



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO. 1033 OF 2012

NGAHU WA MUCHIIRI also known as TITUS NGAHU MUCHIIRI.....PLAINTIFF

VERSUS

JOSEPH KABUI KIRAGU.....1ST DEFENDANT

KAMITI FARMERS COMPANY LIMITED.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff's suit against the Defendants is in respect of land title Number Nairobi Block 117/506. In his Plaint dated 19th December 2012, the Plaintiff seeks the following reliefs:

- a) A declaration that the registration of the title in the name of the 1st Defendant was null and void *ab initio*.
- b) Cancellation of the title in the name of the 1st Defendant and re-issue in the name of the Plaintiff.
- c) A permanent injunction restraining the 1st Defendant from assigning, transferring, charging, alienating or parting with the ownership or possession of Title Number Nairobi Block 117/506.
- d) Damages.
- e) Costs of this suit.

2. In his Defence dated 14th April 2013 the 1st Defendant denies the Plaintiff's claim and states that he is the registered proprietor of Title No. Nairobi Block 117/506 for a term of 99 years from 01.01.1992 as a first registration for valuable consideration having purchased it from the 2nd Defendant for Kshs. 400,000 vide a sale agreement dated 10.10. 2001.

3. Despite being served with summons to enter appearance, the 2nd Defendant neither entered appearance nor filed a defence.

The suit was set down for hearing during service week on 27.11. 2018 and the Plaintiff and 1st Defendant each testified without calling any other witnesses.

PLAINTIFF'S CASE

4. The Plaintiff adopted this witness stated and produced the documents in his List of Documents dated 19th December 2012 as Plaintiff's exhibits 1-16. He testified that he bought a plot from the 2nd Defendant in 1982 and he was issued with a share certificate for the suit property by the 2nd Defendant in 2001. He stated that he was issued with an allotment letter dated 3.1.2011 addressed to the Commissioner of Lands requesting him to issue the Plaintiff with a Lease for the suit property. The 2nd Defendant wrote another letter to the Commissioner of Lands dated 12.4.2011 confirming that the Plaintiff was the registered proprietor of land Title Number Nairobi Block 117/506. He further testified that when he went to check on the status of the suit property in May 2011, he discovered that a title had been issued to the 1st Defendant on 8.3.2006. He testified that he never sold the suit property to the 1st Defendant or anybody else. His inquiries from the 2nd Defendant did not yield any useful information as the 2nd Defendant was evasive.

5. Upon cross-examination, the Plaintiff stated that he did not know the 1st Defendant. It was his evidence that he had bought the suit property through his friend Asaph Wanyoike Kimani who made payments on his behalf and he was issued with receipts for the same. He stated that he was not sure if Asaph entered into a written agreement with the 2nd Defendant. He stated that he did not know the officials of the 2nd Defendant. He confirmed that he was issued with a share certificate when he completed the payments but he had not taken possession of the suit property. He said he did not know if the 1st Defendant had taken possession of the suit property although he had seen the sale agreement between the 1st and 2nd Defendant dated 10.10.2001. He said he did not know if the 1st Defendant was aware that the plot had been sold to the plaintiff.

1ST DEFENDANT'S CASE

6. The 1st Defendant also adopted his witness statement and documents in his List of documents. He testified that he was introduced to the 2nd Defendant by his neighbour Joseph. It was his testimony that he bought the suit property on 10.10.2001 at Kshs. 400,000 and he was issued with a share certificate. He was also issued with an allotment letter which he presented to the Commissioner of Land in 2006. He was then issued with a Certificate of Lease in 2006. He denied colluding with the 2nd Defendant and stated that if he knew that the suit property was not available for sale, he would not have bought it. He testified that after he bought the plot he took possession thereof, fenced it and allowed someone to carry out some farming on it upto the year 2013.

7. Upon cross-examination, the 1st Defendant stated that he did not pay any stamp duty in respect of the sale agreement. He stated that his Share Certificate was not dated. He said that he had been informed that the suit property was vacant and available for sale. He said he did not check the 2nd Defendant's register of members to confirm the plots allocated to them. He stated that he was not aware of any irregularity with regard to the suit property as he was not aware of any commitment between the Plaintiff and the 2nd Defendant.

PLAINTIFF'S SUBMISSIONS

8. Learned counsel for the Plaintiff submitted that the 1st Defendant does not hold a valid title to the suit property. He faulted the process through which it was acquired. He submitted that the 1st Defendant's sale agreement did not adequately describe the property being sold as it referred to plot Number 117/506 in Kamiti Farmers Co. Ltd. It was his submission that this was not only vague but it was not ascertainable. He took issue with the fact that no stamp duty had been paid in respect of the sale agreement. He referred to section 19 of the Stamp Duty Act which provides that an instrument chargeable with stamp duty shall not be received in evidence in any proceedings whatsoever except in criminal and in civil proceedings by a collector to recover stamp duty unless it is stamped. Counsel submitted that no evidence was adduced to show that the 1st Defendant was issued with an allotment letter by the Commissioner of Lands. It was his further submission that even though the Certificate of Lease issued to the 1st Defendant was stamped, he did not produce a receipt to show that he paid stamp duty. Counsel referred to the cases of **Munyu Main v Hiram Maina (2013) eKLR** and **Daudi Kiptugen v Commissioner of Land Nairobi & 4 others (20150) eKLR** for the proposition that when a registered proprietor's root of title is challenged he must prove that the process of acquisition of the said title was lawful.

9. Counsel submitted that the Plaintiff had produced receipts showing how he acquired the suit property from the 2nd Defendant. He also produced a share certificate and an allotment letter issued to him by the 2nd Defendant on 12.4.2001 and another one on 3.1.2011. Both documents were signed by the 2nd Defendant's chairman and bore the 2nd Defendant's seal.

10. It was counsel's contention that the 1st Defendant colluded with the 2nd Defendant to acquire the Plaintiff's property. He submitted that the 1st Defendant knew all along that the suit property was not available for sale, since he did not confirm from the 2nd Defendant's records that the suit property had not been previously allotted to an existing member. He submitted that the 2nd Defendant did not deny that the Plaintiff was the first one to be allotted the suit property and that the Plaintiff was the rightful beneficial owner of the suit property. He therefore submitted that the Plaintiff had established fraud on the part of the Defendants. It was his contention that a title that had been procured by way of fraud or misrepresentation was impeachable by dint of section 26 (1) (a) of the Land Registration Act and the 1st Defendant should not be allowed to benefit from his own illegality.

DEFENDANT'S SUBMISSIONS

11. Learned counsel for the 1st Defendant submitted that the 1st Defendant's title is unassailable as it is a first registration under the provisions of the Land Registered Act, Cap 300 of the Laws of Kenya (now repealed). It was his submission that the 1st Defendant's certificate of lease was issued on 8th March 2006 for a term of 99 years. He referred to section 143 of the Registered Land Act (now repealed) which provides as follows:

S. 143 (1) Subject to subsection (2) the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land lease or charge for valuable consideration, unless such 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 his act, neglect or mistake"

12. Counsel submitted that the above provision of the law is applicable to the circumstances of this suit by dint of section 106 (3) of the Land Registration Act which provides that:

S.106 (1)....

(2).....

(3) “For the avoidance of doubt-

(a) any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under this Act”

13. He submitted that this position is reinforced in section 107 of the Land Registration Act which provides as follows:

S.107 (1)“Unless the contrary is specifically provided for in this Act, any right, interest, title, power or obligation acquired, accrued, established coming into force or exercisable before the commencement of this Act, shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act”.

14. It was his further contention that under the provisions of section 26 of the Land Registration Act, a Certificate of title issued to a purchaser is deemed to be prima facie evidence that the person named in the title is the absolute and indefeasible proprietor of the land. He submitted that the provisions of the Land Registration Act do not apply to the circumstances of this case for three reasons; Firstly, section 143 of the Registered Land Act which applies by virtue of section 106 and 107 of the Land Registration Act protects a first registration by whatever means procured, including fraud, illegality, unprocedural means and/or corrupt scheme. Secondly, if the provisions of section 26 of the Land Registration Act were to apply, no evidence has been adduced by the Plaintiff imputing fraud or corrupt scheme on the part of the 1st Defendant. Thirdly, section 80 of the Land Registration Act which empowers the court to cancel or rectify the register to land is subject to stringent conditions which have not been fulfilled in the circumstances of this case. The said section provides as follows:

s.80(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”

15. Finally, he submitted that the 1st Defendant is a bona fide purchaser for value without notice as defined in the case of **Katende v Haridar & Co Ltd 2 EACA 173** where the court stated as follows:

“...a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following: -

(a) He holds a certificate of title;

(b) He purchased the property in good faith;

(c) He had no knowledge of the fraud;

(d) The vendors had apparent valid title;

(e) He purchased without notice of any fraud;

(f) He was not party to any fraud.”

16. In urging the court to dismiss the Plaintiff’s claim counsel submitted that no evidence had been adduced to prove fraud against the 1st Defendant. He referred to the case of **Shimoni v Registrar of Titles & 5 Others (2016) eKLR** for the proposition that the title of a bona fide purchaser for value without notice could not be impeached.

ISSUES FOR DETERMINATION

17. The issues that the court is called upon to determine are as follows:

- i. Whether the 1st Defendant holds a valid title to the suit property
- ii. Whether the Plaintiff has proved fraud on the part of the Defendants
- iii. Whether the Plaintiff is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

18. With regard to the first issue, it not in dispute that the 1st Defendant holds a Certificate of Lease in respect of land title No. Nairobi Block 117/506 issued to him by the Commissioner of Lands on 22nd February 2006. He produced the sale agreement, receipt for Kshs. 400,000, share Certificate and allotment letter issued by the 2nd Defendant as his exhibits. After the purchase he immediately took possession thereof and fenced the plot. He denied colluding with the 2nd Defendant and said he would not have bought the suit property if he knew that it was not available for sale. However, in cross-examination he stated that he did not check the register of the 2nd Defendant's members to confirm the members and plot numbers allocated, which means he admits that he did not conduct any due diligence before buying the suit property. Learned counsel for the Plaintiff has submitted that sale agreement does not adequately describe the suit property as property is described as plot No. 117/506 in Kamiti Farmers Co. Ltd and therefore the same is not ascertainable. He has also submitted that the Sale Agreement produced by the Defendant is inadmissible as no stamp duty was paid for the same contrary to section 19(1) of the Stamp Duty Act. The said section provides that an instrument chargeable with stamp duty shall not be received in evidence in any proceeding whatsoever, except in criminal proceedings and in civil proceedings by a collector to recover the stamp duty. He cited the case of **Mara North Conservancy Ltd v Koinanke Ole Nkoitoi & 3 Others (2011) eKLR** where the learned Judge confirmed the position and stated that the Plaintiff had since paid the stamp duty.

19. In the case of **Westlands Residential Resorts Ltd v Kawakanja Limited and 2 Others (2013) eKLR** the Court of Appeal considered whether an agreement for sale was inadmissible for failure to pay stamp duty under Section 19 of the Stamp Duty Act and held that sub section 3 of section 19 stipulates the procedure for handling such a document. Section 19(3) provides for steps to be taken by the Court which has received an unstamped instrument. In the case of **Surgi Pharm Limited v Asher Pharmacy Ltd HCCC No. 295 of 2004** Justice Emukule considered section 19(3) and observed that if any unstamped instrument was produced before the court, the court had three options to take, if the time for stamping had expired, it shall be impounded unless it is forwarded to a collector. Secondly, the person presenting it should be given reasonable opportunity to apply to the collector for leave to stamp it out of time and thirdly, in all other cases, the instrument will be received in evidence upon payment of the amount of unpaid duty and the penalty remitted to the collector after the document is admitted in evidence.

20. In the instant case, the Defendant did not invoke the provisions of section 19(3) and the unstamped sale agreement produced by him is therefore inadmissible.

21. Counsel further submitted that the Defendant had not demonstrated that the Certificate of Lease he was holding was properly acquired. He cited the case of **Munyu Maina v Hiram Gathiha Maina (2013) eKLR** where the court held as follows:

“We state that 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. It is this instrument of title that is in challenge and 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, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the Respondent did not go this extra mile that is required of him and no evidence was led to rebut the Appellant's testimony. We find that a trust exists in relation to the suit property”

22. Similarly, in the case of **Daudi Kiptugen v Commissioner of Lands Nairobi & 4 Others (2015) eKLR** the court held that

“In order to determine the question whether the lease held by the Plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or Certificate of Lease and assert that he has a good title by mere possession of the Lease or Certificate of Lease. Where there is contention that the Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate through evidence, that the Lease or Certificate of Lease that he holds was properly acquired. 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 the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease Certificate 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. It is therefore necessary for this court to determine how the Plaintiff ended up having a Lease and Certificate of Lease in his name and further determine if the Government did intend to issue the Plaintiff with a Lease over the suit land.”

23. The 1st Defendant did not produce any allotment letter from the Commissioner of Lands to show that the suit property was allocated to him before he was issued with Certificate of Lease. He also did not produce any receipts to show that he paid stamp duty. It is interesting to note that the 2nd Defendant wrote to Commissioner of Lands on 12th April 2001 confirming that the Plaintiff was the registered allottee of the suit property and requesting that he be issued with a lease, then a year later on 26th June 2002 the 2nd Defendant wrote to the Commissioner of Lands requesting that the lease be issued to the 1st Defendant. As if this was not dishonest enough, the 2nd Defendant issued the Plaintiff with a letter of allotment dated 3rd January 2011 in respect of the suit property, long after the Certificate of Lease had been issued to the 1st Defendant.

24. From the foregoing, there is no doubt that the 2nd Defendant was dishonest and fraudulent in its dealings with respect to the suit property. On his part, the 1st Defendant failed to conduct due diligence in respect of the suit property before he purchased it and he was unable to demonstrate that he obtained the Certificate of Lease through a proper process as he neither produced a letter of allotment from the Commissioner of Lands nor did he produce any receipts to show that he paid the requisite charges. In the circumstances, the 1st Defendant's title was obtained unlawfully and unprocedurally and he therefore did not obtain a good title.

25. Moving on to the second issue, the onus was on the Plaintiff to prove fraud. In the case of **Gichinga Kibutha v Carolyn Nduku (2018) eKLR** the court observed as follows:

“It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 Bullen & Leake & Jacobs, Precedents of Pleadings 13th Edition

quoting with approval the cases of *Wallingford v Mutual Society (1880) 5App Case 685, 697, 701, 709*, *Garden Neptune v occident (1989) 1 Lloyd's Rep 305, 308*, *Lawrence v Lord Norrey (1880) 15 App. Case 210 at 221* and *Davy v Garret (1878) 7 Ch D. 473 at 489* it is stated that:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, though it not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved. (1) “General allegations, however strong may be the words in which they are stated are insufficient to amount to an averment of fraud of which any court ought to take notice.”

26. At paragraph 13 of the Plaintiff, the Plaintiff has pleaded that the registration of the 1st Defendant as the proprietor of the suit property was fraudulent and he has set out the particulars thereof. The evidence against the 2nd Defendant which is uncontroverted demonstrates that the 2nd Defendant knowingly sold the suit property to both the Plaintiff and 1st Defendant and misled the Commissioner of Lands into registering the suit property in the name of the 1st Defendant, yet it had earlier on issued an allotment letter to the Plaintiff. However, the allegations of fraud against the 1st Defendant were not proved to the required standard. For instance, there is nothing to show that the 1st Defendant knowingly misled the Commissioner of Lands into registering the suit property in his name.

27. Having said that, there is ample evidence to show that the Certificate of Lease for land parcel No. Nairobi Block 117/506 was not obtained procedurally as the 1st Defendant was unable to prove that he was issued with a letter of allotment by the Commissioner of Lands, nor did he prove that he had paid all the requisite charges. The 1st Defendant also neglected to carry out due diligence by checking the register of the 2nd Defendant to establish if the suit property was available for allotment. It is therefore my finding that the 1st Defendant's title was obtained unlawfully and unprocedurally.

28. The final issue for determination is whether the Plaintiff is entitled to the reliefs sought. The Plaintiff seeks a cancellation of the 1st Defendant's title and re-issue of the said title in the name of the Plaintiff. Counsel for the 1st Defendant submitted that the 1st Defendant is a bona fide purchaser for value without notice and that his title being a first registration under the Registered Land Act, it cannot be cancelled even on grounds of fraud. He argued that by dint of section 106 (1) (3) and section 107 (1) the law applicable to this suit was section 143 of the Registered Land Act.

29. In the case of **Esther Ndengi & Another v Gatei Mbugua (2020) eKLR** the Court of Appeal held as follows:

“However, in our considered view, the learned judge was correct when he applied section 106(1) of the Land Registration Act No. 3 of 2012 which provides:

“On the effective date, the repealed Acts shall cease to apply to a parcel of land to which this Act applies”.

In our view, the RLA had ceased to apply and the applicable statute was the LRA. Further, the Judge placed reliance on section 80 (1) of the LRA which provides:

“80.(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”.

It is clear from the above provisions that no registration is exempt from rectification and titles obtained fraudulently are prone to cancellation.

As to whether the “new” Land Laws were applicable, the judge stated:

“From the date of commencement of the Land Registration Act, 2012, the registers maintained under the repealed Acts were deemed to be the land register for the section 104 of the Act. The titles held under the repealed Acts were equally under section 105 of the Land Registration Act deemed to be titles issued under the said Act. It is thus clear that the applicable law would be the law as presently contained in the new Land Acts”.

We agree.”

30. From the above authority which is binding on this court, the law that applies to the instant suit is the Land Registration Act and not the Registered Land Act. The provisions of section 143 of the RLA therefore cannot assist the 1st Defendant.

31. I have already held that the 1st Defendant's title was obtained unprocedurally, therefore by dint of section 26(1) (b) and section 80 of the Land Registration Act it is liable to be cancelled. I am not persuaded that the 1st Defendant is a bona fide purchaser for value without notice as he negligently failed to conduct due diligence before the purchase of the suit property thereby contributing to the faulty registration of the title in his name when it had already been allocated to the Plaintiff.

32. The upshot is that the Plaintiff has proved his case on a balance of probabilities. I thus enter judgment for the Plaintiff and make the

following final orders:

- a) A declaration is hereby issued that the registration of title No. Nairobi Block 117/506 in the name of the 1st Defendant was unprocedural and therefore null and void *ab initio*.
- b) The title in the name of the 1st Defendant is hereby cancelled and a title shall be re-issued in the name of the Plaintiff.
- c) A permanent injunction is hereby issued restraining the 1st Defendant from assigning, transferring, charging, alienating or parting with possession of the title No. Nairobi Block 117/506.
- d) The costs of this suit shall be borne by the Defendants jointly and severally.

Dated and Signed this 10th day of June 2020.

J.M ONYANGO

JUDGE

Dated, signed and delivered at Nairobi this 25th day of June, 2020.

E.O. OBAGA

JUDGE.