



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, TUNOI & LAKHA, J.J.A.)
CIVIL APPEAL NO. 272 OF 1998
BETWEEN

GEORGE CHEYNE & 20 OTHERS)APPELLANTS

AND

ROBIN MUNYUA KIMOTHO 1ST RESPONDENT

SAMUEL CHERUIYOT 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

THE COMMISSIONER OF LANDS 4TH RESPONDENT

JUDGMENT OF THE COURT

This is the unsuccessful plaintiffs' appeal, from a ruling and order of the superior court (Mbogholi Msagha, J) given on 16th July, 1998 whereby the learned Judge struck out the plaintiffs' claims and dismissed the suit with costs against the first defendant, now the first respondent in the appeal.

The plaintiffs are all residents of Mahuti Crescent & Lane in South C Estate, Nairobi. They are also the registered proprietors of all those several plots which abut against and to a certain extent completely enclose plot number L.R.209/5041, the subject matter of this appeal, which shall hereinafter be referred to as the suit plot.

The plaintiffs who have been residents of their estate since 1958 state in their plaint dated 24th September, 1997 that they have been enjoying, without interruption, use of the suit plot as a recreational facility, genuinely believing the same to have been purposely set aside as such a facility for themselves and their children. Consequently, by virtue of their constant usage they have maintained it as an attractive greenland planted with trees and over the course of years they have naturally preserved and maintained the suit plot with the fervent hope that it will eventually become a vital heritage for their children and the generations to come.

However this was not to be, for the Director of Surveys moved on to the suit plot on 22nd August, 1994, surveyed it and made Deed Plan No. 188945 which eventually created the suit plot which measures approximately 0.1003 of a hectare with a term of 99 years from 1st July 1994 with an annual rent of Shs.8,000.00 revisable.

However, by devise or otherwise, and most probably by way of what is commonly known as land grabbing, the Commissioner of Lands surreptitiously, without the knowledge of the plaintiffs who are directly affected by any dealings on the suit plot and in total disregard for general public interest,

alienated the suit plot to one Joseph Kiragu Kariuki, who is not enjoined in these proceedings. The Attorney General and the Commissioner of Lands contend that the suit plot was never set aside for any recreational facility. They allege that the suit plot before alienation rested in the Government of the Republic of Kenya and its transfer to the first respondent complied entirely with the provisions of the Government Lands Act Cap 280 Laws of Kenya.

They further aver that the uninterrupted use and enjoyment of the suit plot by the plaintiffs and their children was unlawful and unauthorised.

The first respondent has filed a written statement of defence and a counterclaim. He states in his defence that Joseph Kiragu Kariuki sold and transferred the suit plot to him on 31st January, 1996. He (the first respondent) was now a bona fide purchaser for value without any knowledge of defect on the title to the suit plot and the transaction was duly accorded consent by the Commissioner of Lands.

In his ruling pursuant to an application brought under Order 6 rule 13 (b) of the Civil Procedure Rules the learned Judge held:

"There is evidence that the said parcel of land was transferred by the said Joseph Kiragu Kariuki, with the consent of the Commissioner of Lands, to the first defendant. Following the said transfer, at a consideration set out therein, the registration therefor conferred title upon the first defendant. He became the absolute and indefeasible owner of the said parcel of land and is not subject to challenge as there is no evidence or allegation of fraud or misrepresentation in the acquisition of the title to which he was a party.

Mr. Joseph Kiragu Kariuki is not a party to these proceedings and there are not any allegations of fraud or misrepresentation in the plaint against him or the first defendant. The first defendant is a purchaser for value without notice. As the plaintiffs claim equitable rights, the title of the first defendant takes precedence and is supreme over all other alleged equitable rights of title. See Wreck Motor Enterprises vs. The Commissioner of Lands & Others. C.A. NO. 71 of 1997 and Civil Application No. NAI. 60 of 1997 Dr. Joseph N. K. Arap Ng'ok vs. Justice Moijo ole Keiwua & 4 Others ."

We respectfully agree with this proposition of the law.

The case for the plaintiffs as presented in this Court was entirely based on the averment that the learned Judge erred in law in holding that the first respondent was the absolute and indefeasible owner of the suit plot in spite of the fraudulent way the title to the suit plot was obtained.

Section 23 (1) of the Registration of Titles Act (the Act) 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.

In the instant case, the pleadings do not allege or disclose any fraud or misrepresentation on the part of the first respondent. This fact was readily conceded to by Mr. Kipkenda, counsel for the plaintiffs. Further, there is no evidence at all of attendant circumstances or primary facts so as to give rise to a proper inference of fraud or misrepresentation on the part of the first respondent. We think that the learned Judge came to the correct decision on the material presented before him.

The Commissioner of Lands, the 4th respondent, may have exhibited utter disregard and contempt for the welfare and interests of the plaintiffs and the generations to come and has, indeed, facilitated the grabbing of a public utility plot, but, as the suit against him is still alive, we say no more in this appeal.

We do not deem it necessary to consider the other grounds of appeal.

Accordingly and, for the reasons above stated, the learned Judge reached the correct conclusion and the appeal fails and is dismissed with costs.

Dated and delivered at Nairobi this 2nd day of July, 1999.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR