



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 330 OF 2008

JOHN NJENGA KIMANI.....PLAINTIFF

VERSUS

FRANCIS MBOGO.....1ST DEFENDANT

SUSAN KINUTHIA MBOGO.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 20th May 2004 the plaintiff has sued the defendants seeking:-

(a) An eviction order for the defendants to vacate LR No. Escarpment/Kinari/Block 1/2639.

(b) Costs of the suit.

2. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance through the firm of M/S Gachoka & Co. Advocates, on the 24th June 2004.

3. They also filed a statement of defence and counter-claim dated 12th July 2004. The defendant denied each and every allegation in the plaint. In paragraph 9 of the defence they have given particulars of fraud and/or misrepresentation on the part of the plaintiff as follows:-

(a) Using fraudulent means to acquire land parcel no. Escarpment/Kinari/Block 1/2639 without the defendants knowledge and/or consent.

(b) Fraudulently subdividing the defendant's parcel of land into 5 portions without the defendant's knowledge and/or consent.

(c) Having himself registered as the absolute proprietor of land No. Escarpment/Kinari/Block 1/2639.

(d) Fraudulently having Land Parcel No. Escarpment/Kinari Block 1/1759 to be subdivided without the defendants' knowledge and/or consent

4. In their counterclaim, the defendants state that they are entitled to Land parcel No. Escarpment/Kinari/Block 1/1759 wholly and that the registration of plaintiff as the owner ought to be rectified. They seek that:-

(i) The plaintiff's suit be dismissed with costs.

(ii) The plaintiff's title deed be cancelled and the registration of Escarpment/Kinari/Block 2639 be declared null and void.

(iii) The defendants be declared as the legal and rightful owners of Escarpment/Kinari/block 1/2639 measuring 1 acre and be registered as such.

(iv) Costs of the counter claim be awarded to the defendant.

(v) Such further or other reliefs as the court may deem fit to grant.

5. In reply to the statement of defence and counterclaim, the plaintiff denied the allegations in the counterclaim and prayed that it be dismissed with costs and judgment be entered as prayed in the plaint.

6. In the notice to produce dated 29th November 2005 and filed on 30th November 2005, the defendants required the plaintiff to produce:-

- (i) An official search for land parcel no Kinari Escarpment Block 1/1759 and 2639.***
- (ii) Original documents of sub division of land parcel no Kinari Escarpment Block 1/1759.***
- (iii) Transfer of land document.***
- (iv) Copies of land board consent for both land parcels nos 1759 and 2639.***
- (v) Original title deed for Kinari Escarpment Block 1/2639.***
- (vi) Certificate of green cards for land no. Kinari Escarpment Block 1/1759 & 2639.***
- (vii) Any other document relating to land parcel no. Kinari Escarpment Block No 1/2636 and 1759.***

7. PW1 John Njenga Kimani the plaintiff told the court that he is the registered owner of Land Parcel known as Escarpment/Kinari Block 1/2639. That he bought the same from Samuel Muthiora Gitau in 1996. He produced the title deed as exhibit P1. The transfer was registered on 7/1/1997. He said he went to the land in 1996 and found the defendants had built on the land and were cultivating it. He reported the matter to the assistant chief and the district officer. The defendants were summoned to avail their documents but instead went to the district commissioner. The plaintiff then decided to institute this suit. He further stated that the land is situated in Kinari in Lari Division. He also stated that he has been unable to construct on the land or cultivate it because the defendants chased him away. He prays that he be declared the owner of the suit land measuring approximately 1 acre and the defendants be evicted.

8. PW2, Isaac Njiru a land registrar based at Kiambu Land Registry testified on 29th September 2015. He told the court from the records at Kiambu Land Registry, Land Parcel number Escarpment/Kinari/ Block 1/2639 is a subdivision of 1759. Escarpment/Kinari/Block 1/1759 measuring 2.23 ha was first registered on 2nd December 1992 in favour of the Government of Kenya and transferred to Muthiora Gitau on the same date.

9. On 31st October 1996. S. Muthiora Gitau recorded a correction of name to read Samuel Muthiora Gitau. The title was then closed on subdivision resulting in parcel numbers 2635 to 2639. New land registers were opened in favour of Samuel Muthiora Gitau on 7th January 1997, he transferred parcel no. 2639 to John Njenga Kimani for a consideration of KShs.50,000/-. He further told the court that the registered proprietor of 2639 from the records is John Njenga Kamani. He produced certified copies of Green Card as exhibit P2. He also told the court that there is transfer document dated 7th January 1997 registration receipt dated 7th January 1997, a letter of consent issued by Land Control Board Lari to Samuel Muthiora Gitau as the transferor and John Njenga Kimani as transferee. An official search and the application for registration were produced as a bundle as exhibit P3. He told the court that the records in the land registry do not reflect the defendants.

10. DW1, Francis Mbogo Wainaina, the 1st defendant, told the court that the 2nd defendant Susan Kanuthu Mbogo is his wife. He says they reside on land parcel known as Escarpment/Kinari/Block 1/1759. They have lived there since 1990. He said the scheme was started in 1988. He said the land measures approximately five (5) acres. He further told the court that in the year 2002, the chief informed them to hand over their documents to the ministry of lands at Ardhi House. The reason was that there were many disputes arising out of the said scheme. He said he complied. He then waited to be issued with a title deed. He told the court the land has never been subdivided as there are no beacons. He stated that he does not know Samuel Muthiora Gitau. He only met the plaintiff in court. He prays that he be issued with title deed as he is in occupation.

11. At the end of the hearing the parties tendered written submissions.

12. I have considered the pleadings, the evidence on record, and the submissions on record. The issues for determination are:-

- (i) Whether the plaintiff acquired title to the suit premises fraudulently and it ought to be cancelled.***
- (ii) Whether the plaintiff is entitled to an order of eviction against the defendants.***
- (iii) Whether the defendants are entitled for judgment in terms of the counterclaim.***
- (iv) Who should bear costs?***

13. It is the plaintiff's case that he bought the suit property from Samuel Muthiora Gitau in 1996 for KShs.100,000. He was then issued with a title deed which he produced as exhibit P1. When cross examined by the defendants counsel, he told the court that he used to work at the lands office but he is retired, while Samuel Muthiora works at Survey department of Kiambu Lands Registry. He also admitted that the said Samuel Muthiora Gitau was not one of the squatters at Kinari forest. PW1 did not produce the sale agreement and other documents relating to the transaction as he said he had misplaced them. PW1 also told the court that he saw the 1st defendant in 1997. I believe he told the court lies when he claimed the land was vacant when he bought it.

DW1 Fancis Mbogo Wainaina has adduced evidence to show that he has been on the land since 1988.

14. It is not clear how Samuel Muthiora Gitau acquired the land. PW2 Isaac Njiru told the court that that from the records held at Kiambu

Land Registry, the register of Escarpment/Kinari/Block 1/1759 was opened on 2nd December 1992. The land was then registered in the name of the government of Kenya. That Kinari was a settlement scheme excised out of Kinari forest. That the original land parcel Escarpment/Kinari/Block 1/1759 measured 2.23 hectares or 5.510 acres. That the land was transferred to Samuel Muthiora Gitau on 2nd December 1992 and on 31st October 1996 a subdivision was effected to give rise to titles 2635 to 2639. The original title 1759 was then closed on 7th January 1997. The land parcel No. Escarpment/Kinari Block 1/2639 was transferred to the plaintiff for a consideration of Kshs. 50,000/-. This contradicts the plaintiff's claim that he paid Kshs.100,000 for the suit property. PW2 produced certified copies of register, registration receipt applications for consent for land control board as exhibit p3. When cross examined by the defendants' counsel PW2 admitted that he came across a report authored by the ministry of lands taskforce relating to allocation of land in the said scheme. He also told the court that the numbers were allocated by the survey department after undertaking survey.

15. It is not in doubt that PW1 and Samuel Muthiora Gitau both worked at the lands registry Kiambu. It is also obvious that they were aware that Kinari scheme was being allocated to squatters. Samuel Muthiora Gitau took advantage of his position to allocate himself land meant for squatters at Kinari Scheme. He was however not aware that someone else was on the land. The plaintiff ought to have done due diligence before buying the portion from Samuel Muthiora Gitau. It should be noted that the said Samuel Muthiora Gitau was not called as a witness in this case. His testimony could have assisted the court to reach a fair conclusion, particularly how he acquired the said parcel.

16. Section 26(1) of the Land Registration Act provides that:-

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.

17. The fact that there is no history of how Samuel Muthiora Gitau became the registered owner of Escarpment Kinari/Block 1/1759 which he subdivided into five portions is not clear. It could only mean that he took advantage of his position at Kiambu Lands Registry and registered himself as the owner of parcel number 1759. I find that the particulars of fraud and misrepresentation set out in paragraph 9 of the defence and counterclaim have been proved. Samuel Muthiora Gitau did not appear as a witness to give an explanation. The defendants story has not been controverted. The title deed by the plaintiff therefore was acquired fraudulently since Samuel Muthiora Gitau acquired the title under questionable circumstances.

18. DW1 Francis Mbogo Wainaina told the court that he was given parcel No. Escarpment Kinari/Block 1/1759 in 1990. He immediately settled with his family and developed the land. That in 2001, he was summoned to the area chief's officers whereupon he met John Njenga (the plaintiff) who was claiming to be the owner of Escarpment/Kinari/Block 1/2639, one of the portions subdivided from 1759. He told the court the chief could not handle the dispute and referred them to the district officer and later the district commissioner. DW1 said he visited the chief land registrar's office in Ardhi house who confirmed that 1759 has not been subdivided. He was advised to stay in his land until the was issued with a title deed.

19. There is no doubt that the defendants are on the suit land. They have been there since 1990 while they awaited the issuance of the title deed. They were unaware that their land had been subdivided. As stated earlier, this was done fraudulently and/or without following due process.

20. In summary, the title being held by the plaintiff cannot give him any rights over portion of the defendants' land, as it is not clear how Samuel Muthiora Gitau acquired it in the first place. The defendants have been in possession of the land since 1990. As good citizens they waited for the issue of the title deed from their government. It will not be fair to dispossess them of the said land.

21. The upshot of the matter is that the plaintiff's case fails and the defendant's counterclaim succeeds. Accordingly, I dismiss the plaintiff's case with costs to the defendants and enter judgment in favour of the defendants as per the counterclaim as against the plaintiff as follows:-

(a) That the plaintiff's suit is hereby dismissed with costs to the defendants.

(b) That the plaintiff's title deed is hereby cancelled and the registration in his favour of land parcel Escarpment /Kinari/Block 1/2639 is null and void.

(c) That a declaration is hereby issued that the defendants are the legal and rightful owners of land parcel Escarpment/Kinari/Block 1/1759 which includes Escarpment/Kinari/Block 2639 measuring 1 acre and be registered as such.

(d) That costs of the counterclaim are awarded to the defendants.

It is so ordered.

Dated, signed and delivered in Nairobi on this 21ST day of May 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

No appearance for the Defendants

Kajuju - Court Assistant