



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 288 OF 2013

JANE MUTHONI NGARE and JOSEPHINE WAMBUI

NGARI (Suing as the Legal Representative of the Estate of

Patrick Ngari Mbachu).....**PLAINTIFFS**

VERSUS

FLOMENA NJOKI KAMAU.....**DEFENDANT**

J U D G M E N T

1. The plaintiff commenced this suit by way of a plaint dated 28th June 1990 vide Nakuru CMCC No.545 of 1990. The suit was transferred to the High Court and was registered as Nakuru HCCC No.460 of 1999. Following the inauguration of the Environment and Land Court, the suit was transferred to the Court and registered as Nakuru ELC No.288 of 2013. By the further amended plaint dated 8th June 2019 filed on 10th June, 2019 effected with the leave of the court the plaintiff sought the following orders:-

*(a) A declaration that the deceased plaintiff is the legal owner of **L.R No. Kijabe/Kijabe Block 1/3046**.*

*(b) A declaration that the Defendant's Title Deed for the Land Reference No.**Kijabe/Kijabe Block 1/3046** was obtained mistakenly, by error or fraudulently.*

*(c) An order that the title deed for **L.R No.Kijabe /Kijabe Block 1/ 3046** be cancelled.*

*(d) An order that the Land Registrar, Nakuru District do rectify his register by issuing the title deed for **L.R No.Kijabe Block 1/3046** in the name of the plaintiffs.*

(e) Costs of this suit.

(f) Any other or further relief that his Honourable court may deem fit to grant.

2. The defendant vide a defence filed on 25th July 1990 denied all the averments contained in the plaint filed by the plaintiff. She contended the plaintiff was not entitled to the prayers sought in the plaint.

3. The suit was part heard before Munyao, J on 11th June 2015 when the plaintiff Patrick Ngari Mbachu (now deceased) testified. The plaintiff was substituted following his death by his two widows and the further hearing proceeded before me on 12th February 2020 in the absence of the defendant who though served with a hearing notice failed to attend. After the close of the plaintiff's case the trial closed and the plaintiff filed their closing submissions as directed by the court.

4. The plaintiff in his evidence testified he purchased land from a member/shareholder of Maai Mahiu Kijabe Longonot Company Ltd known as Waweru Kanai in 1979 for a sum of Kshs16,000/=. He produced the sale agreement (in kikuyu) dated 27th October 1979 and its English translation (" PEX1") . He stated he paid Kshs 10,000/= on execution of the agreement and paid the balance of Kshs 6,000/= later. He explained that after signing the sale agreement they proceeded to the company's offices where the shares were transferred from Kanai's name to himself upon payment of the transfer fees of Kshs.200/=. He stated he was issued with a share certificate and was allocated plot No.3046 after balloting. He produced the share certificate and the ballot affirming that he was allocated plot No.3046.

5. The plaintiff (deceased) testified that after being allocated the plots they were advised to pay for the processing of their titles and he paid a sum of Kshs 160/= on 19th August 1985 at the D.O's office at Naivasha where they were advised to collect their title deeds at Nakuru. He stated that in 1990 he discovered that a title for his plot had been issued in the defendant's name and that his name had been cancelled. The plaintiff carried out a search on 8th June 1990 which revealed that the defendant was the registered owner of plot No.3046. A further search carried out in 2015 still revealed the defendant was the registered owner. The plaintiff produced in evidence the abstract of title (green card) and the certificates of search as exhibits "7,8 & 9" respectively.

6. It was the plaintiff's further evidence that the initial allocations in 1979 were for 3 acres but after balloting the shareholders were allocated portions of 5 acres which necessitated some people to be moved from the portions they had occupied. The plaintiff stated that he moved from the 3 acres plot to the one of 5 acres in 1983. He stated he has occupied and developed his plot. He has constructed a timber house, cultivated on the land and kept livestock thereon. He stated that the defendant never came to the initial plot of 3 acres that he occupied between 1979 and 1983 and neither had she at any time come to the plot of 5 acres that he had occupied from 1983 to date. He stated that he first saw the defendant in court. He prayed that the title for the plot issued in the defendant's name be cancelled and that he be registered as the owner in place thereof.

7. PW2 Patrick Ndungu Kuria testified that he was the secretary of Maai Mahiu Kijabe Longonot Company Ltd. He affirmed Waweru Kanai was an original member of the company and that he sold and transferred his share (s) to Patrick Ngari Mbachu. The witness affirmed the plaintiff was entitled to ownership of plot No.3046 as per their records. He produced in evidence two letters dated 12th January 2005 and 12th March 2015 where the chairman of the company wrote confirming the plaintiff was their share holder and the owner of the plot No. 3046. The witness further affirmed that the defendant was not a member of their company as she did not appear anywhere in their records.

8. PW3 Josephine Wambui Ngari was a widow of the plaintiff and she and her Co- wife Jane Muthoni Ngari were substituted as the personal legal representatives having been issued with grant of letters of administration intestate for the plaintiff's estate in Limuru SPM Succession cause No.31 of 2017 on 20th July 2017. She asserted that the husband was the owner of plot No. 3046 Kijabe Longonot and that as the administrators they were entitled to be registered as owners on behalf of the estate.

9. The plaintiff's counsel filed written submissions on 11th March 2020 following the close of the trial. I have reviewed and considered the pleadings, the evidence adduced both orally and by way of documents and the submissions made on behalf of the plaintiff and the following issues arise for determination:-

(i) Whether the deceased plaintiff was a member of Maai Mahiu Kijabe Longonot Co Ltd and whether he was legitimately and lawfully allocated plot No.3046 by the said company .

(ii) Whether the deceased plaintiff has occupied and has been in possession of land parcel Kijabe/Kijabe Block1/3046.

(iii) Whether the defendant was validly and lawfully registered as the owner of the suit property or such registration was fraudulently procured?

(iv) What reliefs and/or orders should the court grant or make ?

10. The evidence of the plaintiff in this matter was not controverted. Though the plaintiff was cross examined by counsel for the defendant, his evidence remained consistent that he purchased a share from an original member of Maai Mahiu Kijabe Longonot Co Ltd consequent to which the share was transferred to him and he became a shareholder. He was as a consequence of being a member allocated a plot No.3046 measuring approximately 5 acres which he took possession of and occupied by building a home thereon. The plaintiff produced documentary evidence to support his evidence. PW2 the secretary of Maai Mahiu Kijabe Longonot Co Ltd corroborated the plaintiff's evidence and asserted that the defendant was not a member of their company. If the defendant was not a member of the company, she could not have been allocated any land by the company. PW2 stated that any documents the defendant may have tendered in support of her membership of the company could not have been genuine and did not originate from the company. The defendant did not give any evidence and her pleadings remained mere statements of facts which were unproven. The pleading cannot constitute evidence until it is testified upon, and if applicable tested in cross examination by the opposite party.

11. In the case of *Shaneebal Ltd -Vs- County Government of Machakos (2018) eKLR* G.V Odunga, J considering the position of uncontroverted evidence cited Madan, J (as he then was) with approval in the case of *CMC Aviation Ltd -Vs- Crusair Ltd (No.1) (1978) KLR 103; (1976-80) IKLR 835* where he stated:-

"Pleadings contain averments of the parties concerned. Until they are proved or disproved or there is an admission of them or any of them, by the parties, they are not evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven."

12. Under paragraph 24 of his judgment in the case, Odunga, J rhetorically posed the question: -

"What are the consequences of a party failing to adduce evidence?"

He answered the question by making reference to the case of *Motex Knitwear Ltd -Vs- Gopitex Knitwear Mills limited Nairobi Milimani HCCC No.834 of 2002* where Lesit, J citing the case of *Antar Singh Bahra & Another -Vs- Raju Gorindji HCCC No. 548 of 1998* where the court stated :-

“Although the defendant has demined liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and counterclaim are unsubstantiated. In the circumstances, the counter claim must fail”.

13. In the case Odunga, J went on to conclude thus :-

“In this case the plaintiff has given evidence on oath supported by documentary evidence which go to prove the case. Accordingly, in the absence of any evidence to the contrary and as proof in Civil cases on a balance of probabilities, I find that there was indeed an agreement between the plaintiff and the defendant for supply by the plaintiff to the Defendant of said mechanical equipment at an agreed price”.

14. In the instant matter on the evidence adduced by the plaintiff and the witness coupled with the documentary evidence which was not controverted, there is irresistible and unrefuted evidence that the plaintiff indeed purchased the share of one Waweru Kanai in the Maai Mahiu Kijabe Longonot Company Ltd which led to him being allocated plot No.3046 by the company. The plaintiff paid for the land registration fee vide receipt No.836030 of 19th August 1985. The receipt indicated the payment was for plot No.3046. On the basis of the evidence I am satisfied that the plaintiff became a member of Maai Mahiu Kijabe Longonot Company Ltd after he purchased the share belonging to Waweru Kanai and that he was by reason of his shareholding in the company allocated plot No. 3046 by the company in respect of which he was entitled to be issued a title deed. I am also satisfied he took possession of this land and has occupied the same since 1983 and has effected developments thereon as depicted in the photographs produced in evidence.

15. Having held that the plaintiff was a lawful shareholder of Maai Mahiu Kijabe Longonot Co Ltd and was lawfully allocated plot No.3046 and that he was the person legally entitled to be issued a title deed for the property, it follows that the defendant’s registration as the owner could not have been property obtained. The defendant did not testify to explain how she obtained title to the suit property. In the face of the evidence led by the plaintiff which was not rebutted, the court is obliged to accept the evidence as correct and in the circumstances cannot come to any other conclusion, other than that the defendant must have fraudulently obtained the title that she holds. The evidence by PW2, the secretary of Maai Mahihu Kijabe Longonot Company Ltd, was clear that the defendant was not a member of their company and without being a member she could not have been allocated any land. The letter by the chairman of the company dated 25th January 2005 stated their membership was upto number 2576 and explained that the defendant’s alleged share certificate No.2784 fell outside the register of their members. The certificate was thus fake and so must have been the other documents the defendant preferred in proof of her ownership. The court in the premises, holds and finds the registration of the defendant as the owner of land parcel **Kijabe/Kijabe Block 1/3046** was fraudulently procured.

16. Under section 26(1) of the Land Registration Act 2012 the title of a registered proprietor can be challenged on the ground of fraud or misrepresentation or if the title is shown to have been acquired illegally, unprocedurally or through a corrupt scheme. Section 26 (1) of the Act provides :-

(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. I have made a determination that the defendant could not have validly acquired the title to the suit property. The plaintiff on the basis of the evidence, regularly acquired the suit property and was entitled to be registered as the owner. In the premises I am persuaded that this is an appropriate case for the court to order the rectification of the register as provided under section 80 (1) of the Land Registration Act, 2012. Section 80 of the Act provides as follows :-

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

18. The defendant in the present suit had the opportunity to tender evidence if any, to rebut the evidence by the plaintiff. She did not and consequently the plaintiff’s evidence stood unchallenged. In the premises I am satisfied the plaintiff has proved his case on a balance of probabilities and I accordingly enter judgment in the plaintiffs favour in the following terms:-

(a) A declaration be and is hereby issued that the deceased plaintiff is the legal owner of L.R Kijabe/Kijabe Block 1/3046.

(b) A declaration be and is hereby issued that the Defendant’s Title Deed for land parcel Kijabe/Kijabe Block 1/3046 was obtained through misrepresentation, and/or fraudulently.

(c) An order be and is hereby issued that the title deed for L.R No. Kijabe/Kijabe Block1/3046 in the defendant’s name be cancelled.

(d) An order be and is hereby issued that the Land Registrar, Nakuru County do rectify the register by issuing the title deed for land parcel Kijabe/Kijabe Block1/3046 in the names of Jane Muthoni Ngare and Josephine Wambui Ngari the appointed administrators of the deceased plaintiff's estate.

(e) Costs of the suit awarded to the plaintiffs.

Judgment dated signed and delivered electronically at Nakuru this 7th day of May 2020.

J M MUTUNGI

JUDGE