



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 12 OF 2017

WILSON NDEGWA KAMAU

(suing as the legal representative of

KAMAU NDEGWA)

-

PLAINTIFF

VS

SABINA WAITHIRA KAMAU

-

1ST DEFENDANT

STANLEY GITARI KANYUIRO

-

2ND DEFENDANT

JUDGMENT

1. The Plaintiff is the son of the 1st Defendant. The 2nd Defendant is a purchaser of one of the three plots derived from the subdivision of LOC 2/GACHARAGE/790 registered in the name of Kamau Ndegwa alias Kamau Kamore. Kamau Ndegwa was the father to the Plaintiff and the husband to the 1st Defendant. He died on 13/5/99.

2. The claim of the Plaintiff commenced by a plaint dated the 24/12/12 which was filed in Court on the 21/12/12. Then the Plaintiffs claim against the 1st Defendant was for the following orders;

- a. An order that the Register of the suit land LOC2/GACHARAGE/790 be rectified by cancelling out the name of the Defendant therefrom.
- b. Costs of the suit.
- c. Any other relief that the Court deems fit and just.

3. On the 28/1/2013 the 1st Defendant filed a statement of defence dated the 21/1/13. In it, she denied the claim of the Plaintiff more particularly the particulars of fraud and illegality set out in para 6 of the plaint. She further asserted that the land or piece of land registered as LOC2/GACHARAGE/790 which was the subject of the suit did not exist and therefore the suit was a misnomer, incompetent and an abuse of the process of the law and the Court.

4. The 1st Defendant then as a singular Defendant denied the contents of Para 7 and 8 of the plaint with regard to alleged actions to dispose of the land described above and having illegally and fraudulently transferred the same to herself. In further response to the Plaintiffs claim the 1st Defendant averred that the prayers sought by the Plaintiff were neither tenable nor maintainable in law on the following grounds;

- a. There are previous Land Dispute Tribunal matters to wit; LDT NO 20 of 2009, LDT 66 of 2005 and SPMCC No 21 of 2010 involving the same parties thus rendering the current suit resjudicata.
- b. The subject matter of the suit is non-existent and the entire suit is an abuse of the process of the Court.

She consequently sought an order for striking out the suit or its dismissal with costs.

5. Following an order of the Court dated 25/11/16 the Plaintiff on the 29/11/16 filed an amended plaint dated 28/11/16. In the said plaint the Plaintiff added the 2nd Defendant as a party in which at para 8 and 9 he alleged that the 1st Defendant illegally and fraudulently acquired a title to the LOC 2 /GACHARAGE /790 registered in the name of Kamau Ndegwa alias Kamau kamore (deceased) and fraudulently and illegally subdivided the land into 3 parcels namely LOC 2/GACHARAGE/3818, 1819, 3820 and registered LOC 2/GACHARAGE/ 3818 and

3819 in her name and sold and/or transferred parcel No LOC 2/GACHARAGE/3820 to the 2nd Defendant.

6. The particulars of fraud on the part of the 1st Defendant are set out in Para 8 of the plaint.

7. Further the Plaintiff stated that by the 1st Defendant illegally and fraudulently transferred the 3 parcels of land to herself and later one parcel to the 2nd Defendant thus effectively seeking to defeat the Plaintiff's right and interest and his rightful share in the land thereby causing loss and damage to the Plaintiff. The particulars of loss and damage are set out in para 11 of the plaint.

8. The Plaintiff sought the following orders in the amended plaint;

- a. An order that this honourable Court do rectify the register of the said lands LOC 2/GACHARAGE/3818, 3819 and 3820 by ordering cancellation of the 1st and 2nd Defendants' names
- b. Such further orders as the Court deems fit and just
- c. Costs of this suit.

9. On 24/7/17 the 2nd Defendant filed a statement of defence against the Plaintiff claimant and a counterclaim against the 1st Defendant. In the statement of defence the 2nd Defendant states that he is a bonafide purchaser of parcel No LOC 2/GACHARAGE /3820 from the 1st Defendant and averred that he has paid the full purchase price upon which he was given vacant possession and has taken possession and extensively developed the land. The 2nd Defendant stated that the Plaintiff was aware of the agreement of sale by the 1st Defendant and asserted that his title to LOC 2/GACHARAGE /3820 is protected by law.

10. As for the Counterclaim against the 1st Defendant the Plaintiff states that he bought LOC 2/GACHARAGE /3820 on 15/5/12 from the 1st Defendant and has paid in total Kshs 440,000/-. The 2nd Defendant sought the following prayers against the 1st Defendant in the counterclaim;

- a. A sum of Kshs 440,000/- being the consideration paid plus penalty as per the agreement.
- b. Interest at Court rates at 14% p.a on the principal from the date of the agreement (15/5/12).
- c. Costs of the development of the land upon valuation.

11. At an interlocutory stage the 1st Defendant by a Notice of Motion dated 19/3/13 and filed in Court on 20/3/13, sought an order of the Court striking out the Plaintiffs suit and dismissal of the same with costs on the grounds particularised in the defence and generally in that the suit was fatally defective, incompetent and an abuse of the due process of the law and the Court. More particularly in the general ground the 1st Defendant asserted that the plaintiff's suit is resjudicata.

12. After hearing the parties the Court on 31/8/13 dismissed the 1st Defendants Notice of Motion with costs on the grounds that resjudicata is not applicable in so far as the matters relating to Murang'a LDT case No 20 of 2009 and 66 of 2005 and SPMCC NO 21 of 2010 are concerned respecting the course of action in this suit.

Evidence of the parties

13. At the hearing of the suit the Plaintiff adopted his written statement and interalia testified and stated that the 1st Defendant is his step mother and the land parcel LOC 2/GACHARAGE/ 790 belonged to his late father Kamau Kamore who died on the 12/5/99. He informed the Court that the 1st Defendant illegally and fraudulently transferred the suit land to her name in 2008 after the death of his father without petitioning for succession in the estate of his late father. He stated that he got to know about the transfer in the year 2010 when he wanted to file for succession of his late fathers' estate. To support his case, he produced documents marked as PEX 1-9 which interalia included the green card for the original land LOC 2/GACHARAGE/790, the certificate of searches, death certificate of Kamau Kamore, grant of letters of administration ad litem where he was appointed an administrator, searches for titles for LOC 2/GACHARAGE /3818-1820.

14. He informed the Court that his father had 3 wives and the 2nd Defendant is the younger wife. He was aware that the father distributed land to the other two wives but in respect to Parcel LOC 2/GACHARAGE/ 790, he did not. That he was aware of the awards issued in the two LDT cases. That he filed a case in Muranga but he withdrew it as he had not petitioned for letters of grant of administration. That he filed cautions severally on the land which were removed without any hearing. In response to whether he was aware that parcel LOC 2/GACHARAGE /3819 was reserved for him by the 1st Defendant, he replied in the negative. He admitted that he did not appeal against the decisions of the Land Dispute Tribunal even though he did not agree with them.

15. The 1st Defendant testified and adopted her written statements and stated that the Plaintiff is his last-born son. Her other two sons died leaving the Plaintiff and two married daughters. She produced documents in support of her defence marked as DEX1-13. That the Plaintiff was a party to the Land Dispute Tribunal cases; LDT 66 of 2005 and LDT 20 of 2009. She stated that she became registered as owner of the original land LOC 2/GACHARAGE/ 790 pursuant to LDT 66 of 2005 which tribunal decreed that the land belonged to her. Further LDT 20 of 2009 adjudged that the land belonged to her and allowed her to subdivide the land into 3 portions. The caution lodged by the Plaintiff was also removed pursuant to the orders of the said Land Dispute Tribunal. She admitted that no succession has been filed in respect to the estate of her husband. She averred that her late husband transferred the land to her during her lifetime just like the other two co-wives who too got

land.

16. In addition, she stated that the Plaintiff was aware of the sale of the land to the 2nd Defendant as he even attended the Land Control Board and never raised any objection. That he reserved parcel LOC 2/GACHARAGE/3818 for the Plaintiff but he wants the whole land to himself.

17. The 2nd Defendant led evidence that he bought land LOC 2/GACHARAGE/3820 from the 1st Defendant in 2012, paid fully and took possession in 2014 and developed the same with tea bushes and trees thereon. Land control board consent was obtained. The Plaintiff was among other family members that attended the land board at Kigumo where the consent was issued. In cross examination he averred that he bought the land before the subdivision was done and that he did not obtain the green card to know who the original owner of the land was.

18. After close of pleadings and the procedural steps in the suit were completed, the suit was heard and with concurrence of the Court the parties on the 28/1/19 proposed to be heard further by Written Submissions.

19. The Plaintiff and the Defendant filed their Written Submissions on the 21/1/19 and 28/1/19 respectively.

20. The Court has considered all the pleadings the evidence the submissions and the materials placed before it and the issues that fall for determination are as follows;

- a. Whether the transfer of the LOC 2/GACHARAGE/790 to the 1st Defendant was fraudulent and illegal.
- b. Whether the title arising out of LOC 2/GACHARAGE/790 should be cancelled that is to say LOC 2/GACHARAGE /3819 and 3820
- c. Whether the 2nd Defendant is a bonafide purchaser of LOC 2/GACHARAGE/ 3818.
- d. Whether the 1st Defendant is entitled to the orders sought in the statement of defence and counterclaim and the 1st Defendant.
- e. Whether the Plaintiff has suffered loss and damage.
- f. Who should bear the costs of the suit and the Counterclaim.

Whether the transfer of the LOC 2/GACHARAGE/ 790 to the 1st Defendant was fraudulent and illegal.

21. Black's Law Dictionary defines fraud as follows;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

22. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that;-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:**

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (**Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308**).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (**see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

23. In the case of **Insurance Company of East Africa vs. The Attorney General & 3 OthersHccc135/1998** it was held that whether there was fraud is, however, a matter of evidence.

24. Relative to the plaintiffs claim in this suit the particulars of fraud against the 1st Defendant as set out in Para 9 of the amended plaint as follows;

- a. Causing the suit land to be transferred to herself long after the registered owner had died.

- b. Obtaining title illegally and fraudulently purporting the same was transferred to her by the deceased Kamau Kamore
- c. Committing forgery in the documents of transfer of the suit land to herself
- d. Obtaining the title deed by fraudulent means.

25. Principally, the transfer of LOC 2/GACHARAGE/ 790 to the 1st Defendant was done on the 5/6/08 while the registered owner Kamau Ndegwa died on 13/5/99. The effect of the death of Ndegwa is that no valid transaction or transfer could be done in respect to LOC 2/GACHARAGE/790 without a grant of representation. The 1st Defendant alluded in evidence that the land transfer was signed by the deceased husband during his lifetime. She did not present to the Court the transfer documents for the Court to determine its veracity. I have seen the LDT 66 of 2005 orders which stated that the land belonged to the 1st Defendant because it was transferred to her as a gift. The green card also denotes the word gift against the entry of the name of the 1st Defendant. The Land Dispute Tribunal referred to a consent of Land Control Board of 1995 that approved the transfer of the land as a gift. All these were not supported by any evidence and they remain mere statements.

26. In the circumstances, therefore the Court finds that the 1st Defendants action of presenting any documents of transfer for registration after the death of Ndegwa was illegal and fraudulent against the estate of the said Kamau Ndegwa. Such an action is an affront to section 45 of the Succession Act that bars the intermeddling with the estate of a deceased person. The Court finds the action illegal and unlawful in law.

27. Further the Court has evaluated the mandate of the Land Dispute Tribunal as provided under section 3(1) of the Land Dispute Tribunal which provided as follows;

“(1) Subject to this Act, all cases of a civil nature involving a dispute as to— (a) the division of, or the determination of boundaries to land, including land held in common; (b) a claim to occupy or work land; or (c) trespass to land, shall be heard and determined by a Tribunal established under section 4.

28. It is the Courts finding that the Land Dispute Tribunal did not have any mandate to determine title on registered land such as in this case. Its actions are null and void and I declare them as such in agreement with the with the decision in **Macfoy v United Africa Co. Ltd (1961) 3 All E.R.** 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.”

Whether the titles arising out of LOC 2/GACHARAGE/790 should be cancelled that is to say LOC 2/GACHARAGE /3818- 3820

29. The three parcels of land namely LOC 2/GACHARAGE /3818-1820 arise out of the subdivisions of LOC 2/GACHARAGE/790. The Court has held that the transfer of parcel LOC 2/GACHARAGE/790 to the 1st Defendant is tainted with an illegality and fraud. Consequently the 1st Defendant did not possess power to subdivided LOC 2/GACHARAGE/790 into the 3 parcels of land or at all and dispose of all or any of the said parcels to the 2nd Defendant or any other person. Nevertheless the 2nd Defendant in his statement of defence alleges that he is a bonafide purchaser and that his title to LOC 2/GACHARAGE /3818 is protected by law.

30. In the case of **Samuel Kamere Vs Land Registrar (2015) ECLR** the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).

31. The 2nd Defendant statement in the preceding para would be valid if the matters set out in the judgement above were truly bonafide.

32. Section 26 of the Land Registration Act states as follows;

“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.

33. The two instances when title of a proprietor may be challenged is where there is fraud and misrepresentation for which the person was a party and secondly is where the title is obtained illegally unprocedurally or through a corrupt scheme. The title of the 2nd Defendant falls under the second scenario.

34. In this case going by the documents on record the 2nd Defendant admitted in evidence that he bought the land before the subdivision that is to say parcel LOC.2/GACHARAGE/790 and that he did not obtain a copy of the green card of the same. In a proper due diligence of the 2nd Defendant he ought to have ascertained and obtained consent of the persons who are beneficiaries of LOC 2/GACHARAGE/ 790 from which LOC 2/GACHARAGE/ 3818 was excised before purchasing the same from the 1st Defendant. He also stated that there was reluctance of the family to give consent and when they went to the land control board he was asked to remain out as they tried to resolve the issues. The evidence on record does not show that this was done. The Court finds that the 2nd Defendant was not a bonafide purchaser for value.

Whether the 2nd Defendant is entitled to the orders sought in the statement of defence and counterclaim against the plaintiff and the 1st Defendant.

35. With regard to the claim of the Plaintiff and defence of the 2nd Defendant the Court has in the preceding paras held that the 1st Defendant did not have legitimate power to subdivide LOC.2/GACHARAGE/790 and sell LOC.2/GACHARAGE/3818 to the 2nd Defendant and that the 2nd Defendant was not a bonafide purchaser for value. Those findings settle the defence of the 2nd Defendant with respect to the plaintiffs claim in the negative.

36. As for the Counterclaim, the 2nd Defendant has made a plea in his pleadings and given evidence during trial. Although the 2nd Defendant did not produce evidence of any payments made to the 1st Defendant, the 1st Defendant has not filed any defence to the 2nd Defendants' counterclaim and did not challenge the evidence given in that behalf by the 2nd Defendant during trial. On the balance of probability, the Court finds that the claim of the 2nd Defendant as against the 1st Defendant is proven. The Court will make appropriate orders in the judgement.

37. By mathematical addition the total claim of the 2nd Defendant although in the pleadings and evidence is stated to be Kshs 440,000/- it ought to be Kshs 450,000/- made up of the sum of Kshs 390,000/- and Kshs 60,000/- for the purchase of the coffee bushes. The Court took into consideration that the 2nd Defendant has been utilising the suit land since 2014 to date.

38. As regards the 2nd Defendant's prayer for costs of the development of the land upon valuation, the 2nd Defendant did not lead any evidence and the Court is unable to determine this limb of the claim. It is declined.

Whether the Plaintiff has suffered loss and damage.

39. In the plaint the Plaintiff claims loss particularised in para 11. The Plaintiff did not lead any evidence in monetary terms as to how and what loss he has suffered. The particulars remain mere apprehensions and allegations.

Who should bear the costs of the suit and the Counterclaim?

40. The Plaintiff and the 2nd Defendant have substantially proven their claims against the 1st Defendant. In the whole scheme of things in this case the 1st Defendant is at the centre with respect to the course of action of the Plaintiff and the 2nd Defendant. In this case the Court finds that costs should follow the event.

41. Final orders;

- a. The Plaintiff's and the 2nd Defendant's claims succeed partially.
- b. The Land title No LOC 2/GACHARAGE /790 issued to the 1st Defendant be and is hereby cancelled and reverted to Kamau Kamore.
- c. The subdivisions namely LOC 2/GACHARAGE /3818-3820 made by the 1st Defendant and emanating from LOC 2/GACHARAGE/ 790 are hereby declared null and void.
- d. The title subdivisions numbers LOC 2/GACHARAGE /3818-3819 registered in the name of the 1st Defendant are hereby cancelled
- e. The title for parcel No LOC 2/GACHARAGE /3820 registered in the name of the 2nd Defendant be and is hereby cancelled.
- f. The 1st Defendant shall pay to the 2nd Defendants the sum of Kshs 450,000/- with interest thereon from the date of this judgement at 12% p.a. until payment in full.
- g. The 1st Defendant shall pay the Plaintiffs cost of the suit and the 2nd Defendants counterclaim which may be agreed or taxed by the taxing master of the Court.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 21ST DAY OF MARCH 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ndegwa HB for Mrs Kimani for the Plaintiff

Peter Muthoni HB for Mwangi Ben for the 1st and 2nd Defendants.

Irene and Njeri, Court Assistants