



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 45 OF 2015

DIANA WAMBUI WANJIKU.....PLAINTIFF

-VERSUS-

EUNICE WANGU GITHUKA.....1ST DEFENDANT

CHARLES MUNYIRI GACHIGUA.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 10th February, 2015 and filed on 11th February 2015, the plaintiff herein instituted this suit seeking judgment against the defendants herein for:-

- (i) An order for cancellation of the title issued to the 2nd defendant on 21st November, 2014 and restoration of the land register as at 21st November, 2014;**
- (ii) Any other appropriate order to facilitate registration of the plaintiff as the proprietor of the suit land;**
- (iii) Costs of the suit and interest thereon at court rate.**

2. According to the pleadings filed in this suit and the evidence produced in support thereof to wit:-

- (i) the sale agreement executed between the plaintiff and the 1st defendant dated 28th May, 2012;
- (ii) Application for consent of Land Control Board;
- (iii) Letter of consent from Mathira Land Control Board dated 7th November, 2012;
- (iv) Transfer dated 11th January, 2013;
- (v) Certificate of official search dated 4th December, 2014;
- (vi) Proceedings in Karatina Principal Magistrate's Court Criminal Case No. 940 of 2014-Republic v. Eunice Wangu Githuka and
- (vii) The oral testimony of the plaintiff; on 28th May, 2012 the plaintiff and the 1st defendant entered into an agreement for sale and transfer of the 1st defendant's interest in a portion of the parcel of land known as Konyu/Baricho/3921 (hereinafter called the suit property).

3. According to the agreement, the portion being sold or bought was 50 feet by 100 feet. The purchase price was Kshs. 400,000/=.

4. As can be attested from the documents listed in paragraph 3 above, in fulfillment of her obligations under the agreement referred to above, the 1st defendant obtained all the documents required to transfer the portion of the suit property to the plaintiff. However, before the suit property could be sub-divided and the portion sold or bought transferred to the plaintiff, the 1st defendant fraudulently entered into another agreement with the 2nd defendant for sale of the whole of the suit property to the 2nd defendant.

5. The particulars of fraud urged against the 1st and the 2nd defendant are as follows-

1st defendant:-

- (a) Purporting to sell and transfer the suit land in favour of the 2nd defendant well knowing that she had effected transfer of her interest therein in favour of the plaintiff;
- (b) Receiving the sum of Kshs. 550,000/= from the 2nd defendant purporting the same to be consideration for the suit land while well knowing that she had no legal interest in the suit land;
- (c) Deliberately failing to inform the 2nd defendant that the suit parcel had been transferred to the plaintiff.

2nd defendant:-

- (a) Making a false transfer of land document;
- (b) Effecting transfer of the suit land in his name without any valid transfer of land executed by the 1st defendant;
- (c) Effecting registration of transfer of the suit land without any valid land control board's consent in collusion with third parties at the District Land's Registry.

6. Despite having been served with summons to enter appearance, the 1st defendant neither entered appearance nor filed a statement of defence. Consequently, on request by the plaintiff, on 3rd March, 2016 interlocutory judgment was entered against her.

7. In his statement of defence and oral testimony in court, the 2nd defendant denied the allegations leveled against him and contended that he was an innocent purchaser of the suit property for value without notice of the plaintiff's interest or claim therein. In support of his case, the 2nd defendant produced the following documents:-

- (i) Sale agreement entered between the 1st defendant and himself dated 18th November, 2014;
- (ii) Certificate of Official search dated 3rd October, 2014 showing that the 1st defendant was the registered proprietor of the suit property as at the time he entered into a contract for sale of suit property with the 1st defendant;
- (iii) Certificate of Official Search dated 4th December, 2014 showing that as at 4th December, 2014 he was the registered proprietor of the suit property;
- (iv) Letter from his advocate dated 22nd January, 2014 in response to the plaintiff's demand letter dated 16th December, 2014.

8. During hearing, the 2nd defendant informed the court that he was informed by one Kimiti that the 1st defendant was selling her land. He visited the 1st defendant who showed him a vacant parcel of land which had sweet potatoes crops. The 1st defendant told him that she was the owner of the suit property and showed him some documents which showed that she was the owner of the suit property. He conducted a search and confirmed that the land was in the plaintiff's name. He paid the entire purchase price and took possession. Later on, the plaintiff started laying claim on the suit property. The seller was charged with a criminal case to wit Karatina Principal Magistrate Court's Criminal Case No. 940 of 2014.

9. In cross examination, he stated that he was the complainant in the criminal case and that the 1st defendant was the accused. He stated that he is aware that the 1st defendant was convicted and sentenced to a jail term of 2 years imprisonment in respect of the transaction entered between her and him.

10. Explaining that he later learnt that the 1st defendant had sold the same land to the plaintiff, he admitted that the transaction entered between him and the 1st defendant was irregular. That notwithstanding, he maintained that he became aware of the transaction entered into between the plaintiff and the 1st defendant on 2nd December, 2014 when the 1st defendant was taken to court.

11. Although according to the agreement executed between him and the 1st defendant he was to take possession of the suit property after clearing the purchase price, he never took possession of the suit property as provided for in the agreement because the 1st defendant had requested him to allow her harvest her crop of sweet potatoes.

12. He admitted that is not the one in occupation of the suit property and does not know who is.

13. At close of hearing parties to this suit filed submissions which I have read and considered.

14. From the pleadings and the submissions filed, I find the issues for the court's determination to be:-

- (a) Whether the 2nd defendant was an innocent purchaser for value of the suit land without notice of the plaintiff's interest therein?
- (b) Whether the plaintiff has made up a case for being granted the orders sought or any of them?
- (c) What orders should the court make?

15. On whether the 2nd defendant was an innocent purchaser for value of the suit land without notice of the plaintiff's interest therein, the totality of the evidence adduced in this case shows that the 2nd defendant was neither aware nor a party to the fraud perpetrated by the 1st defendant when she purported to sell the suit land to her. The plaintiff, in her own testimony before court, was categorical that she was not aware whether by the time the 2nd defendant purchased the suit land, he was aware of her interest in the suit land. She also acknowledged that when the 2nd defendant obtained his title, the suit land was still registered in the name of the 1st defendant and that there was nothing registered against the title to show that she had an interest in the land. On the basis of the 2nd defendant's uncontroverted evidence to the effect that he was an innocent purchaser for value of the suit land without notice of the 1st defendant's interest therein, I return a positive verdict on this issue.

16. As to whether the plaintiff has made up a case for being granted the orders sought or any of them, since the plaintiff seeks the cancellation of the title held by the 2nd defendant on the ground that the registration was obtained by fraud, to be entitled to that relief, the plaintiff must through cogent evidence proof that the registration effected in favour of the 2nd defendant is vitiated by the pleaded fraud.

17. As pointed out above, the plaintiff in his pleadings (plaint paragraph 11 thereof) pleaded that:-

“...in advancement of the defendants' fraudulent scheme the 2nd defendant caused himself to be registered as the proprietor of the suit property. The particulars of fraud against the 2nd defendant were as captured in paragraph 5 of this judgment; namely making a false transfer of land document; effecting transfer of the suit land in his name without any valid transfer of land executed by the 1st defendant and effecting registration of transfer of the suit land without any valid land control board's consent in collusion with third parties at the district land's registry.”

18. Did the plaintiff prove the pleaded particulars of fraud against the 2nd defendant?

19. With regard to that question, it is noteworthy that neither the plaintiff nor the 2nd defendant produced any documents that were relied on in transfer of the suit land to the 2nd defendant to warrant making definitive findings concerning the pleaded fraud in the transfer of the suit property to the 2nd defendant.

20. As the person who would fail if no evidence was adduced capable of proving the pleaded fraud in the transfer of the suit land to the 2nd defendant, it behooved the plaintiff to show that the 2nd defendant indeed made a false transfer of a land document, effected transfer of the suit land in his name without any valid transfer of land executed by the 1st defendant and that the 2nd defendant, in collusion with third parties at the district land's registry, effected registration of transfer of the suit land without any valid land control board's consent. Since this court cannot determine those issues on the basis of speculation as to what could have transpired in the transfer of the suit land to the 2nd defendant, I find and hold that the plaintiff failed to discharge the burden imposed on her of proving the alleged fraud on the part of the 2nd defendant in the transfer of the suit land to him.

21. The totality of the evidence adduced in this case shows that the 2nd defendant was an innocent purchaser for value without notice of the defect in the 1st defendant's title reason wherefore he filed a complaint before the police leading to arrest and arraigning of the 1st defendant in court in connection with the fraud she committed by selling the suit land to him when she had already sold it to another person. This being a case of two equities and cognizance of the fact that the transaction in favour of the 2nd defendant was concluded through a process the plaintiff was unable to impugn, I find and hold that the plaintiff has failed to make have a case for rectification of the title held by the 2nd defendant.

22. My considered view of this matter is that the plaintiff's remedy lies in refund of the purchase price by the 1st defendant but since the plaintiff never sought such relief, I have no choice but to dismiss her case.

23. As regards the costs of the suit, I find the 1st defendant to be responsible for the dispute that is the subject matter of this suit and accordingly condemn her to pay the costs of the suit.

24. Orders accordingly.

Dated, Signed and Delivered in open court at Nyeri this 14th day of February, 2019.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff

N/A for the defendant

Mr. King'ori for the 2nd defendant

Court assistant - Esther