



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 622 OF 2017

(Formerly Nairobi ELC No. 98 of 2016)

IN THE MATTER OF ARTICLES 22, 23, 27, 40, 47, 50, 60, 165 AND 157 OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS & FREEDOMS UNDER ARTICLES 27, 40 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22

BETWEEN

GACIKU KANGARI.....1ST PETITIONER

MARGARET WARIARA KAARA.....2ND PETITIONER

FRANCIS NJOMO MURATHE.....3RD PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

FREDRICK LAWRENCE MUNYUA OTIENO

(Suing through GLADWELL SUZANNE WATHONI OTIENO

and ELIZABETH SOHPIE WAIRIMU OTIENO

through a (General Power of Attorney).....1ST INTERESTED PARTY

ANNE WAKONYU.....2ND INTERESTED PARTY

JUDGEMENT

By a Petition dated 15th July, 2014, the Petitioners seek for the following orders and declarations:

1. That an order of certiorari to issue to quash the alleged proceedings before the Land Registrar North District and the decision of the Chief Land Registrar dated the 23rd October, 2013.
2. That an order of prohibition do issue to prohibit jointly and severally the Chief Land registrar or any other Land Registrar from interfering with the Petitioners' title number LR. KAJIADO/ OLCHORO ONYORE/ 2142.

3. That an order of Mandamus do issue against the Chief Land Registrar compelling the said Chief Land Registrar to remove the restriction registered against LR. KAJIADO/ OLCHORO ONYORE/ 2142 on the 28th November, 2012.
4. That an injunction do issue restraining the Chief Land Registrar from interfering with the Petitioners' right to LR. KAJIADO/ OLCHORO ONYORE/ 2142.
5. That a declaratory order do issue that the rights and freedoms of the Petitioners under articles 40 and 47 have been violated by the action of the Chief Land Registrar.
6. That an order for compensation do issue and that injury as to the quantum thereof be gone into.
7. That the Court may issue any other order in exercise of its powers under article 23 (3) of the Constitution.
8. That costs be provided to the Petitioners.

The Petitioners filed a further affidavit sworn by MARGARET WARIARA KAARA where she annexed a Valuation Report by Tuliflocks Limited and contend that the value of the suit land as at 21st June, 2017 was Kshs. 60 million.

The Respondents opposed the Petition and filed a replying affidavit sworn by one RUFUS KARIMA KALAMA who was the District Land Registrar. He confirms that according to their records LR. KAJIADO/ OLCHORO ONYORE/ 2142 (hereinafter referred to as the suit land) was subdivision of parcel number LR. KAJIADO/ OLCHORO ONYORE/ 195 which was initially registered in the names of William Koike Rayies on 25th February, 1988 and title deed was issued to him. He explains that on 18th April, 1988, land parcel number LR. KAJIADO/ OLCHORO ONYORE/ 2142 was transferred to Palmasio Getecha and Isabella Wanjiru Getecha. Further, that the suit land was subsequently transferred on 26th July, 1990 to Frederick Lawrence Munyua Otieno and a title deed issued to that effect. He avers that on 19th January, 1993 a transfer was registered against the suit land in the names of Anne Wakonyu Kirumo which purported that Frederick Lawrence Munyua Otieno had transferred it to her. He confirms that on 15th February, 2012, the transfer of the suit land was made in the names of the current Petitioners. Further, that on 28th November, 2012 a complaint was made by Elizabeth Wairimu Otieno one of the sisters to Fredrick Lawrence Munyua Otieno that some people were subdividing the suit land which belonged to their brother purporting to have bought it. He states that after he received the complaint, he lodged a restriction and parties who claimed ownership of the suit land were summoned. Further, those who attended the meeting included the Petitioners, Elizabeth Wairimu Otieno, Gladwell Otieno, Waiyaki Otieno and George Kaurai, but Anne Kirumo never attended it. He avers that during the meeting, it was alleged that Fredrick Lawrence Munyua Otieno authorized his mother now the late Virginia Wambui Otieno to sell and transfer the suit land but no power of Attorney was produced to prove authority. Further, a letter was produced by Fredrick Lawrence Munyua Otieno denying the allegations of authorizing his mother to transfer the property. He reiterates that an original title deed in the names of Fredrick Lawrence Munyua Otieno was produced which casted further doubts about the transfer of ownership to Anne Wakonyu Kirumo because if there was a transfer, the original title deed should have been surrendered for cancellation. He contends that no revocation has been done or will be done hence the orders the Petitioners are seeking are premature. He reiterates that the issue of ownership of the suit land needs to be determined before the Petitioners allege infringement of their constitutional rights.

The Interested Party through GLADWELL SUZANNE WATHONI OTIENO and ELIZABETH SOPHIE WAIRIMU OTIENO opposed the Petition and filed a relying affidavit where they averred that they hold a General Power of Attorney for Fredrick Lawrence Munyua Otieno, the registered proprietor of the suit land. They confirm that Fredrick Lawrence Munyua Otieno purchased the suit land from Palmasio Gatecha and Isabella Wanjiru Gatecha and executed a Sale Agreement dated the 6th April, 1990. They state that the consent of the Land Control Board was issued on 24th April, 1990 and the parties duly executed a transfer of Land Form on 28th May, 1990 after which the said transfer was duly registered on 26th July, 1990. They explain that sometime in December, 2012 they received news that some unknown people were trespassing on the suit land and on inquiry they discovered the Petitioners herein were purporting to be its owners. They confirm that on 12th December, 2012, they wrote a letter to the Chief Land Registrar informing him of the fraud and on 7th October, 2013 a meeting was convened by the District Land Registrar, Kajiado where the Petitioners herein were present. Further, that during the meeting it was discovered that there was no proof that the 1st Interested Party authorized anybody to sell the suit land on his behalf. They reiterate that the District Land Registrar concluded that no good title was passed to the current owners since the valid transfer should be registered after all the requisite conditions have been met, and in the subsequent transfers, no conditions were met. They contend that vide a letter dated the 23rd October, 2013, the District Land Registrar of Kajiado North wrote a letter to the Chief Land Registrar referring to the findings of the meeting held on 7th October, 2013 and recommended that the current registered owners of the suit land surrender their title to him for cancellation as well as reverting the title back to Fredrick Lawrence Munyua Otieno. They insist the 1st Interested party has never sold the suit land to anybody and the Land Registrar acted within his legal mandate to recommend for cancellation of any title found to have been illegally or fraudulently obtained. They reiterate that no good title was passed to the Petitioners and they have not shown how their rights have been infringed upon.

On 16th April, 2018, the Land Registrar Mwinzi was cross examined as per the averments in RUFUS KALAMA's replying affidavit filed in response to the Petition herein. During cross examination by the Petitioners he confirmed that as per 23rd January, 2012, the Search issued by the Kajiado Land Registry showed Anne Wakonyu Kirumo as the owner of the suit land. He insisted there was a suspected fraud on how the said transfer was effected and there could have been collusion with the Land Registrar's office. Further, as for the transfer from Anne Wakonyu Kirumo to the Petitioners' the transfer was properly done. He stated that the complaint was raised after 20 years but they have no mechanism of detecting fraud unless a complaint is raised. Further, the Land Registrar realized there was another title issued to Fredrick Lawrence Munyua Otieno, which should have been cancelled before a new one is issued.

During cross-examination by the Counsel for 1st Interested Party, he confirmed that the 1st Interested Party had annexed various documents including Power of Attorney; Sale Agreement dated the 6th April, 1990; Land Control Board Consent dated 7th May, 1990; transfer from Palmasio to Fredrick Lawrence Munyua Otieno dated 26th July, 1990; and title deed was issued on 26th July, 1990. He stated that if the suit

land was sold by Fredrick Lawrence Munyua Otieno, then the original title should have been surrendered for cancellation. He averred that they did not have any document of transfer from Fredrick Lawrence Munyua Otieno to Anne Wakonyu. As a result of the same, the District Land Registrar Rufus Kalama arrived at the conclusion that no good title was passed to the Petitioners and they were required to surrender their title for cancellation so that title to suit land can be reverted to Fredrick Lawrence Munyua Otieno. He contended that to date the Petitioners' were yet to surrender their title. He reiterated that the Land Registrar acted within his mandate to call for cancellation of the title.

The 2nd Interested Party failed to enter appearance nor file a response to the Petition despite being served via substituted service.

The Petitioners, Respondents and the 1st Interested Party filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the materials filed in respect of the Petition herein, the following are the issues for determination:

- ***Whether the Petitioners are bona fide purchasers for value without notice***
- ***Whether the Petitioners' are entitled to the orders sought in the Petition.***

Before dealing with the issue of whether petitioners are entitled to the orders sought in the petition, it is important to determine whether they are bona fide purchasers for value without notice.

As to whether the Petitioners are bona fide purchasers for value without notice. The Petitioners contend in their Petition that they purchased the suit land from the 2nd Respondent. They annexed a copy of the Sale Agreement, Certificate of Official Search as well as the Green Card. They insist they are bona fide purchasers for value without notice and have relied on the Uganda Court of Appeal decision of **Katende V Haridar & Company Ltd** to buttress their arguments. The Respondents and the 1st Interested Party contend that the Petitioners did not acquire a good title from the 2nd Interested Party. From the evidence adduced in Court, the Petitioners opted to rely on their affidavit evidence and never called the vendor who was the 2nd Interested party to testify and confirm the transaction. The 1st Interested party denied selling the suit land to the 2nd Interested party. It emerged that he still had the original title in his custody. The Land Registrar, appeared in Court and testified that there were no documents to confirm that the transaction between the 1st Interested Party and the 2nd Interested party in respect of the suit land indeed took place. It was his evidence that the said transfer was a forgery and that was the reason why they recommended for the surrendering and cancellation of the Petitioners' title deed so that the same could revert to the 1st Interested Party. I believe it was this recommendation that led to the Petition herein. I note after the 2nd Interested party had been enjoined in the suit herein, the Petitioners' never sought for compensation from her and yet she is the one who sold them the suit land. It is interesting to note that after the Land Registrar summoned the Petitioners over the dispute in respect of the Certificate of title which they were holding over the suit land, they did not immediately sue the vendor Anne Wakonyu but she was only enjoined in the suit much later. The Certificate of official Search dated the 23rd January, 2012 produced by the Petitioners indicated the suit land was registered in the name of the 2nd Interested Party from the 19th January, 1993. The Green Card in respect of the suit land did not indicate the amount of consideration paid by the 2nd Interested Party to the 1st Interested party, nor by the Petitioners to the 2nd Interested Party. It only shows consideration paid by Palmasio Getecha and Isabella Wanjiru Getecha to the original owner William Raiyes as Kshs. 80, 000 and what the 1st Interested party paid to Palmasio Getecha and Isabella Wanjiru Getecha as Kshs. 90,000. Except for the Sale Agreement and the Certificate of Title, the Petitioners have not annexed any copies of documents to prove the process they adhered to in the acquisition of the suit land. It is trite law that land transaction is a process and there are various documents to support it, to wit: Consent of the Land Control Board; Transfer of Land Form; Receipt for Registration; Payment of Stamp Duty; Copies of ID and PIN Certificates as well as Copies of Passport size Photographs for vendor and purchaser. These documents are required to confirm that a sale/ purchase indeed took place. Further, the burden of proof is upon a party claiming ownership to produce the documents confirming that a transaction indeed took place. From the Sale Agreement annexed to the Petition, it indicates the same was made on 15th February, 2012 but at the jurat section where the parties were signing it is dated 16th February, 2011. No explanation has been made on the difference in the two dates and I opine that this is a pertinent issue that cannot be wished away. By dint of **section, 112** of the **Evidence Act**, and taking into account the evidence adduced by the Petitioners, it was incumbent upon them to provide evidence to the contrary that there was a mistake in the Sale Agreement. Further, the burden of proof was upon them to produce the vendor to confirm that the transaction between them in respect of the suit land indeed took place. In the case of **Arthi Highway Developers Limited V West End Butchery Limited & 6 others (2015) eKLR** the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party cannot invoke indefeasibility of title where the process for acquisition of title is irregular. Further in the Uganda Court of Appeal Case of **Katende V Haridar & Company Ltd** cited with approval in the Kenya High Court the case of **Lawrence Mukiri V Attorney General & 4 others ELC 169 of 2008**, on what amounts to bona fide purchaser for value thus: '...a bonafide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. **He holds a certificate of Title**
- b. **He purchased the Property in good faith;**
- c. **He has no knowledge of the fraud;**
- d. **The vendors had apparent valid title;**
- e. **He purchased without notice of any fraud;**

f. He was not party to any fraud.

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.'

It was the Petitioners' arguments that the Respondents have not shown any evidence that would disqualify them from being deemed to be bonafide purchasers for value. The 1st Interested Party submits that lack of completion documents in a land transaction was proof of fraud and relied on the case of **Samuel Kamau Macharia V Ali Khan Ali Muses & 2 others (2014) eKLR** to support this argument. However based on the evidence presented and my analysis above, insofar as the Petitioners hold title, I am unable to deem them as bona fide purchasers for value as they have not demonstrated to court the process they adhered to, to acquire it. Further, except for the Certificate of Official Search and Sale Agreement, they have not furnished court with documentary proof on the process they adhered to in acquisition of the title. In their submission, they claim to be in occupation of the suit land but this was not pleaded in the Petition and as per the valuation report from Tuliflocks Limited, it indicates the said land is vacant. It is against the foregoing that I find that the Petitioners are not bona fide purchasers for value.

As to whether the Petitioners' are entitled to the orders sought in the Petition.

The Petitioners filed this Petition seeking various declaratory orders including Mandamus, Certiorari, Prohibition, Compensation, Violation of their Property Rights and injunction. Their main contention is that the recommendation by the Land Registrar to the Chief Land Registrar calling upon them to surrender their title over the suit land for cancellation, was a violation of their rights. Further, that the restriction entered by the Land Registrar against the suit land also violated their property rights as they were unable to subdivide the land as intended. The Petitioners filed a valuation report and sought for the Respondents to compensate them for damages suffered since they were led to believe that the 2nd Interested Party was the proprietor of the suit land, when they undertook the search. The vendor who sold them land did not file a response to the Petition and they also never sought for any compensation from her. The Respondents opposed the claim and contended that the Petitioners did not acquire a good title and should pursue compensation from the 2nd Interested party who sold them the land. Further, the Respondents reiterate that the Land Registrar registered a restriction over the suit land to preserve it pending the determination of its owner. The 2nd Respondent submitted that upon the Land Registrar receiving a complaint of fraud in respect of title over the suit land he summoned all the parties involved including the 2nd Interested party to deliberate on the issue. Further that he entered a restriction over the title after receiving the said complaint.

By dint of section 80 of the Land Registration Act, it is only the Court that can order for the cancellation of the title and not the Land Registrar. I concur with the Petitioners that the Land Registrar did not have capacity to order for cancellation of the title which is a preserve of the court. From annexure GK 5 attached to the Petition, I note there was a meeting dated the 7th October, 2013 convened by the Land Registrar where the Petitioners and the 1st Interested Party were present and an original title deed held by the 1st Interested Party was produced. Further, the 1st Interested party sent a letter denying authorizing his mother to sell the land on his behalf. The 2nd Respondent insists that if the 1st Interested party sold the suit land to the 2nd Interested Party, then the original title should have been surrendered to their office for cancellation. From my observation, I find that since the Petitioners failed to avail the vendor to confirm purchase and did not produce consent of the Land Control Board, Transfer Form the transaction could not be termed above board. Further, the Sale Agreement they seek to rely on contains a contradiction as to the date of the transaction. If indeed the 1st Interested Party authorized his mother to sell the suit land on his behalf, then how come there was no power of Attorney and he still continued to retain the original title. Petitioners have relied on Article 40 of the Constitution and contend that the same has been violated. Article 40 (6) provides that: **'The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.'** I opine that this provision envisages a situation where a party acquires a valid title and not a disputed title. I note that the Land Registrar convened a meeting and gave the Petitioners audience in respect of the suit land. This fact is admitted by both Petitioners, Respondents and the 1st Interested Party who all confirm a meeting was convened on 7th October, 2013 by the Land Registrar. Further, it is from this meeting that the Land Registrar communicated to the Chief Land Registrar to recommend that the Petitioners' surrender their title for cancellation. In accordance with the Land Registration Act, Insofar as I indeed concur with the Petitioners that it is only the Court that cancel title, I however note that the Petitioners' title has not yet been cancelled as they are yet to surrender it. Further that the Land Registrar entered a restriction in accordance with section 76 of the Land Registration Act to prevent any improper dealing or for any other sufficient cause over the suit land as it was pertinent to protect the sanctity of title pending the determination of its rightful owner. In the circumstances and based on the averments of the Respondents and the Interested Party, I do not find that the Petitioners' rights were violated in respect of the actions of the Respondents over the suit land. I hold that orders of mandamus, certiorari and prohibition cannot stand since the Petitioners were accorded audience which demonstrates there was procedural fairness when the Land Registrar convened the meeting and made his findings in respect of the suit land which he communicated to the Chief Land Registrar.

On the question of an injunction, since I already made a finding that the Petitioners were not bona fide purchasers, and the principles of granting an injunction are already well settled in the case of **Giella Vs Casman Brown**, at this instance I find that the Petitioners have not established a prima facie to warrant the grant of an injunction.

On the issue of damages suffered, I note that the Petitioners presented a Sale Agreement, which they signed with the 2nd Interested Party. The Petitioners filed a valuation report stating that the suit land was now valued at Kshs. 60 million but failed to call the author of the report to confirm how it arrived at this valuation. I am of the view that the Petitioners are entitled to get damages from the 2nd Interested Party who sold them the suit land and will make an order to that effect.

It is against the foregoing that I find the Petition dated the 15th July, 2014 unmerited and proceed to dismiss it with costs to the 1st Interested Party. The said costs are to be borne equally by the Petitioners and the 2nd Interested Party.

Date signed and delivered in open court at Kajjado this 24th day of April, 2019

CHRISTINE OCHIENG

JUDGE