



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 203 OF 2007

PERIS NJERI THUO (Suing as the legal

representative of the Estate of the late THUO NG'ANG'A

BORO.....PLAINTIFF

VERSUS

HANNAH WANJIKU MUNGAI.....DEFENDANT

JUDGMENT

1. By a Further Amended plaint dated the 28th July 2011 and filed on the 4th August 2011, the plaintiff **PERIS NJERI THUO**, suing as the legal representative of the **estate of the Late Thuo Ng'ang'a Boro** sued the defendant Hannah Wanjiku Mungai for orders of injunction restraining her from interfering with her (plaintiffs) quiet possession of Property known as **LR NO. MOLO SOUTH/IKUMBI BLOCK 9/120(Haraka)** and for a declaration that the said property belongs to her. She further sought an order of cancellation of title issued to the defendant in respect of the said property.

In her Amended defence and counterclaim filed on the 6th September 2011, the defendant claimed ownership of the suit property and further that the plaintiff's husband the Late Thuo Ng'ang'a Boro obtained Title to the plot fraudulently. She therefore put up such claim and counter-claim and sought a declaration of ownership of the suit property to herself.

2. From the above narration, it is evident that the dispute between the parties concern the occupation, title and use of the land in dispute.

Ordinarily, this dispute ought to be heard before the Environment and Land Court.

At the date the Environment and Land Court was established, this case was parheard by the High Court (Justice Emukule).

Practice direction issued by the Honourable The Chief Justice and Gazetted as Notice No. 5178 donated authority to the High Court to continue to hear part heard cases.

As at the time I took over hearing of the case in April 2016 the plaintiff's case was already finalised. I took the proceedings in the defence, and the final determination of the suit.

3. **Plaintiff's Evidence: PW1 John Njogu Mbugua** was a member of Haraka farm at the material time

testified that the farm had 304 members and Thuo Ng'ang'a Boro, deceased was one such member, that in the register the deceased Plot was **No. 121** upon allocation, and when the Register Index Map (R.I.M) was changed, the same plot became **Plot No. 120** but same plot on the ground. He Further testified that the Defendant's plot became **No. 116**, and that the plots did not change on the ground. He produced the register as PExt I.

According to the register, it was his testimony that the defendant had 3 Plots Nos. 38, 37 and 116. He stated that the deceased's Plot No. 120 was given **TITLE NO. MOLO SOUTH/ITUMBI BLOCK 9/120 (Haraka) on the 26th September 2007.**

Upon cross examination, he testified that each member retained the number of plot on the ground and Register Index Map changed some numbers, including that of the plaintiff to 120 and that of the defendant to No. 116.

4. PW2 was Peris Njeri Thuo, the plaintiff

Her testimony was that she obtained Letters of Administration for her late husband's estate vide **Molo RMCC Succession Cause No. 64** of 2006(PExt 3) and that **TITLE NO. MOLO SOUTH/IKUMBI BLOCK 9/120** was given to the deceased (PEXh 5), and that she cultivated the land since 1992 upto when the land was sold to one Esther Chepng'eno when the husband got sick, but that the defendant took occupation of the suit property without her consent to the exclusion of the purchaser. She therefore sought the orders and declarations in the plaint.

Upon cross examination, she reiterated her testimony that her ballot Plot was not No. 121, but Plot No. 120 which is shown in the title, and the suit plot.

5. PW3 was Esther Chepng'eno

Her evidence was that she bought the suit plot in April 2003 from the deceased in presence of witnesses including the plaintiff but the defendant chased her from the same when she went to fence it, and since then the defendant has been in occupation.

On cross examination she stated that she built a house hereon but the defendant chased her away and that she was included in the confirmation of grant, to confirm her ownership as a purchaser.

6. Defendants Evidence

Hannah Wanjiku Mungai the defendant testified that she was a shareholder of Haraka farm and that the her Plot was No. 120, and three others where she has resided for over 20 years while farming on the 5 Acres on Plot No. 120. It was her evidence that she balloted for the said plot and paid survey fees (DExt. 1 and 2) after which she was shown the land parcel by the surveyor.

It was her further evidence that the company failed to give her Title to the plot but in Nakuru CMCC No. 23 of 2003, the court ordered that Title be given to her. She produced DE.xh 3 the decree in the said case.

It was her case that the land belongs to her and that the plaintiffs sold it when they knew it was not theirs to PW3.

7. Upon cross examination, the defendant stated that she sued the company because it had failed to give her title to Plot No. 120. She stated that during period 2003-2004 she was a director of the company when she sued it and the court decided in her favour. She denied collusion with the other directors who did not defend the suit.

8. At the close of the evidence, parties filed written submissions plaintiff's submissions were filed on the 13th September 2016 while the defendants submission were filed on the 8th September 2016.

9. I have considered the evidence on record as well as the submissions by both parties Advocates.

ISSUES FOR DETERMINATION

The issues that comment to me for determination based on the evidence are:

(1) Who between the plaintiff and the defendant was the original allottee by Ballot by Haraka Farmers Limited of Plot No.121, later changed to Plot No.120 in the Registry Index Map (R.I.M) upon which a title deed was processed and issued on the 10th August 1995 to the Defendant.

(2) Whether the defendants Title to Plot No. 120 issued on the 26th September 2007 was obtained fraudulently.

(3) Whether the parties are entitled to their respective reliefs as stated in the plaint, the defence and counterclaim.

(4) Costs.

10. Analysis of Evidence and Determination

It is not in dispute that both the plaintiff and the defendant were at all material times members of Haraka Farmers Limited, and that both were allocated various plots. The plaintiffs late husband Thuo Ng'ang'a Boro, reading from the companies register of members (PExt 1) was allocated Plot No. 121 and upon Registry Index Map(R.I.M.) changed the plot to No. 120. The said register shows that the Defendant was allocated Plot No. 38, 116 and 64.

11. I have seen that there are no cancellations or alterations in the register. The defendant is recorded as confirming that she had four plots from the company on the 10th August 1995. In an attempt to prove ownership of Plot No. 120, the defendant produced a ballot paper (DExt 1). I have seen the exhibit. It is indicated Plot No 120. It is not dated. It is in the name of Ngenge Karigi and signed by Ngenge Karigi. It was not explained how these documents relate to the defendant or the party named, or issued by what company. Another receipt (DExt 2) is issued by the company to the to the defendant for Kshs.5000/= being survey fees on A & B. A and B are not shown to what plots they relate. These did not refer to the defendant other than the two receipts, the defendant did not produce any other documents to prove allocation to her of the suit plot. The plaintiff produced certificate of confirmation of grant of Letters of Administration that indicated suit plot belonged to the deceased and the plaintiff was the beneficiary thereof. That was on 28th September 2012.

12. **PW1 Evidence** was not challenged by the Defendant on how the company allocated the plots to its various members. It is evident from the company secretary (PW1) that Plot No. 120 was allocated to the plaintiff, not to the defendant. The defendant has failed to show how or when the same plot was allocated to her.

13. There is no dispute that the defendant settled on the other plots she was allocated up to the time when the plaintiffs husband and allottee of **Plot No. 120** died by which time he had purported to sell the same to the 3rd party (PW3) to raise money for medication. This was in the year 2003, yet she testified that she had settled on her other plots from 1992, and the plaintiffs family had been working and cultivating on the plot since allocation to the time they sold the plot.

14. It is therefore evident that the plaintiffs allocation and subsequent registration in the deceased's name was above board and not obtained through fraud or illegality as stated by the defendant in her counterclaim.

Under **Section 107-109 of the Evidence Act**, it was upon the defendant to prove the particulars of fraud stated in her counterclaim that the plot was allocated to the deceased by fraud and that the registration

was also obtained fraudulently. Occupation, use and possession of a suit property by a party does not *per se* constitute fraud nor does it constitute an overriding interest against the title. See **Section 29 of the Registered Land Act 300** (now repealed).

15. To the contrary, the plaintiff has in my considered opinion proved on a balance of probabilities that the plot was allocated to her late husband, that upto 1992 they occupied and used the land upto 2003 when they purported to have sold the same. Completion of the sale transaction was however not concluded due to the claim of ownership by the plaintiff.

16. The title to the plaintiff's late husband was issued on 10th August 1995. The plaintiff waited upto 2003-2004 when she was a director of the company to sue it for the deceased's title to be canceled and rectified in her favour. No explanation was tendered why she did not sue the deceased who was the registered owner, nor sued the company earlier when she was not a director.

17. It was submitted that the defendant had colluded with the company not to defend the suit filed at the **Nakuru Chief Magistrates Court Case No. 2318 of 2003** seeking declaration that she was the rightful owner and sought rectification of the register.

All this time the defendant knew that the deceased had obtained title on the 10th August 1995. She could not adequately explain why the deceased was not enjoined in the suit above yet he was the registered owner. It is trite law that no adverse orders ought to be made against a party who is not a party in a suit.

18. This act of not enjoining the registered owner of the property to the suit, in the above case in my view was a calculated move, shrewd and dishonest to deny the deceased's estate a chance to defend the suit. See the cases **ELC No. 51 of 2014 (O.S) Alice Chemutai Too -vs- Nick Kipkurui & 22 Others (2015) e KLR** and **Esther Ndegi Njiru & Another -vs- Leonard Gatei (2014) e KLR**.

19. Further and more importantly, the only court that had jurisdiction to entertain any dispute involving title to registered land before the enactment of the Environment and Land Act, 2011 was the High Court. See Registered Land Act Cap 300, Laws of Kenya. That being the case **Section 143 of the Registered Land Act Cap 300 Laws of Kenya** (now repealed) replaced with to **Section 80(1) of the Land Act 2012** is clear that where the court is satisfied that any registration was obtained through fraud, the court may direct cancellation of the title (other than a first registration.)

20. **Further Section 26(1) of the Repealed Act, Cap 300** states that title of a registered proprietor is *prima facie* evidence that the proprietor is the owner of the subject land but may be challenged on grounds of fraud or that the said title was acquired illegally or unprocedurally or through a corrupt scheme.

21. The title registered in favour of the deceased on 10th August 1995 could not be canceled and rectified in favour of the defendant pursuant to a decree dated 13th March 2005 by the Magistrates Court – directing the defendant (Haraka Farmers Co. Ltd) to effect the transfer of Land title **NO. MOLO SOUTH/IKUMBI BLOCK 9/120** from undisclosed parties to the plaintiff(defendant herein). Without hesitation, the decree is a nullity having been issued by a court without jurisdiction, to that extent, the cancellation of the title and subsequent Registration in favour of the Defendant is null and void.

22. Having carefully considered all rival arguments, I find that the suit plot was allocated to the deceased, and the plaintiff being the legal administrator of the Estate is the owner of the said plot See Confirmed grant of letters of administration. It is a further finding that the defendant obtained the said plot and the title through fraud and collusion and therefore illegally. See **Josephat Muthui Mwangi -vs- Chief Land Registrar & 2 Others (2015) e KLR**, **ELC Case No. 85 of 2013** and also **210 of 2010 Labh Singh Harman Sign Lits -vs- A.G & 2 Others (2015) e KLR**.

23. Coming to the question whether the parties are entitled to their respective reliefs as sought, it is my finding that the defendant has failed to prove her counter-claim to the required standards.

The court having found that the title to the suit plot in favour of the defendant was fraudulently obtained, it follows that the plaintiff is entitled to the prayers in her further Amended plaint.

Consequently, a declaration is therefore issued that the suit plot, **L.R NO. MOLO SOUTH/IKUMBI BLOCK 9/120 (Haraka)** belongs to the plaintiff, by virtue of being the Administrator of her late husband's Estate, the Late **Thuo Ng'ang'a Boro**.

24. In the case **Muthembwa -vs- Muthembwa C.A No. 74 of 2001**, the Court of Appeal rendered that mere declarations will only prolong litigation and proceeded to issue substantive orders to give effect to the declarations. I will follow suit and issue substantive orders therefore.

25. Consequently, there shall be judgment entered for the plaintiff against the defendant as follows:

(1) A declaration is issued that the suit property L.R NO. MOLO SOUTH/IKUMBI BLOCK 9/120(Haraka) belongs to the plaintiff.

(2) That the title to the suit property registered in the names of Hannah Wanjiku Mungai the defendant on the 26th July 2009 is hereby cancelled, as having been obtained fraudulently.

(3) That the Land Registrar Nakuru County is directed to rectify the register, and issue a title Deed to the suit property Land Parcel NO. L.R MOLO SOUTH/IKUMBI BLOCK 9/120(HARAKA) in favour of the plaintiff, PERIS NJERI THUO forthwith.

(4) That the defendant shall remove herself from occupation and use of the suit property forthwith.

(5) An order of permanent injunction is also issued restraining the defendant from interfering with the plaintiff's quiet possession of the suit property NO. L.R MOLO SOUTH/IKUMBI BLOCK 9/120(HARAKA).

(6) That the plaintiff shall have costs of the suit.

Dated, Signed and Delivered this 2nd Day of March 2017.

J.N. MULWA

JUDGE