



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 649 OF 2014

RUAI CENTRAL 54 ASSOCIATION.....PLAINTIFF

(Suing through:

JULIUS NTORONO KUBAI

ERASTUS NYAMBUTU MIGOSI

BEATRICE MUMBI NJOROGI

VERSUS

PADDY KAMAU NG'ANG'A.....1ST DEFENDANT

GEORGE WANYUTU BORO.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 5th June 2014, the Plaintiff prays for Orders that:

- a) A declaration that the Plaintiff is the proprietor of land reference number NAIROBI/BLOCK 105/328.*
- b) Cancellation of entries nos. 8, 9, 10, 11 and 12 in the register.*
- c) Costs of the suit.*

2. The Plaintiff, a registered Society under the Society Act avers that it has been the registered proprietor of plot number NAIROBI/BLOCK 105/328 situated in Ruai since 19th May 2006 as per entry no. 6 in the Register having bought it from the 1st Defendant who was the previous registered owner as per entry 4. The Plaintiff took possession of the land after registration and issuance of title in May 5th 2006. The Plaintiff avers that the 2nd Defendant filed CMCC 3198 of 2003 against the 1st Defendant claiming the suit property and judgment was issued in his favour which it argues was done in disregard of entry no. 6 as well as in the absence of production of the certified copy of the Register which was mandatory according to Civil Procedure Order 14 Rule 1.

3. The 2nd Defendant made a defence and counterclaim dated 27th August 2014 praying that the Plaintiff's action in the original suit be dismissed and judgment be entered against the Defendant in the counterclaim for:

- a) An eviction order directed at the Plaintiffs in the original action and the Defendants in the counterclaim either by themselves, their agents, servants or anyone claiming under them from property Land Reference no. NAIROBI/BLOCK 105/328*
- b) An order directed at the OCPD/OCS Ruai Police Station to implement/enforce order (a) above.*
- c) That a permanent injunction do issue restraining the Plaintiff in the original action and Defendant in the counterclaim, either by themselves, their agents, servants or anyone claiming under them from entering upon, erecting structures, alienating or in any other way interfering with the Plaintiff's (by counterclaim) right to quiet enjoyment of the said property land reference no. NAIROBI/BLOCK 105/328.*

4. PW1, Julius Kubai, the Chairperson of the plaintiff, adopted his witness statement dated 5th June 2014. He told the court that they bought the land in the year 2006 and the same is registered in their name. He produced the certificate of lease as an exhibit p1 in this case. He also relied on the documents in the list of documents dated 5th June 2014. He further stated that the members are in occupation of their respective parcels of land. They have put up permanent buildings. He told the court that he has put up a rental building which is in occupation of tenants. They have been on the land for long time until some people appeared claiming the land. He prays that they be declared as the owners of the respective parcels of land as they have titles.
5. PW2, Erastus Nyabuga Migosi, told the court that he resides in Ruai. He adopted his witness statement dated 5th June 2014. He confirmed that he purchased the suit land in the year 2006. That they bought individual plots measuring 15ft X 20 ft. The members then decided to form an association for purposes of getting titles. The certificate of registration was produced as exhibit in this case. That they bought the suit property from the 1st defendant and that they were not asked to surrender the title deed to the Ministry of Lands. He also stated that they were not parties to the suit between the 1st and 2nd defendants.
6. PW3 Beatrice Mumbi Njoroge, the treasurer of the plaintiff, adopted her witness statement dated 5th June 2014. She confirmed what PW1 and PW2 told the court. That in the year 2010, the 2nd defendant claimed the land was his. She confirmed that every member is residing on his/her respective plot. She also prays that they be declared the owners of their respective plots and that the title to the 2nd defendant be cancelled.
7. PW4, Peter Murimi Mugo also adopted his witness statement. He confirmed what PW1 to PW3 told the court. That they bought the land as a group but the 2nd defendant later came claiming he owns the land. He told the court that their title issued on 19th May 2006 has never been surrendered. He also stated that he is residing on the land.
8. PW5, Peter Mwangi, also adopted his witness statement. He told the court that he owns two plots on the suit land. That they bought from the 1st defendant. he told the court they were not parties to the suit between the 1st and 2nd defendants. Further that he has developed his plot and resides there. He also prays that the plaintiff be declared the owner of the suit land and the subsequent title be cancelled.
9. DW1 Paddy Kamau Nganga, 1st Defendant adopted his witness statement dated 30th July 2015. He stated that he purchased property known as NAIROBI/BLOCK 105/328 vide a written agreement made 18TH February 2003 from the then registered Beatrice Maiga Mungara. She provided him with original title documents, a copy of provisional letter from Embakasi Ranching Company Ltd dated 28/11/1982 a publication newspaper of 26th June 1989 establishing that she was the owner. He said that a transfer was effected dated 25th February 2003. He then entered a sale agreement with the Plaintiff and a transfer dated 19th May 2006 was done and a title deed was issued. He stated that the Plaintiff took possession on 19th May 2006. He stated that the published notice had indicated the property issued to the 2nd Defendant's father as [D 74] NAIROBI/BLOCK 105/167 and the Beatrice as [B 180] NAIROBI/BLOCK 105/328. He denied having colluded to defraud anyone and stated that to the best of his knowledge the suit property belongs to the Plaintiff. He also denied any knowledge of transactions carried out after entry no. 7 in the register of the suit property.
10. DW2 George Wanyutu Boro, a businessman in Nairobi recorded his witness statement on 9th February 2015. He is the 2nd Defendant in the suit and the Plaintiff in the counterclaim. He claims to be the rightful owner of NAIROBI/BLOCK 105/328 having acquired it from his late father, Patrick Boro Waweru. He stated that his late father had purchased it through share certificate number 7067 on 27th January 1986 and was issued with a Share Certificate 9025 by Embakassi Ranching Company Limited. He stated that the property was transferred to him on about 3rd September 1997 and it was allocated share certificate no. 1601. He told the court that after that, his two plots called no. B 130 and bonus plot no. 130B were allocated LR NAIROBI/BLOCK 105/328 and was issued a transfer of lease by Embakassi Ranching Company. He stated that he was unable to register the lease because the suit property had been irregularly transferred to Mrs. Beatrice Maiga Mungara who had colluded with the 1st Defendant. He sued in CMCC 3198 of 2003 and the Court gave a declaration on 26th September 2006 that he was the rightful owner of the suit property and the court also issued a permanent injunction restraining the 1st Defendant from dealing in NAIROBI/BLOCK 105/328 (suit property). Thereafter the Plaintiffs made an application seeking a review of the court orders but it was struck out with costs to DW2. He stated that his advocates Mwaura & Wachira Advocates made an application seeking that Land Registrar to reinstate the suit property to its original position and it was allowed, the Executive Officer of the Court being authorized to effect the transfer. The Judiciary also wrote to the Commissioner of Lands directing him to consent to the transfer. He told the Court that in 2013 his Advocates wrote to the Plaintiffs demanding them to vacate the suit property. The Plaintiffs through their chairman responded offering to purchase the suit property. The Plaintiffs proposed Kshs 4,500,000/- which offer was rejected because the suit property was valued at Kshs. 65,000,000/-. He further stated an official search on 16th April 2014 on the suit property showed that he is the registered owner yet the Plaintiff remains in possession.

Submissions

11. Plaintiff's submissions dated 11th May 2020 asserts that the failure of the 2nd Defendant to enjoin the Plaintiff in CMCC 3198 of 2003 or CMCC 3198 of 2007 dubious and calculated to disentitle it from the suit property. Counsel contends that in that case the disputed land neither belonged to the 1st Defendant nor the 2nd Defendant and therefore the Magistrate was misled into issuing orders in favour of the 2nd Defendant herein. Counsel for the Plaintiff submitted that in this suit the Plaintiff was able to produce evidence of ownership of the suit property as well a paper trail showing how it came to own the property. Further, that the 1st Defendants also produced documents to support this position. Moreover, Counsel contended that the 2nd Defendant could not explain how he obtained title to the suit property through succession of his father's estate, an argument which he later abandoned claiming that the suit property was a gift inter vivos. Counsel added that the 2nd Defendant could not produce evidence showing how his father or himself came to be registered proprietor of the suit land. Counsel for the Plaintiff urged the court to grant the Plaintiffs prayers as proved and dismiss the counterclaim by the 2nd Defendant as it is an effort to bring calumny to Court by instrumenting the Court as a conveyor belt for fraud. To this end the Plaintiff relied on the case of **Kibiro Wagoro Makumi alias Kibiro Wagoro –v- Francis Nduari Macharia & another ELC case no. 63 of 2017.**

12. Counsel reiterated that the 2nd Defendant sued the 1st Defendant claiming land owned by the Plaintiff. He then proceeded to prosecute the case without notifying the Plaintiff. This resulted in the creation of entries 8 to 12 in the Register without the involvement of the Plaintiff thus it was fraudulent because there was no consent from the registered owner. **Anastacia Wangui Muriithi -v- Jean Wamarwa Nyamu ELC case 144 of 2015.**

13. The 1st Defendant filed submissions dated 30th July 2020. It was submitted that the newspaper publication dated 26th June 1989 clearly indicated that the property allocated to Beatrice Maiga was 180B Nairobi/Block 105/328 while that allocated to the father of the 2nd Defendant's father was (D74) Nairobi/Block 105/167. Then on 20/2/2003 Beatrice Maiga wrote a letter confirming her sale to the 1st Defendant and consent to lease to transfer to the 1st Defendant. This transfer was effected and a certificate of lease issued. The first Defendant said that he was in possession of the suit property by the time the 2nd Defendant trespassed upon the suit property and started to erect structures leading to the 1st Defendant filing suit seeking a permanent injunction restricting the 2nd Defendant. Counsel reiterated all the events relating to the suit property after law suits judgment was entered for the Plaintiff. It was their contention that the 2nd Defendant misrepresented that Beatrice Maiga Mungara was the rightful owner of the suit property which led to Embakassi Ranching Company Limited's secretary wrongly gazetting the suit property as belonging to plot B1880 when it actually belonged to plot number B130 and 130B. Counsel contended that Beatrice fraudulently dealt with the suit property thereafter, transferring it, believing it was hers. The 1st Defendant argues that the decree dated 23/10/2006 from the Magistrates Court was done in disregard of entry no. 6 in the copy of register opened on 7th November 1988. Counsel argued that at the time of delivery of that judgment dated 26/9/2006 in CMCC 3196 of 2003 the suit property had already passed to the Plaintiff and that the Plaintiff ought to have been made a party to that suit. The 1st Defendant denies collusion with anyone including the 2nd Defendant and stated that he is a stranger to the transactions in the certified copy of the register carried out after entry no. 7.

The 1st Defendant relied on **Alice Chemutai Too-v- Nickosn Kipkurui Korir & 2 others [2015]eKLR**. Counsel argued that in that case the Judge observed that the protection of title is removed when fraud or misrepresentation is proved.

14. Counsel also argued that the 2nd Defendant has no legitimate right or title over the suit property as the plot which he inherited from his father was (D74) Nairobi/Block 105/167 while the 1st Defendants plot was the suit property, evidence being the newspaper publication dated 26th June 1989. The 1st Defendant maintained that he lawfully and legally acquired ownership from Beatrice Maiga Mungara and that there was no misrepresentation he was aware of from the previous owner as he was provided with all original documents to the land. **Grace Wambui Munene v Uma Investments Limited [2018] eKLR.**

15. The 2nd Defendant's submissions are dated 27th August 2020. They raised two issues for the Court to determine:

(1) Who is the rightful owner of the suit property NAIROBI/BLOCK 105/328.

(2) Who shall bear the costs of the suit.

Counsel for the 2nd Defendant pointed out that from the Plaintiff's bundle of documents around 29/11/2006, the Plaintiff applied to be enjoined in CMCC 3198 of 2003 but the application was struck out on the grounds that the suit had been heard and determined and that no appeal was preferred by the Plaintiffs. Further, that during the suit the 1st Defendant herein convinced the Court that he was the owner of the suit property.

Counsel relied on section 26(1) of the Land Registration Act and urged the court to consider 2nd Defendant's title as his conclusive evidence of ownership. Counsel relied on **Margaret Njeri Wachira -v- Eliud Waweru Njenga [2018] eKLR**.

16. It was also contended that the Plaintiffs actions are that it wants to appear as a bona fide purchaser but they were a part of a fraudulent scheme. **Katende -v- Haridar & company limited [2008] 2 E.A. 173** which was cited in the case of **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura -v- Attorney General & 4 other [2017] eKLR**.

17. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the respective parties and the authorities cited. The issues for determination are:-

(i) Who is the rightful owner of the suit property Nairobi/Block/105/328?

(ii) Who should bear costs of the suit?

18. It is not in dispute that the plaintiffs' members are in occupation of the suit property. They have constructed permanent buildings thereon. The plaintiff in support of its case relied on a certified copy of register in respect of LR No Nairobi/Block 105/328. It shows that on 5th October 1990 a lease was issued in the name of Beatrice Maiga Mungara and on 25th February 2003, a lease was issued to Paddy Kamau. On 19th May 2006 a lease was issued to Ruai Central 54 Association. They have also relied on a certificate of lease dated 19th May 2006. The lease is for 99 years with effect from 1st January 1988.

19. It is also not in doubt that arising out of CMCC 3198 of 2003 or 3198 of 2007; orders were issued to the effect that the 2nd defendant was the owner of the suit land. That the Registrar of Titles proceeded to make entries into the register, returning proprietorship to the 1st defendant before making further entries on the same record effecting transfer in favour of the 2nd defendant. The Registrar proceeded to issue a certificate of lease to the 2nd defendant. As things stand there are two certificates of leases issued in respect of the suit property one to the plaintiff and the other to the 2nd defendant.

20. The plaintiff was not enjoined in CMCC 3198 of 2003 or 3198 of 2007. The judgment of the trial court is dated 26th September 2006. Consequently, a decree was extracted dated 23rd October 2006. It should be noted that by this time a certificate of lease had been issued to the plaintiff on 19th May 2006. The said judgement did not take into account entry no 6 in the copy of register where the plaintiff is shown to be registered owner of the suit property.

21. **Section 26(1)** of the Land Registration Act provides that:-

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.

22. I find that the plaintiff obtained the certificate of lease procedurally having purchased the same from the 1st defendant who was the registered owner then. The entries nos 8 – 12 in the Register were made without the involvement of the plaintiff how became the registered owner in 19th May 2006.

23. I find that the plaintiff's members are bonafide purchasers for value without notice of the ongoing dispute between the 1st and 2nd defendant. No evidence has been tendered by the 2nd defendant to show that the plaintiff was involved in any fraudulent registration as the owner and/or to disentitle the 2nd defendant from the suit property. In the case of **Katende v Haridar & Company Limited [2008] 2 E.A 173** cited in the case of **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs Attorney General & 4 Others [2017] eKLR**, where the Court of Uganda held that:-

“For the purposes of the appeal, it suffices to describe a bonafide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successful rely on the bona fide doctrine....(he) must prove that:

(a) he holds a certificate of title;

(b) he purchased the property in good faith;

(c) he had no knowledge of the fraud;

(d) he purchased for valuable consideration;

(e) the vendor had apparent valid title;

(f) he purchased without any notice of fraud;

(g) he was not a party to any fraud”

As I stated earlier the 2nd defendant did not tender any evidence to show that the plaintiff's members were a party to any fraud. In fact he has failed to prove any fraud in the transaction between the 1st defendant and the plaintiff. The plaintiff has a certificate of lease issued in 19th May 2006. The same was not surrendered. I find that the plaintiff's members were bonafide purchasers for value without any notice of the 2nd defendant's claim.

24. The 2nd defendant holds a certificate of title issued following a judgment of the court in CMCC 3198 of 2003 or CMCC 3198 of 2007. It was incumbent upon the 2nd defendant to appraise the court then of what was the true position as regards ownership of the suit property. He failed to do. I find his counterclaim must fail and the same is dismissed with costs.

25. There is no evidence that the said suit property was registered in the name of the 1st defendant irregularly and unprocedurally. At the time he had good title to pass on to the plaintiff.

26. In conclusion, I find that the plaintiff has proved its case as against the defendants.

27. Accordingly, judgment is entered for the plaintiff as against the defendants jointly and severally as follows:-

(a) That a declaration is hereby issued that the plaintiff is the proprietor of Land Reference No. Nairobi/Block 105/328.

(b) That an order is hereby issued directing the Chief Land Registrar to effect cancellation of the entries no 8, 9, 10, 11 and 12 on the register.

(c) That the plaintiff do have costs of the suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 17th day of December 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff

Mr. Makau for the 1st defendant

Mr. Oketch for the 2nd defendant

Kajuju – Court Assistant