



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 201 OF 2015

(FORMERLY KERUGOYA ELC NO. 29 OF 2014)

KENNETH KARIUKI IRERI.....PLAINTIFF

VERSUS

TITUS KITHINJI NDICHI.....DEFENDANT

(BY ORIGINAL CLAIM/SUIT)

TITUS KITHINJI NDICHI.....PLAINTIFF

VERSUS

KENNETH KARIUKI IRERI.....1ST DEFENDANT

NTHIGA MWARIRE.....2ND DEFENDANT

ALFRED NGIRI MARANGI.....3RD DEFENDANT

NYAGA TITIMA.....4TH DEFENDANT

(BY COUNTERCLAIM)

JUDGEMENT

1. By a plaint dated 30th October 2009 the Plaintiff sought the following reliefs against the Defendant;

- a. *An eviction order do issue against the Defendant herein.*
- b. *The Defendant be condemned to pay the costs of this suit with interest at court rates.*
- c. *Any other or further relief that this honourable court may deem fit.*

2. The Plaintiff pleaded that he bought *Title No. Nthawa/Riandu/1298* (hereinafter *the suit property*) in 1984 in consequence of which he was registered as proprietor. It was further pleaded that the Defendant had wrongfully and without the Plaintiff's consent settled on the suit property and despite demand made the Defendant had refused to vacate the suit property thus rendering the suit necessary.

3. The Defendant filed a defence and counterclaim dated 22nd December 2009 in which he challenged the Plaintiff's title to the suit property. The Defendant maintained his ownership of the suit property and stated he that he had long settled upon it before the Plaintiff purportedly bought it. The Defendant further pleaded that if the Plaintiff had any title to the suit property then it was obtained in a fraudulent, unlawful and improper manner.

4. By his counterclaim, the Defendant joined the 2nd – 4th Defendants as Defendants in the counterclaim. The Defendant pleaded that he was lawfully allocated the suit property during the land adjudication process which culminated in an appeal to the Minister under the **Land**

Adjudication Act. It was pleaded that through a conspiracy between the 3rd and 4th Defendants *Embu PMCC No. 262 of 1992* was filed which was somehow settled through a consent judgement by which the 2nd Defendant was purportedly allocated the suit property.

5. It was further pleaded that the Defendant was not a party to the said suit when it was heard and concluded. However, it was pleaded that the said judgement was later on set aside on 13th April 1994 together with all consequential orders. It was further pleaded that the 2nd Defendant in the counterclaim was wrongfully registered as proprietor of the suit property on 2nd December 1993 on the basis of the aforesaid consent judgement. The 2nd Defendant is the one who later on sold and transferred the suit property to the Plaintiff in the main suit.

6. The Defendant contended that his deprivation of the suit property pursuant to the aforesaid consent judgement was fraudulent and irregular and that it was obtained through collusion on the part of the Defendants in the counterclaim. He enumerated several particulars of the alleged fraud, irregularity and collusion in paragraph 19 of the counterclaim.

7. On the basis of matters pleaded in the counterclaim, the Defendant sought the following reliefs in the counterclaim;

a. A declaration that the Plaintiff in the counterclaim/Defendant in the main suit, is the lawful proprietor of land parcel No. Nthawa/Riandu/1298.

b. An order that the names of the Plaintiff in the main suit/the 1st Defendant in the counterclaim, Kenneth Kairuki Ireri be removed, deleted and/or cancelled from the proprietorship section of land parcel No. Nthawa/Riandu/1298 and the names of the Plaintiff in the counterclaim (Defendant in the main suit) Titus Kithinji Ndichi be re-entered, reinstated and/or restored in the proprietorship section of the register for land parcel No. Nthawa/Riandu/1298 and a title deed do accordingly issue to Titus Kithinji Ndichi.

c. That costs of the main suit and of the counterclaim be separately awarded to the Defendant in the main suit/Plaintiff in the counterclaim.

8. The Plaintiff filed an undated defence to the counterclaim on 8th January 2010 in which he denied the contents of the counterclaim. He asserted that he lawfully bought the suit property from the 2nd Defendant in the counter-claim and that he was also not aware of the existence of any previous proceedings before the Magistrate's courts. He, therefore, urged the court to dismiss the counterclaim.

9. When the suit was listed for hearing on 14th November 2018 the advocates for the parties agreed to have the suit disposed of on the basis of the witness statements and documents on record. The Defendant was also granted leave to file and serve additional witness statements and documents within 14 days. The Plaintiff was granted 30 days within which to file and serve written submissions whereas the Defendants were granted a similar period upon service to file theirs.

10. The record shows that none of the parties had filed any submissions by the time of preparation of the judgement. The court also notes that the Defendant did not file any additional witness statements or documents. It would also appear from the record that the 2nd – 4th Defendants in the counter claim have never entered appearance nor filed any defences to the counterclaim despite service.

11. The court has further noted from the record of proceedings that the advocates for the parties did not file an agreed statement of issues for determination. Instead, the Plaintiff filed his version of issues for determination whereas the Defendant did not file any. The court shall, therefore frame the issues on the basis of **Order 15 Rule 2 of the Civil Procedure Rules.**

12. Upon perusal of the pleadings, affidavits, documents and witness statements on record, the court is of the opinion that the following issues arise for determination in the suit and counterclaim.

a. Whether the Defendant's registration as proprietor of the suit property was lawfully cancelled.

b. Whether the Plaintiff was lawfully registered as proprietor of the suit property.

c. Whether the 2nd – 4th Defendants in the counterclaim were involved in any fraud, irregularity or collusion to deprive the Defendant of the suit property.

d. Whether the Plaintiff is entitled to the reliefs sought in the plaint.

e. Whether the Defendant is entitled to the reliefs sought in the counterclaim.

f. Who shall bear the costs of the suit and counterclaim.

13. The next effect of the 1st, 2nd and 3rd issues is really who is the legitimate owner of the suit property. However, for purposes of this suit, the court will deal with the issues separately owing to the nature of the pleadings filed by the parties.

14. The court has considered the material on record on the 1st issue. There is no doubt that the suit property was subjected to the full length of the process of land adjudication under the provisions of the **Land Adjudication Act (Cap 284)**. It is apparent that it was upon conclusion of the appeal to the Minister under **section 29 of the said Act** that the Defendant was registered as proprietor in 1989. The decision of the Minister is final by dint of **section 29 (3) of the said Act** is not subject to appeal. However, an aggrieved party may resort to the supervisory

or judicial review jurisdiction in relation to the decision making process as opposed to the merits of the decision.

15. There is no evidence on record that any judicial review application was ever filed to challenge the decision of the Minister. Instead, the 3rd and 4th Defendants in the counterclaim instituted a civil suit before the Principal Magistrate's court at Embu in which they agreed to have the matter referred to some form of arbitration to the Chief. The resultant award was later on adopted as a consent judgement by the Magistrate's Court. It is on the basis of the said consent that the Defendant's registration was cancelled and the 2nd Defendant in the counterclaim registered as proprietor of the suit property.

16. The material on record shows that the Defendant was not a party to the proceedings before the Magistrate's court at the material time even though he was the registered proprietor of the suit property at the time adverse decisions were made. There is no doubt that there was a serious violation of the cardinal rules of natural justice when the Defendant was deprived of his title to the suit property without being accorded a hearing. That adverse decision is liable to be set aside on the ground alone.

17. The material on record shows that the Magistrate's court discovered later on that it had acted without jurisdiction and upon application it set aside the said consent judgement and all consequential orders on 13th April 1994. It is, therefore, evident that the Defendant's registration as proprietor of the suit property was not lawfully cancelled. It was irregular, unlawful and void *ab initio*.

18. The 2nd issue relates to the Plaintiff's registration as proprietor of the suit property upon purchase from the 2nd Defendant in the counterclaim. The material on record indicates that the 2nd Defendant in the counterclaim acquired the suit property pursuant to the consent judgement of the Magistrate's court which had already been set aside. There was consequently no basis upon which the 2nd Defendant in the counterclaim could have transferred the suit property to the Plaintiff. Apart from the setting aside, it must be remembered that the consent judgement was a nullity in the first instance.

19. The effect of an action which is a nullity was considered in the case of **Macfoy Vs United Africa Co. Ltd [1961] All ER 1169** at **Page 1172** as follows;

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

20. In the circumstances, it is obvious that the 2nd Defendant having obtained nothing from the legitimate owner of the suit property, he had nothing to pass on to the Plaintiff in this suit. It would, therefore, follow that the Plaintiff was not lawfully registered as proprietor of the suit property and he did not obtain a good title thereto.

21. The 3rd issue is whether actions of the 2nd – 4th Defendants in relation to the suit property were tainted with fraud, irregularity or collusion. It is not really necessary to determine this issue in view of the court's findings on the 1st and 2nd issues. Although there was no direct evidence of fraud on the part of the 2nd – 4th Defendants it can reasonably be concluded that they were dishonest in their actions. They knew or ought to have known that the Defendant was the registered owner of the suit property. They failed to join him in, or notify him of, the proceedings before the Magistrate's court even though they knew his interest in the suit property would be adversely affected. They failed to rescind their actions after the setting aside of the consent order. The 2nd Defendant even went ahead to transfer the suit property to the Plaintiff after the setting aside order was made on 13th April 1994. The copy of the green card on record shows that the suit property was transferred on 5th September 1995.

22. There is sufficient material on record to demonstrate various irregularities in the manner in which the proceedings before the Magistrate's Court were filed and conducted. There is also some evidence to demonstrate that those proceedings and the resultant consent judgement were eventually set aside by the same court.

23. The 4th issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. The court has already found that the Defendant is the legitimate owner of the suit property. The court has also found that the Plaintiff was not lawfully registered as proprietor and that he did not obtain a good title to the suit property. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the plaint or any one of them.

24. The 5th issue is whether the Defendant is entitled to the reliefs sought in the counterclaim. In view of the court's findings on the preceding issues, it would follow that the Defendant is entitled to the orders sought in the counterclaim.

25. The 6th and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court is of the view that neither the Plaintiff nor the Defendant brought about the unfortunate state of events which precipitated the suit and counterclaim. The real culprits are the 2nd – 4th Defendants. They shall therefore be condemned to pay the Plaintiff's of the suit and the Defendant's costs of the counterclaim.

26. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his case against the Defendant. The court also finds and holds that the Defendant has proved his counterclaim to the required standard. The court consequently makes the following orders;

a. The Plaintiff's suit against the Defendant is hereby dismissed in its entirety.

b. Judgement be and is hereby entered for the Defendant on the counterclaim in the following terms:

i. A declaration is hereby issued that the Defendant *Titus Kithinji Ndichi is the lawful proprietor of Title No. Nthawa/Riandu/1298.*

ii. An order is hereby issued directing the Land Registrar Mbeere to cancel or delete the name of the Plaintiff, Kenneth Kariuki Ileri from the land register and restore the name of Titus Kithinji Ndichi as proprietor of *Title No. Nthawa/Riandu/1298.*

c. Costs of the suit and the counterclaim shall be borne by the 2nd – 4th Defendants in the counterclaim.

27. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **28TH** day of **MARCH, 2019.**

In the presence of Ms Nzekele holding brief for Mr Okwaro for the Defendant and in the absence of the Plaintiff.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

28.03.19