



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 50 'A' OF 2012

BEATRICE MWIHAKI.....PLAINTIFF

VERSUS

PHILIP MULAMA..... 1ST DEFENDANT

ADAH AWINJA ODINGA....2ND DEFENDANT

JUDGMENT

By a plaint dated 27th July 2010 the plaintiff herein sued the defendants seeking for the following orders.

- a. A declaration that the plaintiff is the registered owner and therefore the absolute owner of the whole that parcel of land known as Pioneer/Ngeria Block I(EATEC) 7778 and that any agreements and all documents held by the defendant over the plaintiff's land are illegal, null and void ab-initio and that the same ought to be expunged from the land register forthwith.
- b. An order of permanent injunction restraining the defendants either acting by himself, servants and or agents from trespassing into, entering upon, encumbering and, or in any other manner interfering with the plaintiff's quiet possession of the suit land.
- c. Costs of the suit.
- d. Any other relief that court may deem fit.

The Attorney general was later enjoined in the counterclaim by the defendants before the matter proceeded. This matter was partly heard by Justice Nelly Matheka and when the matter came for directions, Counsel agreed to proceed from where the matter had reached.

Plaintiff's Case

The plaintiff adopted her statement as her evidence before the court and stated that she is the registered owner of the suit property known as Pioneer/Ngeria Block I(EATEC) 7778 and was issued with a title document on 28th August 2006 of which she is still in possession of.

She denied ever selling the suit property to the defendants or anyone else. She further stated that she utilized the suit property for farming till late 2007 when she had to stop due the post-election skirmishes.

It was the plaintiff's testimony that she was shocked to realize that the suit property had been occupied by the defendants without her consent and that they also had a title document to the suit property. It was her evidence that she did not sign any documents to transfer the land to the defendants.

On cross examination by Counsel for the defendants, the plaintiff stated that she carried out a search and established that the suit land had been transferred to the defendants in 2007. She confirmed that she does not reside on the suit land and that she does not pay rates because the land was transferred to the defendants. It was also her evidence that she still has the original title which she produced a copy of as an exhibit before the court.

PW1 stated that she made a report to the CID but she did not know whether the defendants were charged with any criminal offence. She also stated that she never attended the Land Control Board to get a consent to transfer. It was her evidence that she never met Mr. Gumbo the advocate who conducted the land transaction. She therefore urged the court to grant the orders as prayed in the plaint.

Defendants' Case

The 1st defendant gave evidence and stated that he entered into a sale agreement with the plaintiff in August 2007 for the suit plot at a consideration of Kshs. 1000,000/ The defendants insisted that the plaintiff had sold the suit property to them and that she signed the documents as required, therefore the suit property belonged to them. DW1 stated that they carried out a search and established that the land belonged to the plaintiff.

Further, the defendants stated that they followed all the transaction procedures and eventually were issued with a title document and no one ever told them they were dealing with a fake title. That not even the land registry who received the title for cancellation and issuance of a new title. DW1 testified that he did not acquire the land fraudulently as claimed by the plaintiff.

The defendants urged the court to dismiss the plaintiff's claim but in the alternative, the defendants claimed compensation for kshs. 1,000,000/ from the government of Kenya for the negligence of the registry employees who issued official search results confirming that the plaintiff owned the suit property and further received the title deed presented for cancellation confirming that the title deed was authentic.

The 2nd defendant also gave evidence but stated that even though she is a co-owner she did not actively participate in the transaction so she would not tell if the plaintiff signed the documents or not.

Dw 3 a legal clerk confirmed that he had been tasked by the defendants to identify a plot for them which he did. He stated that he identified the suit land, the owner who is the plaintiff and carried out a search. He also stated that the transaction was done legally and procedurally where all the parties were present

DW4 Mr. Gumbo the advocate who was in the conduct of the transaction testified and confirmed that parties to the sale agreement appeared before him while signing the agreement and he further confirmed that the faces on the identification cards presented to him matched the parties present.

The 2nd defendant's (in the Counter Claim) case

The defendant in the counter claim gave evidence through the County Land Registrar who denied the claims that they were negligent in how they handled the transaction in respect of the suit land. He stated that the land registry had no reason to doubt veracity of the documents presented for the transaction for reasons that;

- a. The sale agreement was drawn by an advocate (Gumbo & Associates) who also witnessed the transfer forms.
- b. Letter of consent was obtained from kesses/Kapseret Land Control Board
- c. Stamp duty and registration fee had been paid.
- d. The title deed presented was also authentic in the eyes of the registry officers

The Land Registrar also stated that he had the original file and documents that were presented for registration and the surrendered titled deed. He further testified that even now looking at the title deed that was presented for cancellation, he can confirm it looks authentic and further stated that it is not possible for the land registry to have been involved in fraud or negligence in this particular case.

Counsel filed submissions in respect of their clients cases to buttress the evidence adduced. It should be noted that Counsel for the plaintiff did not file submissions as had been ordered by the court.

Submissions by the defendants in the original action and now the plaintiffs in the counterclaim

Counsel gave a background to the case and submitted that the plaintiff in her pleadings, made specific allegations of fraud against the defendants. In support of this allegation of fraud, she asserted that the defendants used forged documents to cause the transfer of the land into their names.

She further asserted that no consent of the Land Control Board was either sought or granted. Mr. Manani submitted that the law is clear that where allegations of fraud are made, they must not only be specifically pleaded but strictly proved as was stated in the case of **Bruce Joseph Bockle v Coquero Ltd** :-

"In our view, the appellant's assertion that the respondent's acquisition of the suit premises smacked of fraud and illegalities cannot stand scrutiny. In the case of Koinange and 13 others v Koinange (1968) KLR 23 it was held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings....."

Counsel therefore submitted that from the documentary evidence the plaintiff has not met the threshold required to prove an allegation of fraud. That the plaintiff's allegation of use of forged documents was refuted by the Land Registrar who had all the documents and vouched for their veracity.

Mr. Manani further submitted that the defendants in the original action provided evidence that they purchased the suit-land from the plaintiff,

paid the purchase price in an Advocates office who testified in court that all the parties appeared before him during the transaction. He therefore urged the court to dismiss the plaintiff's claim and allow the counterclaim as prayed with costs.

The 2nd defendant's (in the Counter Claim) Submissions

Counsel for the 2nd defendant filed submissions and listed two issues for determination by the court as follows:

- a. Whether the Land Registrar/registry officers were negligent
- b. Whether the plaintiffs (in the counter claim) are entitled to compensation from the Government of Kenya.

Counsel reiterated the evidence on record and submitted that there is no evidence linking the 2nd defendant with negligence or fraud in this case. Section 14 of the Land Registration Act places on the Land Registrar the discretion to accept or refuse any document for registration. Miss Lungu submitted that in this case, the Land Registrar accepted the title surrendered because he was satisfied and believed that it was authentic and that no evidence was adduced to prove that the officer had other intentions. She therefore submitted that the land registry/Registrar cannot be faulted for the action taken.

Counsel further cited the provisions of Article 40(6) of the Kenyan Constitution coupled with Section 26 (1) (a) and (b) of the Land Registration Act that places a responsibility to the purchasers to titled properties to ascertain the status of the property beyond carrying out an official search as was held in the case of **Godfrey N Nyaga vs. Margaret Theuri & 3 others (2015)eKLR**

Miss Lungu therefore submitted that the government cannot be liable when parties fail to exercise due diligence during land transaction and consequently, the suit against 2nd defendants must fail.

Analysis and Determination

This matter was partly heard by Justice Nelly Matheka but when the matter came up for directions, Counsel agreed that the court proceeds from where it had reached. The court had an opportunity to read the record which was legible and did not require any typing. This is a very old matter which at one point had been listed for dismissal for want of prosecution.

The plaintiff sought for a declaration that she is the absolute owner of the suit land and a permanent injunction against the defendants. She gave evidence and called no witness.

The issues for determination are as to whether the plaintiff entered into a sale agreement with the defendants for the sale of the suit land, whether the defendants fraudulently transferred the suit land in their names, whether the defendants who filed a counterclaim are entitled to the orders sought.

The Attorney General was enjoined in the suit to on behalf of the Land Registrar of which they filed a defence to the counterclaim. They denied any wrong doing and shed more light in this case by calling the Land Registrar who gave evidence in respect of the transaction.

On the 1st issue for determination as to whether the plaintiff entered into a sale agreement with the defendants, the defendants produced an agreement dated 16th August 2007. Even though the plaintiff tried to deny the said agreement, she did not follow any steps with the criminal justice system to investigate the alleged forgery of her signature. Forging of a person's signature to transfer land is a serious issue which should not be taken lightly. The plaintiff just stated casually that she reported the matter but neither followed up nor found out the outcome of the investigation if any.

There was no evidence that the defendants were charged in a court of law with the forgery of the documents as alleged by the plaintiff. There was no verification of the signatures which she denied by a handwriting expert. Parties who allege fraud should know that it is not enough to shout from the roof top that someone has defrauded them. They must meet the threshold required to plead and specifically lead evidence to prove the same. The plaintiff did not do even one third of what was required of her to prove her case. She just blamed and denied everything including the fact that she had entered into an agreement for sale of land and signed the documents before a lawyer.

Mr. Gumbo Advocate gave evidence and confirmed that he is the one who prepared the agreement and all the parties including the plaintiff appeared before him when they appended their signatures. This was further buttressed by DW3 who had identified the suit land, carried out a search and that the transaction was done procedurally and legally.

The Land Registrar also corroborated the evidence of the defendants and gave the transaction a clean bill of health. The Land Registrar being the custodian of the land records, confirmed that he had the original file with all the documents, the surrendered title, the consent of the Land Control Board, the transfer and the identification documents of the parties to the transaction. He absolved the land officers of any wrong doing in the current transaction. With all this evidence, it is clear that the plaintiff entered into a sale agreement with the defendants as there is proof of the same. The evidence is overwhelming against her assertion that she never sold the land. There are many procedures and documentation to a land transaction especially transactions that require the consent of the land Control Board. A person could have missed a step which could have raised a red flag.

Section 26 of the Land Registration Act provides that 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, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

The court is also empowered under Section 80 (1) of the Land Registration Act, 2012 to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I find no fault in the process and registration of the defendants as owners of the suit land.

I have considered the evidence of all the parties, Counsel's submissions, and the relevant judicial authorities and come to the conclusion that the plaintiff has not proved her case against the defendants. I further find that the defendants have proved that they purchased the suit land from the plaintiff and the transaction was done legally and procedurally without any fraud. Their counterclaim against the plaintiff therefore succeeds and I order that the defendants are the indefeasible owners of the suit land the transfer by the plaintiff to them was valid and legal.

The plaintiff to pay costs to the defendants in the original claim.

Dated and delivered at Eldoret on this 8th day of April, 2019.

M.A ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.Kibii holding brief for Mr.Manani for the defendant's and in the absence of Mr.Aseso for the plaintiff and Miss. Lungu for Attorney General.

Mr.Koech – court Clerk