



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC CASE NO. 627 OF 2014

MACHARIA KAGIO.....PLAINTIFF/APPLICANT

=VERSUS=

MUCHAI MUTHIGA, STEPHEN MUTHIGA MWAURA

AND MWIRARIA MWAURA (Sued as the administrators and

legal representatives of the Estate of STEPHEN MUTHIGA

ALLAS MUTHIGA NDUGURA

ALLAS MUTHIGA NDUBURA (Deceased).....1ST DEFENDANT/RESPONDENT

MUCHAI MUTHIGA.....2ND DEFENDANT/RESPONDENT

JUDGEMENT

1. The Plaintiff filed an Originating Summons dated 28th April, 2014 seeking the following orders THAT:-

1. Spent

2. A permanent injunction be and is issued restraining the Defendants/Respondents, by themselves and through its agents, employees and assigns, from selling, alienating, dealing in, transferring, charging, mortgaging, tendering as security, indemnity or guarantee, entering into and or remaining in, and or in any other manner whatsoever claiming or laying claim to, and or in any other manner interfering with the Plaintiff's possession and proprietary rights of and over, property known as L.R No. 6845/170 measuring approximately 2.499 Hectares (formerly known as Farm No. 54 Githunguri Njiru Farm (1966) Limited).

3. The Plaintiff be and is deemed as a creditor of the Estate of the 1st Defendant deceased pursuant to the purchase of the property known L.R No. 6845/170 measuring approximately 2.499 Hectares (formerly known as Farm No. 54 Githunguri Njiru Farm (1966) Limited).

4. The Plaintiff is owner of property by virtue of the agreement made on 3rd April, 1986 and which is to be perfected by the transfer and issuance of title by Githunguri Farm Co Ltd.

5. The certificate of confirmation of grant dated 9th October, 2013 in Succession Cause Number 64 of 2012 at the Githunguri Chief Magistrate's Court be and is hereby set aside, revoked or cancelled in respect of property known as L.R No. 6845/170 measuring approximately 2.499 Hectares (formerly known as Farm No. 54 Githunguri Njiru Farm (1966) Limited) which is owned by the Plaintiff.

6. In the alternative, the interest in the property known as L.R No. 6845/170 measuring approximately 2.499 Hectares (formerly known as Farm No. 54 Githunguri Njiru Farm (1966) Limited) held or purportedly held by the 1st and 2nd

Defendants be and is deemed as having been extinguished by operation of law consequent to which the 1st and 2nd Defendants are hereby deemed as holding the same, if at all, as trustees for and on behalf of the Plaintiff who has been in possession and control of the same from 1986 to date.

7. Costs and interest be provided for the Plaintiff.

2. Arising from the orders in (1) above, the Plaintiff asked the Court to determine the following questions:-

1. Whether the Plaintiff is the owner of property know as L.R No. 6845/170 measuring approximately 2.499 Hectares (formerly known as Farm No. 54 Githunguri Njiru Farm (1966) Limited) by virtue of sale/purchase.

2. Alternatively, whether the Plaintiff is the owner of property known as L.R No. 6845/170 measuring approximately 2.499 Hectares (formerly known as Farm No. 54 Githunguri Njiru Company) by operation of law acquired from actual possession and control from 1986 to date.

3. Whether, still as an alternative, the Defendant's interest in the property known as L.R No. 6845/170 measuring approximately 2.499 Hectares (formerly known as Farm No. 54 Githunguri Njiru Farm (1966) Limited) is extinguished by operation of law and the Defendants have therefore become trustees holding the same for and on behalf of the Plaintiff.

4. Whether by virtue of the Plaintiff's ownership of property known as L.R No. 6845/170 measuring approximately 2.499 Hectares (formerly known as Farm No. 54 Githunguri Njiru Farm (1966) Limited), the same cannot be deemed as being an asset comprising the Estate of the 1st Defendant deceased, which lends the Plaintiff to be the creditor against the said estate.

5. Whether the Plaintiff, as owner of property known as L.R No. 6845/170 measuring approximately 2.499 Hectares (formerly known as Farm No. 54 Githunguri Njiru Farm (1966) Limited), is entitled to injunctive relief as prayed for.

6. Whether the certificate of confirmation of grant dated 9th October, 2013 in Succession Cause Number 64 of 2012 at the Githunguri Chief Magistrate's Court ought to be set aside, revoked or cancelled in respect of the suit property which is to devolve to the Plaintiff thereafter.

3. This suit was brought against the administrators of the estate of Stephen Muthiga alias Muthiga Ndugura alias Muthiga Ndubara (deceased) on behalf estate of the deceased and Muchai Muthiga in his individual capacity. Muchai Muthiga the second Defendant herein is the only surviving son of the deceased. Muchai Muthiga's Co-administrators are his nephews from his late brothers.

4. The deceased who died on 19th August, 1983 was entitled to L.R No. 6845/170 (suit property) by virtue of being a shareholder in Githunguri Njiru Farm [1966] Limited. The suit property is approximately 2.499 hectares. On 3rd April, 1986, three sons of the deceased who included the 2nd Defendant expressed their intention of selling the suit property to the Plaintiff and his wife who is now deceased. On 22nd April, 1986 the three sons of the deceased entered into a sale agreement in which they agreed to sell the suit property to the Plaintiff and his wife at a consideration of Kshs.78,000/=.

5. The Plaintiff made a down payment of Kshs.9,000/= on execution of the agreement. The balance of the purchase price was to be paid on 24th April, 1986. On 23rd April, 1986, the Plaintiff paid Kshs.60,000/= by cheque to one of the deceased's sons namely Joseph Mburu Muthiga. On 24th April, 1986, the three sons of the deceased acknowledged having received the entire balance of Kshs.69,000/= at the bottom of the sale agreement.

6. The Plaintiff took possession of the suit property and has been staying on it since 1986. He has carried out developments including putting up permanent houses on the same. It is the Plaintiff's evidence that since he took possession of the suit property, no one has ever come to claim the same until December, 2013 when he received a demand letter from M/s Paul Ndung'u & Company Advocates asking him to move out the suit property on allegations that he had trespassed on to the same. Annexed to the demand letter was a copy of certificate of confirmation of grant which showed that the suit property had been distributed to the beneficiaries of the estate of the deceased.

7. The Plaintiff's contention is that he was not aware that the property he was purchasing belonged to a deceased person and that when he got wind that there were succession proceedings in respect of the estate of the deceased at Githunguri Law Courts, he went and filed an objection seeking revocation of the grant but that application was dismissed. It is on this basis that he is seeking the reliefs which he has enumerated in the Originating Summons.

8. The Defendants case is that the suit property belonged to the deceased and that when they carried out the process of succession the suit property was distributed to the beneficiaries of the deceased in accordance with the law of succession. The second Defendant in his evidence in chief denied knowing the Plaintiff. The second witness for the defence claimed that he used to live on the suit property but that he stopped living there when the Court granted an order barring them from interfering with the possession of the Plaintiff. The defence witnesses claimed that even if there was sale of the suit property by those who are alleged to have sold it, then they had no capacity to do so as they had no letters of administration in respect of the estate of the deceased.

9. The Court directed parties to file Written Submissions on 31st January, 2018. The case was set down for mention on 21st March, 2018 to confirm compliance. During the mention on 21st March, 2018, the Plaintiff and the Defendants had not filed their submissions. A mention date was set for 22nd May, 2018 to confirm compliance. Come that date, no submissions had been filed by either side. The Court directed that parties file their submissions within seven days from 22nd May, 2018. The case was fixed for mention on 24th September, 2018. By 24th September, 2018, it is only the Defendants who had filed their submissions. The Plaintiff was granted leave to file their submissions within 7

days. As at the time of writing this judgement, the Plaintiff had not filed their submission and if any were filed, then the same are not in the file.

10. I have considered the evidence adduced by the Plaintiff and the evidence adduced by the Defendants. The issues which are for determination are as set out in Paragraph 2 hereinabove. The Defendants are not denying that there was a sale of the suit property by the three sons of the deceased who included the 2nd Defendant. The 2nd Defendant who was one of those persons who signed the sale agreement conceded in cross-examination that he signed the sale agreement but that he did not know of its implications.

11. There is no doubt that the entire purchase price was paid by the Plaintiff. The Plaintiff took possession of the suit property in 1986. He has been in possession since then until 2013 when the grant of letters of administration in respect of the estate of the deceased was confirmed. This is the first time that the Defendants through their lawyer wrote a demand letter asking him to move out. Although the grandson of the deceased claimed that he was residing on the suit property from the time he was 10 years old, I found his evidence not to be credible. The Court even observed his demeanour and remarked that he had something to hide as he appeared evasive while answering questions. This grandson was DW2. He claimed that his late father used to reside in a mud walled house which is now not there.

12. The Plaintiff moved to Court after he received a demand letter from the Defendant's advocates. Prior to this time, there was no one who had attempted to evict him from the suit property. The Defendants only seem to argue that since the sellers had no letters of administration, the sale is null and void. The Plaintiff's evidence is that as at the time he purchased the suit property, he did not know that the owner had died. This evidence has therefore not been controverted. The Plaintiff's evidence is that he came to learn late that there was succession in respect of the estate of the deceased. He attempted to have the grant revoked in vain.

13. In the case of ***Bob Njoroge Ngarama Vs Mary Wanjiru Ngarama & Another [2014]eKLR***, Lady Justice Odero quoted from case book on Law of Succession where W. Musyoka at page 485 where the author states as follows:-

“Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property”. The Judge went on to state that however as per ***Re Diplock Vs Wintle [1984] ch 485*** the exception to the above quoted position is that where the holder of such property is a bonafide purchaser for value without notice, he cannot be penalized for an illegality which is not of his own making.

14. In the instant case, even though the sellers were not legal representatives in the legal sense, they misrepresented themselves as owners of the suit property who were entitled to it. This is confirmed by their letter of 3rd April, 1986 in which the assistant chief of the area endorsed their letter to the chairman of Githunguri Njiru Farm [1966] Ltd that they were the heirs to the land which the deceased held at the company. When the sellers later entered into a sale agreement on 22nd April, 1986, there is no evidence that they were doing so on behalf of the estate of the deceased. It is therefore clear that the Plaintiff was an innocent Purchaser for value without notice that the property belonged to a deceased person. The Plaintiff therefore comes under the exception to the general rule as per the ***Re Diplock case (Supra)***.

15. The suit property had been changed into the name of the Plaintiff as per the letters produced by him from Githunguri Njiru Farm [1966] Ltd. The suit having not been registered in the name of the deceased as at the time of sale and the transfer having been effected by the company in the name of the Plaintiff, there was no basis for the Defendants making it a subject of succession. The property was not available to the estate of the deceased. The Defendants were aware of this but decided to re-claim it.

16. It is not clear whether title was ever issued to the deceased or his administrators following succession. This being the case and as the Plaintiff has enjoyed uninterrupted occupation for more than 12 years, I find that the Plaintiff has acquired it by the way of adverse possession. The Plaintiff has been in possession for all intents and purposes. His enjoyment of the suit property has been open and neither the estate nor any of the Defendants can claim it. The Plaintiff was only remaining with perfection of title for the defined land which is the suit property. The claim to the suit property by the estate of the deceased having been extinguished by operation of law, I find that the Defendants have no business to interfere with the occupation of the suit property.

17. There is no basis upon which the Court can fault the certificate of confirmation of grant issued in Githunguri Chief Magistrate's Court in Succession Cause No. 64 of 2012. In any case this Court does not have jurisdiction to entertain succession matters. I therefore find that the Plaintiff has proved that he is entitled to be registered as owner of the suit property by way of adverse possession. If Githunguri Njiru Farm (1966) Ltd or by whatever name it may be called has not processed title in respect of LR No. 6845/170 then they should process the same in the name of the Plaintiff and if by any chance the company has processed title in favour of the Defendants, the title should be registered in the Plaintiff's name. A permanent injunction is hereby granted in favour of the Plaintiff restraining them from interfering in any manner with LR No. 6845/170. The costs of this suit shall be paid to the Plaintiff by the Defendants.

Dated, Signed and delivered at Nairobi on this 3rd day of April, 2019.

E.O.OBAGA

JUDGE

In the presence of M/s Nzioki for Mr. Ombwayo for Plaintiff and Mr. Gichamba for Mr. Ndichu for Defendants.

E.O.OBAGA

JUDGE

3.4.2019