



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 737 OF 2013

MARCLUS KIRANGA NIMROD.....1ST PLAINTIFF

NKK.....2ND PLAINTIFF

VERSUS

NESSY KUTHII JUSTUS.....1ST DEFENDANT

QUEKENDA HOLDINGS LTD.....2ND DEFENDANT

JUDGMENT

BACKGROUND

The plaintiffs filed this suit against the defendants seeking the following orders:

- (1) A declaration that the purported sale of land parcel No. KIINE/RUKANGA/2336 from the 1st defendant to the 2nd defendant is null and void.***
- (2) An order to cancel the name of the 2nd defendant from the register of KIINE/RUKANGA/2336 and replace it with that of the 2nd plaintiff.***
- (3) General damages against the 1st defendant for loss and damage suffered by the plaintiffs.***
- (4) Costs of this suit.***

Both the 1st and 2nd defendants filed their respective defences and in addition, the 2nd defendant filed counter-claim seeking an order for general damages for trespass.

On 12th March 2015, the 2nd plaintiff filed an affidavit stating that he has no case against the defendants and withdrew the suit and in addition filed a notice of withdrawal of suit on 19th March 2015. Later, the 2nd plaintiff filed another affidavit on 31st March 2015 stating that he did not authorize the withdrawal of the suit and has no intention of withdrawing the same against the defendants.

PLAINTIFFS CASE

The crux of this suit is a parcel of land L.R No. KIINE/RUKANGA/2336 bought by the 1st plaintiff from his sister PW II and registered in the name of the 2nd plaintiff his minor son as a trustee then. Sometime in the year 2011, the 1st defendant filed a Miscellaneous Application No. 4 of 2011 (Kerugoya) on an Ex-parte application process and transferred the suit property to her name and later disposed it to the 2nd defendant.

The suit property belonged to the 1st plaintiff's father who gave it to his sister PW 1 as a gift in 2004 on condition that the same is not sold to anybody outside the family. In the year 2010, PW1 had some financial problems and sold it to the PW II for a consideration of Ksh. 1 million. PW1 therefore decided to register it under his son PW2. In the year 2003, the 1st plaintiff was informed that the suit land had been sold and on inquiry, he discovered that the 1st defendant who was his estranged wife had fraudulently transferred the land to the 2nd defendant through Misc. Application No. 4 of 2011 in the Magistrate's Court in Kerugoya. The plaintiff produced the following documents in evidence:

(1) Sale agreement dated 01/02/2008 between PW1 and the 1st plaintiff.

(2) Certificate of urgency in Misc. Application No. 4 of 2011.

(3) Proceedings in Misc Application No. 4 of 2011 – the Court was surprised that the property is registered in the names of the minor.

(4) Order issued in Misc. Application No. 4 of 2011 – where the register of the suit land was rectified by cancelling the 2nd plaintiff and replacing with the 1st defendant.

DEFENDANTS CASE

The 1st defendant on the other hand claims the suit land was registered in her names at the request of the 1st plaintiff via Misc. Application No. 4 of 2011. Later, they agreed that they sell the land so that the 2nd plaintiff joins form 1 and she advertised in OLX. She sold the land to the 2nd defendant in 2011 and the 1st plaintiff was a witness but he did not sign anywhere. The 2nd defendant confirmed that he bought the land from the 1st defendant in 2011 after having seen it advertised online. His wife and the 1st plaintiff were present when he went to view the land. Thereafter, the land was registered in the names of the Company but the agreement was between him and the 2nd defendant. He bought the land at Ksh. 3 million but the green card indicates Ksh. 600,000/=. The defendant produced the following documents as exhibits:

(a) Title deed dated 7/2/2011 in the 1st defendant's names.

(b) Official search dated 14/3/2011.

(c) Valuation report dated 17/3/2011.

(d) Sale agreement between the defendants dated 22/3/2011.

(e) Title deed dated 19/5/2011 in the name of the 2nd defendant.

PLAINTIFFS SUBMISSIONS

The plaintiff submitted that the 2nd plaintiff being a minor then, his father and the 1st defendant herein acted as trustee involving onerous obligation since the trust in this case being the suit was made by the 1st plaintiff on purchase from the sister. The plaintiff submitted that the aggregate accumulation of obligations/duties that vested upon the shoulders of the 1st plaintiff and the 1st defendant as the parents of the 2nd plaintiff in regard to the suit premises amounts to a constructive trust and as trustee, the 1st defendant had a duty to administer the suit property in a manner lawful in accordance with equitable principles that the consequential benefits and advantages accrue not to them as trustees but the 2nd plaintiff herein the costuc que trust. The plaintiffs further submitted that the actions of the 1st defendant to file an Ex-parte Misc. Application No. 4 of 2011 in Kerugoya Magistrate's Court and obtaining orders that the suit land immediately be changed from the 2nd plaintiff's name to that of the 1st defendant was an act of great fraud as there was no disclosure as to material facts. The plaintiffs were never served with the pleadings or any hearing notice as all these happened discreetly to obtain title by deceit with the sole intention to sell it for her own selfish gain to the detriment of the implied trust created by the 1st plaintiff on behalf of the 2nd plaintiff, a minor. In conclusion, the plaintiff submitted that the creator of a trust is the only one who can recall it or interfere with the same but not a third party such as the 1st defendant. The plaintiff sought to have the title fraudulently obtained be cancelled to revert to the original owner, the minor.

He cited the following case:

(1) *Ayoub Vs Standard Bank of South Africa (1963) E.A 619.*

(2) *Mutsonga Vs Nyali (1984) K.L.R 425.*

(3) *Kanyi Vs Muthiora (1984) K.L.R 712.*

(4) *Bank PLC Vs Rosset (1991) 1 A.C. 107.*

(5) *Hussey Vs Palmers (1972) All E.R 744.*

(6) *Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & another (2013) e K.L.R.*

2ND DEFENDANT'S SUBMISSIONS

The 1st defendant submitted that there is no proof of fraud by the defendants. He submitted that the suit property was sold for Ksh. 3,000,000/=. It was further submitted that **Section 25 of the Land Registration Act** states that the rights of a proprietor cannot be defeated except in a manner provided by law. He cited the following cases:

(1) *Michael Muraya Kirara Vs County Commissioner Muranga County and another (2016) e K.L.R*

(2) *Present Truth Fellowship (K) Vs Teresia Wanjiru & 2 others (2017) e K.L.R*

(3) *Samuel Kipkurgat Soc Vs John Kipkoech Soc (2017) e K.L.R*

(4) *Peter Wafula Khaemba Vs Mary Chelimo Sirima & 6 others (2017) e K.L.R*

(5) *Eva Kimea & another Vs Nawal Abdulrahman Abdalla (2015) e K.L.R.*

ISSUE(S) FOR DETERMINATION

The issues arising in this case is on fraudulent registration.

DECISION

Fraud is a serious matter that requires proof on a standard higher than the civil standard of balance of probabilities. The Court must require a high degree before acting on such serious allegations of fraud.

It is not lost in the mind of this Court that the law jealously protects the sanctity of title issued to a registered proprietor as affirmed in **Section 26 of the Land Registration Act No. 3 of 2012** which states:

“26: 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 on 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, un-procedurally or through a corrupt scheme”.

From the proceedings and the evidence adduced, the 1st plaintiff was not a party to the sale agreement with the 2nd defendant and neither was he a party to the suit where the 2nd plaintiff's name was cancelled from the register.

Under **Section 26 (1) (b) of the Land Registration Act**, the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. It has been proved that the title to the 2nd defendant was obtained illegally, un-procedurally and through a corrupt scheme.

In the case of **Arthi Highway Developers Ltd Vs West End Limited & 6 others (2015) e K.L.R**, the Court of Appeal held:

“Likewise in the case of Iqbal Singh Ral Vs Mark Lecchini and the Registrar of titles, Civil Case No. 1054 of 2001, this Court (Hon. Justice Muchelule) held as follows:

“At the time when the 1st defendant sought to buy the land in dispute, the registered proprietor was the plaintiff. There is no dispute that he never dealt with the plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraudulent person who had no claim whatsoever to the land. The consequence is that the 1st defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23 (1) protects titles issued to a purchaser upon the transfer or transmission by the proprietor thereof. The 1st defendant did not obtain a transfer from the plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of Section 23 (1) to say he obtained an indefeasible title”.

Again in the case of **Elijah Makeri Nyangwira Vs Stephen Mungai Njuguna & another (2013) e K.L.R**, Hon. Justice Sila Munyao held in relation to **Section 26 (1) (a) and (b)** of the Land Registration Act:

“.....the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

First, it needs to be appreciated that for **Section 26 (1) (b)** to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, un-procedurally or through a corrupt scheme. The heavy import of **Section 26 (1) (b)** is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent purchaser is impeachable so long as the Court has proved that the title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of **Section 26 (1) (b)** in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. It therefore behoves a purchaser of land to go beyond what is contained in the certificate of search and do due diligence to establish how the seller obtained the title he intends to transfer to him.

The evidence in this case puts no doubt in the mind of this Court that the title to the 2nd defendant was obtained illegally, un-procedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of **Section 26 (1) (b)** have been met and the title of the 2nd defendant is liable to be cancelled. In the final analysis, I find that the plaintiffs have proved their claim in the required standard and should be granted the prayers sought in the plaint.

In the result, the plaintiff's suit is allowed with costs to the defendants jointly and severally. The 2nd defendant's counter-claim is hereby dismissed with costs to the plaintiffs.

READ and SIGNED in open Court at Kerugoya this 22nd day of March, 2019.

E.C. CHERONO

ELC JUDGE

22ND MARCH, 2019

In the presence of:

1. Mr. Wambugu for 2nd Defendant
2. Mr. Mbogo, Court clerk – present