



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 211 OF 2014

LOISE MABUTI.....PLAINTIFF

VERSUS

NANCY WAMBUL.....1ST DEFENDANT

HESBON KIAMBATI.....2ND DEFENDANT

JUDGMENT

Introduction

In a plaint dated 9th July 2014, the Plaintiff sought the following orders:-

(a) A permanent injunction restraining the defendants by themselves, their agents and/or servants as against making any entry, inference, working on or undertaking any activity on land parcel No. NGARIAMA/NGIRIAMB/135.

(b) An order to the Land Registrar to cancel title No. NGARIAMA/NGIRIAMB/1036 and 1037 and revert the same to the original Number NGARIAMA/NGIRIAMB/135 in the joint names of the plaintiff and MUCHIRA NJERU.

(c) Costs and interest of the suit.

By a defence dated 22nd September 2014, the 1st and 2nd defendants denied the plaintiff's claim and sought to have the suit dismissed with costs.

Plaintiff's Case

The plaintiff alone testified and stated that at all material times, she was jointly registered as proprietors of land parcel No. NGARIAMA/NGIRIAMB/135 with one Muchira Njeru. She stated that her husband was one Kariuki son of Njeru Mbogo. She testified that her husband Kariuki passed away during the reign of President Moi. She stated that her husband died the same time the late Mzee Jomo Kenyatta died (1978). The plaintiff further stated that after her husband and father-in-law died, their family land was transferred to one Nyaga Mungai and Muchira Njeru. She stated that Muchira Njeru is her brother-in-law, and also brother to her late husband Kariuki. She said that her brother in-law Muchira Njeru had no wife nor children and that the said Muchira Njeru died after the demise of her husband Kariuki. The plaintiff stated that she never heard that Muchira Njeru was selling land to Joseph Nyagah and that the suit land parcel No. NGIRIAMA/NGIRIAMB/135 has been under her possession and use since 1979 and that she has never seen surveyors come to sub-divide that land into two parcels. She testified that when the late Jomo Kenyatta died, some people came to the suit land but they were beaten and chased away. She stated that when she came to learn that her land was sub-divided into two portions, she filed the instant case. She stated that they have never gone to the Land Board with her late brother-in-law for the sub-division of the suit land. She stated that she was not given a form to sign for the sub-division of her land. She stated that there was a case in Gichugu Law Courts which was dismissed and that she did not sign any mutation form. She said that the transfer forms which is purported that she signed are falsehood as her brother-in-law had died by the time he is alleged to have signed. She said that she is the one using the suit land.

Defendants Case

The defendants on the other hand referred to her witness statement filed in Court on 9th April 2015 which she sought to adopt in her evidence. She stated that she lives in plot No. 1037 while the plaintiff who is her neighbour lives in plot No. 1036. The defendant further stated that she acquired title to the suit land parcel No. NGARIAMA/NGIRIAMB/1037 through Succession Cause No. 300/2009 (Embu). She also stated that she was given the land with four (4) other persons and that there was no objection or protest during confirmation of the grant. She produced the documents contained in the rest of documents filed in Court on 9th April 2015 as Exhibits No. 1, 2 & 3 respectively.

Issues for Determination

(1) *Whether the plaintiff has proved the allegations of fraud and deserves the orders for cancellation of title to land parcel No. NGARIAMA/NGIRIAMBUR/1037?*

(2) *What are the appropriate orders to issue?*

(3) *Who will bear the costs of this suit?*

(1) Whether particulars of fraud as pleaded and particularized in the plaint have been proved?

It is trite law that fraud is a serious allegation which must be strictly proved as was stated in the case of *Urmilla w/o Mahendia Shah Vs Barclays Bank International Ltd & Another (1979) K.L.R 76* where it was held:-

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required”.

Though the plaintiff pleaded and particularized grounds of fraud in the plaint, she failed to discharge his burden of proof. She did not adduce any iota of evidence to prove the allegations of fraud especially on the part of the defendant. The plaintiff therefore failed to discharge her duty as provided by **Section 107 of the Evidence Act**, which provides:-

“1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that these facts exist.

2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”.

Having found that the plaintiff herein failed to discharge her burden of proof as required in law, I hold that there was no evidence availed to prove that the defendant’s certificate of title in respect to land parcel No. NGARIAMA/NGIRIAMBUR/1037 was acquired through fraud, misrepresentation or mistake. Consequently, this Court comes to a conclusion that the defendant’s title herein is absolute and indefeasible.

2. What are the appropriate orders to issue?

It is clear from the sequence of the orders sought that an order for permanent injunction is determined on whether the defendant’s title will be cancelled. Having held that the defendant’s title is absolute and indefeasible, the plaintiff’s prayer for injunction automatically fails.

3. Who will bear the costs of this suit?

Section 27 of the Civil Procedure Act provides as follows:-

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers; provided that the costs of any action, cause or other matters or issue shall follow the event unless the Court or Judge shall for good reason otherwise order”.

(2) The Court or Judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such”.

Following from the provisions of the law above, it is clear that costs shall always follow the event unless the Judge shall for a good reason which reason shall be stated. The defendant in this case has engaged the services of an advocate to defend the suit. It is only fair and just that the defendant enjoys the fruits of this case together with the incidental costs.

Conclusion

For all the reasons I have given herein above, this suit fails and the same is hereby dismissed with costs. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 23rd day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Mr. Oduke holding brief for Mr. Nganga*
2. *Ms Githaiga holding brief for Andande*
3. *Mbogo – Court clerk.*