



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC NO. 252 OF 2014

LAURENT HONGO JACOB OWITI.....PLAINTIFF

VERSUS

CHARLES OYUGI OWINO.....1ST DEFENDANT

MARK AMOS OCHIENG OGOLLA.....2ND DEFENDANT

LAND REGISTRAR KISUMU COUNTY.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

JUDGMENT

By a plaint dated 27th August 2014 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) A declaration that the plaintiff is lawfully registered proprietor of all that property comprised in the title known as KISUMU /KASULE/1582 measuring approximately 0.17Ha situated in Kisumu County within the republic of Kenya being registered as such as the first registered proprietor.
- b) A declaration that the 3rd and 4th defendants as the registered officials lack the statutory powers to transfer the parcel No. KISUMU/KASULE/1582 to the 1st defendant and subsequently to the 2nd defendant without the consent and/or knowledge of the plaintiff.
- c) That the registration of the 1st and 2nd defendant be cancelled and the register be rectified to reflect the name of the plaintiff.

d) Costs of the suit plus interest.

PLAINTIFF'S CASE

PW1 testified and stated that he is the bona fide registered owner of all that parcel of land known as **KISUMU/KASULE/1582** and produced a copy of a title deed issued to him on 29th November 1988 as a first registered owner.

PW1 further stated that the 1st and 2nd defendants are strangers to him and that he had never entered into agreement of sale in respect of his parcel of land **KISUMU/KASULE/1582** and that he did not transfer the said land to the 1st defendant.

PW1 further produced certified copy of the register (green card) of the said land parcel number KISUMU/KASULE/1582 confirming that he is the first registered owner and that if he had sold the land to the 1st defendant then he ought to have surrendered the original title deed of the suit land for cancellation which was never done.

PW1 also produced the Adjudication register of Kasule registration section to confirm that he was the 1st registered proprietor of the suit parcel of land and further produced copies of rates payment receipts.

It was PW1's evidence that he came to learn of the land transaction on 19th August 2014 and immediately filed the current suit against the defendants. PW1 further stated that he is in possession and has built structures on the suit land from which he collects rental income. He therefore closed his case after tendering his evidence.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff submitted that the plaintiff filed the plaint dated 27th August 2014 together with an application seeking for interlocutory injunction against the defendants. That summons, plaint, witness statement, list of documents and an application seeking interlocutory orders were served upon the 3rd, 4th and 5th defendant who filed a defence to plaintiff's suit but never were called a witness testify in defence the suit.

Counsel further submitted that the 1st and 2nd defendants on the other hand were never traced for purposes of effecting personal service and the plaintiff consequently sought leave to serve by substituted service through advertisement in Standard Newspaper dated 22nd September 2015 and affidavit of service filed in court on 28th September 2015 as proof of service upon the 1st and 2nd defendants.

Mr. Omondi counsel for the plaintiff further submitted that the 1st and 2nd defendants, despite service through substituted means in the newspaper did not enter appearance therefore the matter proceeded for formal proof. Counsel further submitted that counsel for the 3rd, 4th and 5th defendant, cross-examined the plaintiff and the only issue that came out was whether the plaintiff's case was time barred.

Counsel listed the following issues for determination by the court as follows

- a) Whether the plaintiff proved his case within the required standards.
- b) Whether the plaintiffs case was time barred.
- c) Who should bear the cost of the suit.

On the first issue as to whether the plaintiff has proved his case with a balance of probabilities counsel submitted that from the plaintiff's testimony and the documents produced as exhibits which were never discredited by the defence it is evident that the same has been proved.

Counsel cited the provisions of Section 26 of the Land registration act No.3 of 2012 which provides that;

Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

Counsel urged the court to find that the plaintiff is the registered proprietor of the suit land which is indefeasible as per the Land Registration Act unless procured by fraud or misrepresentation.

On the second issue the counsel submitted counsel for the 3rd, 4th and 5th defendant in cross examination purported to allege that the plaintiffs case is time barred since according to the green card produced by the plaintiff the said land was fraudulently transferred to the 1st defendant on 3rd September 1994 hence it was time barred.

Mr. Omondi submitted that matters of fraud relating to land, the time begins to run from the date that the fraud is discovered. Which was 4th August 2014 when he visited the lands office to conduct a search to establish the registration status of his land, whereby he was surprised to discover that his parcel of land was as per the records held by the lands registry was on 2nd September 1991 transferred to the 1st defendant and subsequently on 6th April 2003 transferred to the 2nd defendant.

Counsel further submitted that from the plaintiff's evidence he stated that he was not a party to the fraudulent transfer of the said property to the defendants and as such the cause of action in the matter arose on 14th August 2014 hence not time barred.

Mr. Omondi relied on Section 26 of the Limitation of Actions Act which provides that:

Extension of limitation period in case of fraud or mistake

Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or**
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or**
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:**

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or**
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.**

Counsel therefore urged the court to grant the plaintiff's prayers as prayed in the plaint with costs.

ANALYSIS AND DETERMINATION

This is a case that proceeded by way of formal proof as the defendants did not actively participate in the matter. The 1st and 2nd defendant were served vide substituted service by advertisement on Standard Newspaper dated 22nd September 2015. The 3rd and 4th defendants filed a defence but did not wish to participate in the case hence neither called a witness nor filed submissions.

The issues for determination in this case are as to whether the plaintiff is the rightful owner of the suit land and whether he has proved his case on a balance of probabilities. The other issues are whether the suit is time barred and whether the defendants fraudulently transferred the suit land belonging to the plaintiff.

The plaintiff produced a copy of the title deed of the suit land registered in his name, the green card, rates payment receipts and KASULE adjudication section register which shows that he was the first registered owner of the suit land. This evidence was not challenged by the defendants. There was no contrary evidence to show that these documents were procured fraudulently. That being the case the court is bound by the provisions of section 24, 25 and 26 of the land Registration Act to hold that the plaintiff is the indefeasible owner of the suit land.

On the issue as to whether the plaintiff's suit is time barred, the court is guided by the provisions of Section 26 of the Limitations of Actions Act which states as

follows; -

“Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or**
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or**
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it**

The plaintiff discovered the fraud on 4th August 2014 when he had gone to carry out a search at the Lands Registry to confirm the status of his land and found that it had been fraudulently transferred to the 1st defendant who subsequently transferred the same to the 2nd defendant. Upon the discovery the plaintiff filed this suit on 27th August 2014. This makes the suit time bound and cannot suffer from the application of limitation of Actions.

On the issue as to whether the 1st and 2nd defendants fraudulently transferred the plaintiff's suit land, the term fraud is defined in **Black's Law Dictionary** as follows;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly

includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

In Civil Appeal No. 246 of 2013 between **Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others.....** the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok – Vs - Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** where the Court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

The plaintiff specifically pleaded the particulars of fraud and gave evidence that he had not sold the land to the defendants and further that he was not a party to the fraudulent actions by the defendants. It was further his testimony that if he indeed sold the land then the 1st defendant should have surrendered the title for cancellation but he still had the original title with him.

The Court of Appeal in the case of **Evanson Wambugu Gachugi –Vs- Simon Wainaina Gatwiki & 2 Others [2014] eKLR** held as follows:

“Moreover the original title of the suit property was with the 1st respondent. It was never surrendered to the Lands Office in support of the transfer as the original must be surrendered for cancellation before a new title is issued. In the event that the original transfer was unavailable, it was incumbent upon the Land Registrar to publicise its loss in the Kenya Gazette which was not done in this case.”

There was no evidence that the Land Registrar publicized in the Kenya Gazette that the original title was lost for replacement. This was clearly a fraudulent transaction.

On the issue of rectification and cancellation of the titles, the court is empowered under section 80 of the Land Registration Act

Rectification by order of Court.

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 who is in possession and had acquired the land, lease or charge for valuable consideration, 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.

In the case of **Republic –vs- Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563** which was cited with approval in **Kenya National Highway Authority – vs – Shalien Masood Mughal & 5 Others [2017] eKLR** by **Kiage JA in the following terms: -Maraga, J** (as he then was expressed himself as follows:-

“Court should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...”

The mere fact of holding a title does not in itself limit the power of this court as was held by Justice Onyancha in **Alberta Mae Gacci – vs – Attorney General & 4 Others (2006) eKLR** where he stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come...”

Further in the case of **Sai Office Supplies Limited –vs- Rosemary Alivista Luseno & Another [2014] eKLR**, where Nyamweya J. held as follows:

“I find that since the Plaintiff’s evidence of its ownership of the suit property is not contested by the Defendants, it is therefore entitled to the declaration sought of ownership and any consequential orders arising from such ownership. The shortcomings on the part of the 2nd Defendant clients in the due performance of their duties and responsibilities cannot be allowed to be an excuse or bar to any party desirous of asserting their rights through the due process of law, and indeed such dereliction of duty once proved must be appropriately reprimanded.”

I have considered the evidence, the documents produced and the relevant authorities and find that the plaintiff has proved his case against the defendants on a balance of probabilities and make the following orders.

- a) A declaration is hereby issued that the plaintiff is lawfully registered proprietor of all that property comprised in the title known as KISUMU /KASULE/1582 measuring approximately 0.17Ha situated in Kisumu County within the republic of Kenya being registered as such as the first registered proprietor.
- b) A declaration is hereby issued that the 3rd and 4th defendants as the registered officials lacked the statutory powers to transfer the parcel No. KISUMU/KASULE/1582 to the 1st defendant and subsequently to the 2nd defendant without the consent and/or knowledge of the plaintiff.
- c) That the registration of the 1st and 2nd defendant is hereby cancelled and the register be rectified to reflect the name of the plaintiff by the 3rd defendant
- d) Costs of the suit plus interest to be paid by the defendants

DATED and DELIVERED at ELDORET this 7th DAY OF October, 2020

DR. M. A. ODENY

JUDGE