



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 163 OF 2011

PATRICK OGUTU.....PLAINTIFF
VERSUS
ALEX WAIHENYA KIARIE.....1ST DEFENDANT
MUNGAI KIARIE KARANJA.....2ND DEFENDANT
EDWARD MATHENGE NDUNGU.....3RD DEFENDANT

JUDGMENT

In his plaint dated 27th June 2011 and filed on 30th June 2011, the plaintiff sued the Defendants and sought the following orders -

- (a) a Declaration that the transfer land parcel known as KIAMBOGO/KIAMBOGO/BLOCK 2/7242 to the 1st and 2nd Defendants and subsequently to the 3rd Defendant is irregular, illegal, null and void.
- (b) a declaration that the 3rd Defendant lacks capacity to hold and own the said parcel of land.
- (c) an order directed to the Land Registrar to cancel the 1st, 2nd & 3rd Defendants' title and rectify the records on account of the said land parcel to reflect the plaintiff as the rightfully owner.
- (d) a permanent injunction to restrain the Defendants whether by themselves, and or agents from transferring the said parcel of land to any other person without the written consent of the plaintiff.
- (e) Costs and interest.

As all the three Defendants were served and never entered any appearance or filed any defence, this matter proceeded by way of formal proof.

The plaintiff's case is that the Defendants were fraudsters and committed a series of acts of fraud more particularly detailed in paragraphs 23 and 24 of the plaint aforesaid.

The plaintiff testified that he bought the suit land in the Pipeline Area (*estate*) in the Eastern outskirts of Nakuru, and was issued with titles which he kept in a metal box in a house he shared with his oldest brother Fredrick Otieno Ogutu, and he went to his business in Mombasa. All this happened in 1997.

However upon his return to Nakuru later, he found the metal box had been broken into and his titles removed or stolen. Good luck, he so thought, his brother, Fredrick Otieno Ogutu, owned up and

produced what he thought were his original title deeds. On closer look upon his return to Mombasa, he discovered some discrepancies between his old titles and the new ones. He quickly instructed an Advocate to place a restriction on title, and he himself made a report of fraud to Bondeni Police Station Nakuru, and later swore an affidavit concerning the loss, and the matter was advertised in Kenya Gazette Notice Number 2392 dated 2nd April 2004. At the expiration of the 60 days notice as per the Gazette Notice, the plaintiff was issued with new titles in respect of his parcels of land. Titles Numbers Kiambogo/Kiambogo Block 2/7244 and 7243, in the names of Patrick Ogutu - the plaintiff.

The issue of the new titles was however not the end of the plaintiff's troubles. He was summoned by the C.I.D. Nakuru in May 2009, to answer complaints by the 1st and 2nd Defendants that he had sold the suit land to them. He reported to the CID together with the 1st and 2nd Defendants, and after the plaintiff's explanation to the CID the Defendants were advised to cooperate and sought out the matter at the Land's office with the Land Registry.

It was the plaintiff's evidence that after visiting the Land Registrar, these Defendants were satisfied that the alleged transaction to them was fraudulent. Thereafter he filed this suit.

In support of his evidence and claim, the plaintiff produced relevant documents totaling 12 exhibits showing all the steps he had taken with the relevant authorities, the Police and Lands Office Nakuru to show that he was lawful owner of suit land.

I have reviewed the said exhibits in light of the plaintiff uncontroverted evidence and I am satisfied that the plaintiff has proved his case in all the circumstances, and balance of probability.

Section 143(1) of the Registered Land Act (*Cap. 300, Laws of Kenya*) vests in this court, the discretion to order rectification of the Register by directing that any registration be cancelled or amended where the court is satisfied that any registration (*other than a first registration*) has been obtained, made or omitted by fraud or mistake.

In addition to being satisfied that the registration was obtained or made by or omitted by fraud or mistake, the court must also be satisfied (*under Section 143(2)*), in case of a proprietor in possession and acquired the land, charge or lease for valuable consideration, that he did not contribute by his own act or omission, to the mistake, neglect or default. This is not the case of the plaintiff. He was the original owner. His was a first registration. The fraud commenced with his own brother who tampered with the metal box, and had the false title deeds produced in some back street, as the plaintiff remained the registered owner of the parcels of land at all material time.

I am therefore satisfied that this is a proper case for exercising the discretion conferred upon this court by the said Section 143(1) of the Registered Land Act, and all the inherent powers of the court under the Constitution and the Civil Procedure Act to do substantial justice, grant the plaintiff the prayers set out in plaint in terms of paragraph (a), (c), and (e). Having granted prayer (a) and (c) prayers (b) and (d) are superfluous.

There shall therefore be orders accordingly.

Dated, signed and delivered at Nakuru this 2nd day of March, 2012

M. J. ANYARA EMUKULE
JUDGE