



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 491 OF 2013

WANJIRU KANGETHE.....PLAINTIFF

VERSUS

ANN WAIRIMU NDUNGU.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

RULING

This suit was instituted in this court on 22nd November 2013 by a plaint dated 21st November 2013.

The plaintiff Wanjiru Kangethe claims that the defendants Ann Wairimu Ndungu and National Land Commission on 19th February 2009 the defendants fraudulently transferred plot No.LR7340/55 NJIRU/Githunguri measuring 4.129 acres in favour of 1st defendant using an impostor as the legal owner since the legal owner thereof being Kangethe Njuguna had already died in 2002.

The plaintiff claims that on 8th March 2002 the 1st defendant did purchase the said land from Kangethe Njuguna (deceased) at a consideration of 1,000,000 –ONE Million out of which she made party payment of 400,000/- leaving a balance of which she agreed to pay once title was acquired by her but on 2nd July 2002 the seller died before fully effecting a transfer of the said title in the 1st defendant's name.

The plaintiff therefore prays for cancellation of title to NJIRU/GITHUNGURI LR 7340/55, costs of the suit and interest and any other relief since the transfer was fraudulently effected in her name.

From the above background, although this suit is listed today for formal proof hearing as the defendants neither entered appearance nor filed defence despite service of summons to enter appearance being served upon them culminating in the request for interlocutory judgment and entry of such interlocutory judgment by the Deputy Registrar on 15th September 2014, It is clear that the claim is over title to land.

Pursuant to the provisions of Article 162(2)(b) of the Constitution, disputes relating to environment, and the use and occupation of and title to land shall be heard and determined by a superior court with the status of the High Court to be established and whose functions and jurisdiction would be conferred by an Act of Parliament in 2011, Parliament enacted the Environment and Land Court Act , 2011 and Section 4 thereof establishes the Environment and Land Court.

Section 13(1) and (2) of the Act confers original and appellate jurisdiction on the said court, to hear and

determine all disputes as contemplated in Article 162(2) (b) of the Constitution and as may be conferred by any law applicable in Kenya to environment and land.

In addition, Article 165(5) (b) of the Constitution expressly bars the High Court from hearing and determining disputes that fall within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution. Albeit the transitional and consequential provisions of the Constitution under part 5 Section 22 on Administration of Justice permit proceedings pending before this court on the effective date to continue to be heard and determined pending the establishment of the corresponding court, in this case the Environment and Land Court, or as may be directed by the Chief Justice or Registrar of the High Court, which provisions are supplemented by Section 30 of the Environment and Land Court Act; it is clear that this suit was instituted long after the effective date, and even after the establishment and full operationalization of the Environment and Land Court.

It follows that this suit was instituted in this court by an incurable error.

The law requires that a suit is instituted in a court which has jurisdiction and that jurisdiction is everything without which, a court of law acts in vain by making any other step, once the court finds from the onset that it has no jurisdiction to hear and determine this dispute. Had the suit been instituted in the transitional period, it would have been excusable.

The dispute was filed clearly outside the transitional period since the Environment and Land Court was established in 2011 and in 2012, judges of that court were appointed to preside over the court. The suit is filed by an advocate of the High Court of Kenya who is deemed to know the law. It cannot be said that the advocate did not know where this suit ought to have been instituted in the first instance, even as at 2014, when summons to enter appearance were being issued for service to the National Land Commission. At the material time, the Environment and Land Court was fully in place and therefore it cannot, possibly be true that the plaintiff's advocate confused the courts. In addition, as at that time November 2013, the Land Act and Land Registration Act, 2012 were in place and operational. Under Section 80(1) of the Land Registration Act, 2012:

“80(1) subject to Sub Section (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 mistake.

Section 2 of the Land Registration Act, 2012 defines “court” means the Environment and Land Court established under the Environment and land Court Act, 2011.

It follows that any claim for cancellation of title could only be filed in the Environment and Land Court and no other. A party must first consult the law before instituting any claim to establish the jurisdiction of the court over the cause of action.

As stated earlier, this suit was not instituted during the transitional period, had that been the case, this court would simply transit it to the Environment and Land Court. However, as the suit was filed after the transitional period, it follows that the same having been filed before a court whose jurisdiction is expressly ousted by the Constitution, I can do no more than strike out this suit for want of the requisite jurisdiction, which act of striking out, nonetheless, does not bar the plaintiff from instituting a fresh suit before a court of competent jurisdiction, subject, of course, to the law of limitations.

There shall be no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 7th day of October 2015.

R.E. ABURILI

JUDGE

7/10/2015