interfering with the general environment on the suit land howsoever at the suit land known as Plot 145/4 now Block II /825 Ngong.
- c) General and punitive damages against the Defendant.
- d) Costs of this suit and interest thereon at court rates.
- e) Any other relief as this Honourable Court may deem just and fit to grant.

The Defendant who is the representative of the estate of YUSUF NJOGU (deceased) through an amended Statement of Defence dated the 5th November, 2019 denied each and every allegation in the Plaint except for the descriptive and jurisdiction of the court. The Defendant contended that the suit did not disclose any reasonable cause of action against her. The Defendant denied that the Plaintiff had ever been the owner of Plot No. 145 now Block 2/ 825 hereinafter referred to as the 'suit land'. The Defendant averred that she is the owner of the suit land which her late husband legally acquired. Further, that she could not encroach on the suit land which is her rightful property. The Defendant denied the allegations of illegal invasion on suit land and causing wanton damage thereon. She reiterated that the Plaintiff had never been the owner of the suit land hence she had no capacity to sell or lease it. She denied the allegations of trespass on suit land.

The matter proceeded for hearing where the Plaintiff called one witness while the Defendant also had one witness.

Evidence of the Plaintiff

The Plaintiff as PW1 testified that together with her late husband they purchased the suit land from one Margaret Mbutia but the same was registered in his name. It was her testimony that she had registered a caution on the suit land to block it from being transferred to a third party as she had a misunderstanding with the late husband who was threatening to sell it. However, the husband proceeded to sell it to the Defendant despite the existence of the caution. She insists she was not contacted when the caution was removed and the suit land transferred to the Defendant. She claims since 2013 the suit land which had a development was fenced and had a sign thereon indicating the same was not for sale but the Defendant proceeded to remove the sign, entered the land without her consent and interfered with her quiet possession thereon. She denies giving, selling, nor leasing the suit land to anyone. She lodged a complaint with the Office of the Ombudsman who wrote several letters to the Land Registrar but the issue of the transfer to the Defendant was never sorted. She further lodged a complaint with the Ol Kejuado County Council and the Ministry of Lands to no avail. She produced various documents including correspondence from the Ombudsman; Letter of Allotment dated 30th March, 1999; Copy of ID from Margaret Wanjiku Mbutia; Consent to transfer dated 22nd April, 1999; Acknowledgment of payment dated the 23rd April, 1997 by Margaret Wanjiku Mbutia; Affidavits Sworn by Mary Wanjiku

Njoroge in 2008 to the Commissioner of Lands and late Kenneth Njoroge Kaleu; Rates Clearance Certificate; Receipts of Payment; Photos; Marriage Certificate; Death Certificate; Plaintiff's Identity Card; Letter of Transfer from County Council of Ol Kejuado dated 11th November, 2008; Letter of Caution dated 27th January, 2006; Letter of Transfer from the County Council of Ol Kejuado to Survey of Kenya dated 1st November, 2012 and Various Correspondences as her exhibits.

Evidence of the Defendant

The Defendant as DW1 confirmed she was the widow to Yusuf Mburu Njogu (deceased). She explained that she witnessed the Sale Agreement dated 2nd October, 2012 between her husband and Kenneth Njoroge Kaleu (Plaintiff's late husband) in respect to the suit land. She confirmed that her husband paid Kshs. 7 million as purchase price. Further, that before executing the Sale Agreement they undertook a search which revealed that the suit land was free from any encumbrances. She insists her late husband was the owner of the suit land having been issued with a Certificate of Lease dated the 26th February, 2016. She disputes that the Plaintiff ever owned the suit land as claimed. Further that they cleared all outstanding rates, rent and penalties in respect to the suit land. She confirms that the original allottee Margaret Wanjiku Mbuthia signed the relevant transfer forms to enable them acquire title. It was her testimony that on 19th March, 2016 when they sent workers to clear the suit land, they discovered someone had put a sign thereon that the plot was not for sale and they reported the matter to Ngong Police Station. She reiterates that they adhered to the legal process to acquire the suit land. She produced various documents including the Sale Agreement executed on 2nd October, 2012; Copy of PIN No. for Kenneth Njoroge Kaleu; Copy of ID Card No. 13412849 and PIN for Margaret Wanjiku Mbuthia; Copy of Letter of Allotment dated 30th March, 1999; Receipts for payment of Land Rent and Rates; Rate Clearance Certificate dated the 11th July, 2012; Various Correspondence relating to the suit land; Consent to Transfer dated the 4th July, 2012; Copy of Property Description and Details dated 4th July, 2012; Copy of Transfer Form (Requesting and Transferring Kshs. 976, 550) dated 21st August, 2015; Copy of Certificate of Lease in the name Yusuf Mburu Njogu dated 26th February, 2016 and Copy of Grant as exhibits.

The Plaintiff filed her submissions where she reiterated her claim but the Defendant failed to file hers despite being granted leave to do so.

Analysis and Determination

Upon consideration of the Plaintiff, Defence, Testimonies of the Witnesses, Exhibits and Submissions, the only issue for determination is whether the Plaintiff is entitled to the orders sought in the Plaintiff.

The Plaintiff has sought for various orders including permanent injunction as well as general and punitive damages against the Defendant in respect to the suit land. She claims to have purchased the suit land jointly with her husband although the same was registered in his name. The Plaintiff as PW1 testified that she had registered a caution on the suit land since they had a disagreement with the husband and she was aware he wanted to sell it. She claimed she was never contacted when the said caution was removed and was not aware the suit land had been transferred to the Defendant. She reiterated that the suit land was matrimonial property and hence should not have been transferred without her consent. PW1 contended that the suit land should not have been sold as it had a sign thereon that indicated the same was not for sale. On perusal of the documents in respect to the suit land presented by the Plaintiff as exhibits, I note there was no indication in any one of them that she was one of the owners of the suit land. Further, in the affidavit sworn on 29th August, 2008, by Kenneth Njoroge Kaleu who was the Plaintiff's late husband, he intimated that there was no need for a caution to subsist over the suit land as it was his only source of livelihood. I note the vendor of the suit land Margaret Wanjiku Mbuthia signed a Transfer Form dated the 23rd April, 1999 transferring it to Kenneth Njoroge Karei and there was no indication thereon that it was jointly owned with the Plaintiff. She further acknowledged receipt of purchase price from the said Kenneth Njoroge Karei. From the Plaintiff's affidavit and various correspondence to and from the Ole Kejuado County Council, the Ombudsman and the Lands Office, it is evident the Plaintiff attempted to stop the husband from disposing of the suit land by lodging a caution thereon. As per the letter dated the 1st November, 2012, the Clerk to Council in a letter to the Assistant Director, Survey of Kenya stated that the suit land had been transferred to Kenneth Kareu as per the consent from Margaret Wanjiku Mbuthia. Further, that the suit land was transferred to Dr. Yusuf Njogu Mburu as per a transfer letter from Kenneth Njoroge Kaleu. They confirmed that the legal owner of the suit land was Dr. Yusuf Njogu Mburu. From the Defence evidence, DW1 was emphatic that the late husband purchased the suit land for Kshs. 7 million. She however did not have all the documents to prove payment. She confirmed that she was present when the late husband entered into a Sale Agreement dated the 2nd October, 2012 with the Plaintiff's husband. Further, that the late husband processed a Certificate of Lease dated the 26th February, 2016 in respect to the suit land. DW1 confirmed that original allottee Margaret Wanjiku Mbuthia signed the relevant transfer forms to enable them acquire title. It was her testimony that on 19th March, 2016 when they sent workers to clear the suit land, they discovered someone had put a sign thereon that the plot was not for sale. I note the transaction over the suit land to Dr. Yusuf Njogu Mburu was undertaken by Kenneth Njoroge Kareu prior to his demise. I note the Plaintiff stopped the transfer of the land to John Rugilo Chweya, but there was no indication as to whether she stopped the transfer of the suit land to Dr. Yusuf Njogu Mburu. From the documents presented by the Defendant, it is evident that they obtained the necessary consents and adhered to the proper legal process to acquire the suit land from Kenneth Njoroge Kareu who had been granted consent to transfer dated 4th July, 2012 by the Ol Kejuado County Council to enable him transfer the suit land to Dr. Yusuf Mburu Njogu.

Section 25 and 26(1) of the Land Registration Act provides that:'

25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. 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.'

In the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** Justice J.M. Mutungi held that '**the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law**'.

From the evidence of PW1, I find that she failed to demonstrate that Yusuf Mburu Njogu acquired the title to the suit land through fraud, misrepresentation or illegally, unprocedurally or through a corrupt scheme since the late husband who was registered as its owner had actually applied for a consent from the Ol kejuado County Council to transfer the said land to Yusuf Mburu Njogu. Insofar as I sympathise with her that this was her matrimonial property, I opine that she came to court too late. Based on the circumstances at hand and in relying on the legal provisions cited above as well as associating myself with the quoted decision, I find that the Defendant is indeed the registered proprietor of the suit land and not the Plaintiff. I disagree with the Plaintiff's averment that the Defendant is a trespasser thereon. In the circumstances, I find that the Plaintiff has no proprietary rights over the suit land which her husband had sold several years before his demise.

It is against the foregoing, that I find the Plaintiff has failed to prove her case on a balance of probability and will proceed to dismiss it with costs to the Defendant.

Dated Signed and Delivered via email this 26th day of May, 2020

CHRISTINE OCHIENG

JUDGE