



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC No. 447 OF 2017

(FORMERLY NAKURU ELC NO 98 OF 2017)

LUCY MUMBI NDUNGU (Suing as the legal representative

of the estate of **PETER KARIUKI WAMBUGU**).....**PLAINTIFF**

VERSUS

DANIEL MWANGI WARUGENDU.....**DEFENDANT**

JUDGMENT

1. Vide a Plaint dated the 26th March 2012, the Plaintiff herein sought for the following orders;

- i. A declaration that the subdivision of the parcel of land known as Nyandarua/ Lesirko/2041 (originally) into two portions Nyandarua/ Lesirko/2636 and Nyandarua/ Lesirko/2637 was in illegal ab initio and it is therefore a nullity.
- ii. A declaration that the Defendant's entry onto the Plaintiff's parcel of land on the portion known as Nyandarua/ Lesirko/2637 is unlawful and irregular.
- iii. A cancellation of the title deed illegally obtained by the Defendant for Nyandarua/ Lesirko/2637.
- iv. An order of injunction restraining the Defendant by himself his agents, servants and/or employees from in any way interfering with the Plaintiff's land known as Nyandarua/ Lesirko/2637.
- v. Costs of the suit and interest.

2. In response to the said Plaint, the Defendant herein filed his statement of Defence and Counterclaim on the 4th May 2012, wherein he denied the allegations contained in the Plaintiff's Plaint and sought for the following orders in his Counter-claim;

- i. The order of injunction restraining the Plaintiff by herself, agents, servants and/or employees from interfering in any way with the Defendant's parcel of land known as Nyandarua/ Lesirko/2637.
- ii. An order that the Defendant is the lawful owner of parcel of land known as Nyandarua/ Lesirko/2637.
- iii. Costs of the suit and interest.

3. The Plaintiff thereafter filed her reply to the defence and defence to counterclaim on the 17th May 2012 denying the Defendant's assertion and reiterating on the contents of her Plaint.

4. Subsequently after both parties complied with the provisions of Order 11 of the Civil Procedure Rules, the matter was set down for hearing.

The Plaintiff's case

5. Briefly, the Plaintiff's case was that the deceased Peter Kariuki Wambugu (whom shall be referred to as the deceased for the purpose of

this suit) who died in the year 2011, was her husband. That upon his death, she had applied for letters of Administration to enable her file the present case on his behalf. She produced the copy of the Grant issued in Succession Cause No. 10 of 2012, as PF exhibit 1.

6. She testified that her deceased husband was the proprietor of a parcel of land No. 2041 in Lesirko whereupon they have been living as a family with their 7 children since the year 1993. That upon the demise of her husband, he was buried on that piece of land.

7. That on the 22nd February 1998 she and the deceased had borrowed Ksh 3,900/= from the Defendant herein Daniel Mwangi Warugendo which money was to accrue at an interest of 30% per month. They entered into an agreement dated the 28th February 1998 to that effect, which agreement was in Kikuyu language and produced as PF exhibit 2(a) while the translated version was produced as PF Exhibit 2(b).

8. It was further her evidence that upon the signing of the agreement, the Defendant had been given title to their land as security for the money they had borrowed. That later in March 1998, they had gone to repay the money to the Defendant who refused to take it stating that he had not renewed his shylock license.

9. That they had gone back in April 1998 with about 7 people as witnesses in an attempt to repay back the money but the Defendant had refused to receive it for which she made an application for caution dated 6th February 1998 and the same had been registered on the 22nd June 1998, documents which she produced as Pf Exhibit 3.

10. That after the caution had been placed on the land, one day a watchmen went to her home and informed her that he had found the Defendant and the deceased at the Land Board. She rushed there only to find both the parties present. When parties were summoned inside the office, she had also accompanied them therein where she had objected to the transfer of the land. That she also gave the District Officer a letter dated 20th July 1998 herein produced as Pf exh 4, opposing the transfer of the land, pending arbitration between the parties.

11. Parties had then been asked to go home and await for an invitation letter for arbitration which was never sent. One day when she was washing the deceased's coat, she had found a letter confirming that he had sold the piece of land to the Defendant Daniel Mwangi Warugendo which information was confirmed by one Joseph. That she had reported the matter to the District Officer who had the warned the deceased not to sell the land and the buyer not to buy the same.

12. That from the copy of agreement, she had found in the deceased's pocket, she had noticed that the amount of money they had borrowed was the same amount that the deceased had sought to sell the land. When she had confronted the deceased, he had informed her that he had been under pressure regarding the money he had borrowed and that was the reason why he had decided to sell the land.

13. That she had then asked the deceased to look for some elders so that they could go to the Defendant to ask him to take his money back since they had no interest in selling the land. That they had got elders wherein they had gone to the Defendant's home but he had yet again refused to be paid.

14. Subsequently, she had visited the land's office, where she had found that the Defendant had already subdivided the land into two pieces resulting into No. 2636 and No. 2637 wherein parcel No. 2637 had been registered in his name. It was her testimony that she had neither seen any surveyor on the land, nor participated in the subdivision of parcel No. 2041. That further the Defendant had not given them title to the other piece of land after the sub division.

15. The Plaintiff testified that after she had discovered that their title had been transferred, she had filed the present suit against the Defendant. She further confirmed that the Defendant had never taken possession or cultivated on his alleged portion of the suit land and further that she did not know under whose name parcel No.2636 had been registered.

16. She confirmed that the only agreement she and the deceased had signed was the one in which they had borrowed the loan. She denied having either executed the agreement dated 16th June 1998 in the Defendant's lists of documents or having attended any Land Control Board meeting in relation to parcel No. 2041. That further she had neither received any letter from the land registrar on the caution she had placed on land parcel 2041 nor had she removed the caution.

17. She asked the Court to cancel the resultant two titles and to order that they revert to the original title. That land parcel No. 2637 was not the Defendant's land and therefore his counter claim ought to be dismissed and he be restrained from interfering with land parcel No. 2637. She also sought for costs of the case.

18. In her cross examination, she had confirmed that a tribunal had been set up at their home between Daniel as the Claimant vs Peter as the Objector. That the tribunal officers had walked around the land and talked of beacons she had never seen. The Plaintiff also confirmed that Parcel No. 2041 had been given to the deceased by his father and therefore the land belonged to both the deceased and his family. Finally it was her testimony that she was not aware of the Tribunal's finding.

19. The next Plaintiff witness Joseph Njoroge Gachine testified that in 1998 he used to live in Oljoro Orok location. That he and the Plaintiff belonged to Gakenia Women Group which was a mixed group of both men and women. That the Plaintiff had borrowed from the group Ksh 6,000/- in 1988 so that she could refund Daniel Mwangi the money she had borrowed from him.

20. That the group had decided that in order to make sure that she re-paid the money, 8 members, him inclusive were to accompany the Plaintiff to re-pay the money to the Defendant whom he had known previously. That they had gone to Mwangi's home where they had found him but he had refused to take the money stating that he would call them later which was never to be.

21. That he had then left for Kitale. In the year 2010, upon his return, he had sought to know from the Plaintiff how things had gone regarding the loan wherein he had been informed that the Defendant had changed the title.

22. He testified that when the loan had been taken, it had been an issue on money business where the Defendant had kept the title as security and that at no time had the parties agreed on a sale/exchange of land.

23. He confirmed that the Plaintiff and her family had built and lived on the suit land. That he Knew that the deceased was a drunkard and somewhat mentally disturbed. That he was not sure whether indeed there had been a sale agreement although it is was not true that the land had been sold to the Defendant.

24. On cross examination, he testified that he had been informed that there had been a dispute filed at the Tribunal on a boundary dispute. He confirmed that the money was loan taken between the years of 1997 and 1998 during which time the deceased did not file any case in Court but that the parties used to go to the Chief.

25. When he was referred to PF Exhibit 4; he stated that the letter was written to the Chief of Kirimangai Location and was dated 1998. That he was sure there had been a mistake because the location was Oljoro Orok Location not Kirimangai and that the writer may have made a mistake. He was firm that he did not know that there had been an agreement of sale of land between the deceased and the Defendant.

26. When referred to the agreement dated 16th June 1998; he stated that Kiragu Murage was a surveyor and that if the agreement had been written at home, he would have been aware of it but since the same was not written at home, he was not aware of any agreement. The Plaintiff thus closed their case.

The Defence case.

27. The Defendant, Daniel Mwangi Warugendu's case was to the effect that he knew both the Plaintiff and the deceased who on 28th February, 1998 went to him and requested for a loan of Ksh. 3,900/- That parties had agreed that they would refund the money on the 28th March 1998 wherein they had reduced the agreement into writing for which he produced the original document written in Kikuyu Language as DF exhibit 1(a) and the translated version as PF Exhibit 1(b).

28. That subsequently the deceased had refunded the money wherein he had given him back his title for parcel No. 2041. That later in June 1998, both the deceased and one Peter Mathanji Wambugu, in the absence of the Plaintiff, had approached him again where they had informed him that they had a problem and that they wanted to sell land to him.

29. That they had entered into another agreement between him and the deceased dated 16th June 1998 for sale of land at a consideration of Ksh 32,500/- where he had paid the 1st installment of Ksh 21,096/- and remained with balance of 11,404/-. That the 2nd installment of Ksh 5,000/- was paid on the 25th June 1998 wherein the 3rd installment of Ksh 1,000/- was paid on the 29th July 1998, and the balance of Ksh 1,704/- was paid when they went to the Land Control Board on 30th July 1998.

30. His evidence was that after he had paid the balance, the witnesses Peter Mathanji and Kiragu had signed the agreement which he produced as DF exhibit 2. That thereafter they had gone before the Board for consent of transfer where the deceased had applied for the application for consent, which copy he produced as DF Exhibit 3. Subsequently they had been issued with the consent on the same date the 30th June 1998 which he produced as DF Exhibit 4. Thereafter he had caused the land No. 2041 to be subdivided giving rise to 2636 and 2637 as per the copy of mutation which he produced as DF Exhibit 5. That he later went to get his title from the Land Registrar on the 9th March 2005 to plot No. 2637 which he produced as DF Exhibit No. 6. He testified that Plot No. 2636 was registered to deceased and it was the land upon which his family was living on.

31. He also testified that there had been no other dispute between him and the deceased save for when the deceased had removed the beacons indicting the boundaries of the land. That was when he had filed a case at the Tribunal where the elders had visited the land and had found the deceased, his wife and children. That it had been the Plaintiff who had showed the elders his portion of land when they had inquired about it but denied being present when the beacons were removed.

32. That at the time, the deceased had informed the elders that although he had sold to the Defendant land, yet he wanted to refund his money. In the end, the Tribunal had held that the deceased returns the beacons and pays the Defendant costs.

33. That the proceedings of the Tribunal had been forwarded to Court in Nyahururu in Land Dispute Case No. 1 of 2011 where the award had been adopted. He produced the land disputes proceedings and the award as DF Exhibit 7(a) as well as the order of the Magistrate's' Court as DF Exhibit 8.

34. The Defendant further testified that the Plaintiff took to him a letter dated the 20th July 1998 from the Board where she wanted to have the consent stopped. That the letter was addressed to Kirimangai location and had no stamp of the Board. That further, at the time, there had been no Kirimangai location as the same had been constituted in the year 2010. The letter had also stated that the Board would sit on 30th July 1998 and despite knowledge of the date, she did not appear before the Board. That since there was no objection, the transfer had been passed.

35. That subsequently in 2009, an allegation of obtaining title fraudulently had been reported to the CID who had asked that he produces all the documents he processed. He obliged and presented the transfer and consent documents to which parties had been asked to solve their dispute with the District Officer where the Board had sat. That after 2 months, the Board had sent the minutes that had passed the consent, to the CID who had confirmed that the same had emanated from the Board and were genuine.

36. It was his testimony that he neither forced the deceased to sign the sale agreement nor was he drunk at the time. That further, the Board could not pass anything before they confirmed the truth. That he did not procure his title fraudulently but through legal means. He sought for

the return of his title and that the same be freed of the encumbrances so that he could deal with it as his land. He also sought that the Plaintiff be ordered to return the beacons they had removed and further that they be restrained from interfering with his land.

37. In his cross examination, he testified that at the moment the Plaintiff was forcefully utilizing his portion of the land. That he had fenced the land in the year 2006 after the beacons had been returned where he had ploughed for two years from 2006 after which he had left ploughing because the Plaintiff had planted trees thereon.

38. That he had not taken immediate possession of the land because the Plaintiff and her family had removed the beacons, the reason he had gone to the tribunal. That the 1st beacons had been placed on the land in 1998 and after they had been removed, the matter had been reported to the Oljoro Orok Police where the police had visited the land, seen the destruction but had taken no action. That after he had gone before the Tribunal in the year 2010, the beacons had been put back.

39. His evidence was that after the deceased had returned his money the parties had not signed an acknowledgement but that he had returned the title to the deceased. That at the back of the agreement there were writings showing Ksh 10,985/- which was the interest accrued although the deceased did not pay it.

40. He further confirmed that the deceased was not a lunatic and that the land was sold at Kshs. 32,500/- for a ¼ acre. That after the Plaintiff came to know of the sale is when she had written to the Board. That he had not known that she had not wanted the land to be sold. He also confirmed that before buying the land, he had not conducted a search.

41. That the Caution had been placed on the land after they had entered into the agreement, which caution had been removed in the year 2005 by the Register after the deceased had written a letter to have it removed. That the Plaintiff had been summoned by the Registrar but had refused to heed to the summons.

42. That the consent dated the 30th July 1998 herein produced as Df exh 4 was in relation to parcel No parcel No. 2637 and not parcel No. 2041.

43. The title in reference to parcel No. 2637 was issued in 2005. In 1998 there was no land ref. No. 2637. The defence closed its case.

Determination.

44. It must be remembered from the onset that despite there having been leave granted to the parties to file their written submissions wherein a reminder had been sent to them on the 29th April 2020 and 5th May 2020, none of the parties had filed their submissions.

45. From the evidence adduced in Court, the following issues arise for determination.

- i. Whether the Plaintiff has proved her case.
- ii. Whether the Defendant's title deed to Nyandarua/ Lesirko/2637 was illegally obtained.
- iii. Whether the Defendant has proved his case in the counter claim
- iv. Whether the Defendant's title should be cancelled.
- v. Who should pay the costs

46. From the evidence herein adduced it is clear that the Plaintiff filed the present suit on the 26th March 2012 which was approximately 1(one) after her husband, Peter Kariuki Wambugu, who was the proprietor of the original land parcel No. Nyandarua/ Lesirko/2041, had passed away.

47. It is also not in dispute that in the year 1998 the couple had borrowed some money from the Defendant herein where they had surrendered title to their land parcel No Nyandarua/ Lesirko/2041 as collateral.

48. It is further also not in dispute that subsequently the original parcel of land had been subdivided resulting into parcels No. Nyandarua/ Lesirko/2636 and Nyandarua/ Lesirko/2637 to which the Defendant was registered as proprietor to parcel No. Nyandarua/ Lesirko/2637.

49. What is in dispute however is whether the deceased Peter Kariuki Wambugu had sold the said parcel of land to the Defendant or not.

50. According to the Plaintiff herein, the original parcel of Land No. Nyandarua/ Lesirko/2041 was given to her husband by her father in law wherein the family settled thereon. In the year 1998, they had borrowed some money from the Defendant leaving title to their land as security. That subsequently they had made frantic efforts to refund the money they had borrowed from the Defendant but he had refused to receive it only for a sale agreement to emerge later indicating that the deceased had sold the land to the Defendant.

51. Her evidence was that she had not been involved in the transaction for sale of the family land that she never attended any Land Control Board meeting in relation to parcel No. 2041 and therefore her consent was not sought. Further, that she did not also participate in the subdivision of the land.

52. The defence case on the other hand was that the deceased had repaid the loan he and the Plaintiff had borrowed wherein later the deceased had approached him seeking to sell to him 0.25 hectares to be excised from the original parcel of land. That parties had entered into an agreement for sale herein produced as Df exh 2 on the 16th September 1998 which agreement was executed, parties appeared before the Land Control Board and the land was subsequently subdivided where the Defendant was registered as the proprietor of one of the resultant parcels of the sub-division being Nyandarua/ Lesirko/2637.

53. The law is very clear on the protection of a holder of title to land. Having established that that the parcels of land in question were registered under the Registered Land Act, Act (Cap 300) which was repealed upon the passage of the Land Registration Act, 2012, the Respondent's registration was governed by the provisions of Section 26 (1) of the Land Registration Act of 2012 which provides as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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.

54. It thus follows that in order to challenge the Defendant's title so as to have it cancelled as prayed by the Plaintiff, evidence according to Section 26 of the Act ought to have been led to prove that the Defendant's title to parcel No. Nyandarua/ Lesirko/2637 was acquired fraudulently, through misrepresentation, illegally, un-procedurally, or through a corrupt scheme.

55. Indeed the Court of Appeal in the case of **Munyu Maina (supra)** held as follows:

“...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.... the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal....”

56. The same reasoning was adopted in the case of **Daudi Kiptugen vs Commissioner of Lands & 4 Others [2015] eKLR** where the Court held that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

57. The Defendant's case was that he and the deceased proprietor of land parcel No Nyandarua/ Lesirko/2041 had entered into a sale agreement on 16th June 1998 for sale of ¼ acre of land at a consideration of Ksh 32,500/- where he had paid for the same in installments until he had finalized the payment of the purchase price as evidenced by Df exh 2.

58. That thereafter they had gone before the Land Control Board for consent of transfer where the deceased had applied for the application for consent which he produced as DF Exhibit 3. Subsequently they had been issued with the consent on the same date the 30th June 1998 which he produced as DF Exhibit 4. The original land No Nyandarua/Lesirko/2041 was subsequently subdivided giving rise to No Nyandarua/ Lesirko/2636 and 2637 as per the copy of mutation which he produced as DF Exhibit 5.

59. Up to this point, it is clear that these transactions were carried out in the year 1998. The Defendant's Title has been challenged on the basis that the suit property, being matrimonial property, the Deceased could not sell it without the consent of the Plaintiff. With due respect, it is clear that the suit property was acquired before the new land laws came into operation. The law does not act retrospectively and therefore I shall reject that line of evidence.

60. The defence case further was that after a land dispute between him and the deceased had been resolved in a Land Dispute Tribunal, its award of the 10th November 2010 was adopted by the Court in Nyahururu PMCC Land dispute No. 1 of 2011 into an order of the Court. Decree of the Nyahururu PM Court was not challenged and therefore the award and eventual judgment of the Court remained valid, was executed and the Defendant was registered as the proprietor of land parcel No Nyandarua/ Lesirko/2637 on the 9th March 2005.

61. That subsequently in the 2009, an allegation of obtaining title fraudulently had been reported to the CID who had asked that he produces all the documents. He obliged and presented the transfer and consent to which parties had been asked to solve their dispute with the District Officer where the Board had sat. That after 2 months, the Board had sent the minutes that had passed the consent to the CID who had confirmed that the same had emanated from the Board and were genuine.

62. I find from both the oral and documentary evidence adduced in Court that the Defendant herein proved to the required standards the legality of how he acquired the title to parcel No Nyandarua/ Lesirko/2637.

63. The Court of Appeal in **National Bank Kenya Limited –vs- Pipeplastic Samsolit (K) Limited and Another [2002] 2.EA 503** held that a Court of law cannot rewrite a contract between the parties and that the parties are bound by the terms of their contract unless they can prove that coercion, fraud or undue influence was used to procure the contract.

64. The contact was entered into by the deceased and the Defendant in the year 1998, the Plaintiff knew of the sale agreement in the same year, title was issue to the Defendant on the 9th March 2005, it therefore behooves the Court as to why the Plaintiff waited until the death of deceased in 2011 to bring the present suit.

65. The end result is that I find that the Plaintiff has not proved her case on a balance of probabilities and I proceed to dismiss her suit. On the other hand I find in favour of the Defendant in his counterclaim and proceed to make the following orders:

i. An order of injunction is herein issued restraining the Plaintiff by herself, agents, servants and or employees from interfering in any way with the Defendant's parcel of land known as Nyandarua/ Lesirko/2637.

ii. An order is herein issued that the Defendant is the lawful owner of parcel of land known as Nyandarua/ Lesirko/2637.

iii. The Plaintiff shall pay the cost of the suit and counterclaim with interest.

It is so ordered.

Dated and delivered at Nyahururu this 25th day of June 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE