



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELCC NO. 503 OF 2017

(FORMERLY NAIROBI ELCC NO.1313 OF 2013)

PATRICIA MARY CLARK.....PLAINTIFF

-VERSUS-

GODFREY NGATIA NJOROGE.....1ST DEFENDANT

SAMUEL KUNTAI TUNAI.....2ND DEFENDANT

THE LAND REGISTRAR KIAMBU.....3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

Introduction

1. The property in dispute in this matter is **L.R. No. Kiambu Municipality/Block III/112** measuring 0.2240 hectares (Hereinafter referred to as “**the suit land**”) which was initially owned by **Mumwe Investment Limited** (Hereinafter referred to as “**the company**”). By a sale agreement dated 22nd February, 1994, the plaintiff, **Patricia Mary Clark** allegedly bought the suit land from the company at a price of Kshs. 750,000. On 23rd November, 1994, a certificate of lease of 99 years was issued to her. In the year 2010, the plaintiff found building stones placed on the suit land. Upon inquiry, she discovered that the suit land was registered in the name of **Samuel Kuntai Tunai**, the 2nd Defendant who had placed the building stones on the suit land with the intention of doing construction thereon.

2. Upon conducting an official search, at the Land Registry Kiambu, the plaintiff realized that the suit land was in the name of the 1st Defendant, **Godfrey Ngatia Njoroje**. The green card indicated that the suit land was first registered in the name of the Company then was transferred to the plaintiff in the year 1994. That on 6th June, 1995, the plaintiff transferred the suit land to the 1st Defendant who subsequently sold it to the 2nd Defendant on 19th February, 2010 thereby the plaintiff was dispossessed of it. She reported the incident to the Criminal Investigations Department, Gigiri for action and the Land Registrar, Kiambu entered a restriction on the suit land on 6th April, 2010 pending the results of investigations.

3. On 26th September, 2013, the plaintiff sought to find out if the Land Registrar had done anything regarding her complaint but was denied the outcome of her official search. On that basis, she filed this suit on 1st November, 2013 against the Defendants jointly and severally and prayed for;

a) An order compelling the 1st and 2nd Defendants or their respective transferees or assigns to surrender for cancellation of any title or Registration Certificate over the land parcel No. Kiambu Municipality/Block III/112.

b) An order compelling the 3rd Defendant to rectify the green card and all official records to reflect that the plaintiff is the registered proprietor of the suit land.

c) Permanent injunction restraining the 1st and 2nd Defendants, its agents and or servants from interfering with the plaintiff's quiet possession of the suit land.

d) General damages of loss of bargain.

e) Costs and interest of this suit.

f) Any other relief that this Honourable court may deem fit and just to grant.

4. The plaintiff is represented by learned counsel, Mr. F.N Njanja. The 2nd Defendant is represented by Kemboi Law Advocates formerly Kemboi and Co. Advocates while learned counsel Mr. S.Terrell appears for the 3rd and 4th Defendants.

The Plaintiff's Case

5. The Plaintiff averred that the Defendants jointly and severally perpetrated fraud and obtained documents through misrepresentation and forgery by presenting to the Lands Registry, registration and transfer documents with full knowledge that they did not own the land. She faulted the 3rd Defendant for admitting the said documents in spite of knowing that the documents were untrue and fraudulent. She stated that it was illegal for the 3rd Defendant to effect transfer and procure title knowing that the 1st Defendant was not the bonafide registered owner of the suit land. It was her averment that the consent of Land Control Board was fraudulently procured and the 3rd Defendant ought to have had reason to believe that the 1st Defendant was not the bonafide registered owner of the suit land.

6. The Plaintiff further faulted the defendants jointly and severally for negligence for failing to require the 1st Defendant to produce certificate of lease relating to the suit land and to summon her to the Lands Registry for purposes of giving information with regard to the suit land. She finally stated that it was negligent for the 3rd Defendant not to take any action in the matter ever since she lodged her complaint in the year 2010.

7. Essentially, the plaintiff (**PW1**) relied on her averments in the plaint and entirely on her statement. Notably, her testimony was that she was still in possession of the original documents to the suit land. That she had neither sold nor transferred the land to any other person. She contested the entry in the green card, (**P Exhibit 13**) which showed that the suit land moved from the 1st Defendant to the 2nd Defendant. That she is in quiet possession of the suit land and lives thereon. In seeking to demonstrate fraud, she made reference to the copy of certificate of lease (P Exhibit 4) issued to the 1st Defendant which had no address and acreage of the suit land.

8. During cross-examination, PW1 stated that she came to know of the sale through the daughter of the owner of the Company that sold her the land. She could not tell how the company got the land or how much it paid for the land. She further stated that the official search conducted by the 2nd Defendant was normal procedure before purchase of property. She also reiterated that she had only parted with the title to the suit land once when she gave it to her lawyer, Jan Mohammed. That she got it back in the year 2010. She testified that upon realization of the 1st Defendant's actions, she reported him to the Land Registry Kiambu but she was referred to the Directorate of Criminal Investigations for action and that the 1st Defendant could not be traced.

The Plaintiff's submissions

9. In her 19 paged submissions, dated 21st January, 2019 and filed on 24th January, 2019, the Plaintiff buttressed her averments in the plaint and her oral evidence. She relied on the principle of *Nemo dat quod non habet*, and emphasized that the 1st defendant could not have transferred a good title to the 2nd Defendant for he obtained the same by deception, fraud, misrepresentation and trickery. It was her submission that there was no instrument of transfer from the Plaintiff to the 1st Defendant. That the 3rd Defendant stated that it was irregular for a transfer to be registered when there was no instrument of transfer from one party to the other. That it was the basis upon which he entered a restriction on the suit land. She further submitted that when a transfer is effected, the transferor's document of title is surrendered for cancellation. In this case however, she was still in possession of the original title for the suit land.

10. The Plaintiff further submitted that the failure by the 2nd Defendant to call the 1st Defendant as his key witness for purposes of demonstrating that he had a clean title was a fatal blow to his allegation that he had a good title to the suit land. As such, the 2nd Defendant could not be said to be an innocent purchaser for value. It was the Plaintiff's position that the 1st Defendant was a non-existent person who colluded with the 2nd Defendant and the 3rd Defendant to make the transfer possible. The Plaintiff submitted that the 2nd Defendant was an active participant in the fraud. She identified the sale agreement signed between the 1st and the 2nd Defendants showing that the suit land was sold for Kshs 11 million (P Exhibit 3). That DW2, Kiarie Kamere, never participated in the execution of the agreement. Similarly, Patrick Onyango Ogola, the person who witnessed the execution of the said agreement by all the parties was not called to testify in this suit.

11. The Plaintiff relied on **Article 40** of the **Constitution** to show that his constitutional right to property and the decision in **Petition No. 224 Of 2010, Emange Se-Semata Investments Limited –vs- The Attorney General & 4 Others** (2012) eKLR where the court stated that it is only property rights that are not illegally acquired that are protected. Expounding on indefeasibility of her title to the suit property, she referred the court to the decision in **Isaac Gathongo Wanjohi & Another –vs- The Attorney General and 6 others** [2012] eKLR, on the issue of fraud and sanctity of title. The plaintiff placed reliance on the decision of **Veronica Nakiyingi –vs- Michael Nsobani Court of Appeal of Uganda No. 44 of 2008** where the learned judges of Court Of Appeal of Uganda held that the court cannot sanction what is illegal.

12. Making reference to the **Evidence Act (Cap 80)** in **sections 107** and **112**, the Plaintiff submitted that she had brought all facts and proved them in an effort to prove issues on ownership of the suit land. She further submitted that **section 3** of the **Law of Contract Act** was not complied with since she never signed the sale agreement disposing of the land to the 1st Defendant. Thus, she prayed for cancellation of the title to the 2nd Defendant pursuant to provisions of section 80 of the Land Registration Act, 2016 (2012) for having been obtained through fraud.

The 1st Defendant's case

13. The 1st Defendant was duly served by way of substituted service on 21st July, 2014 further to leave of the court granted 1st July 2014. He neither entered appearance nor filed a statement of defence. This matter was heard on 28th November, 2018.

14. The 1st, 3rd and 4th Defendants did not file and serve submissions in this suit.

The 2nd Defendant's Case

15. DW2, Joakim Kiarie Kamere, an advocate of the High Court of Kenya stated that he acted for the 1st Defendant regarding D2 Exhibit 3 in the year 2009. That the 1st Defendant lives in Karen and operates Karen Auto Bazaar. This witness testified for purposes of clarifying the contentious issue of the 1st Defendant's existence and the bankers cheque payments made to his law firm. He confirmed knowing the 1st Defendant and that he acted for him in this matter. He further confirmed receiving the banker's cheques and releasing the money to the 1st Defendant in cash and in cheques. During cross-examination, he said that he has the original agreement for sale which he personally prepared but execution was done by Patrick Onyango of Kemboi & Co. Advocates. He said that he came to learn later of the suit but did not know the 2nd defendant.

16. The 2nd defendant (DW1) filed his statement of Defence dated on 10th March, 2016 wherein he averred that having lawfully and in good faith purchased the suit land from the 1st Defendant, he was the legal and registered proprietor of the land. That according to the official search obtained from the Land Registry at Kiambu, he was its registered proprietor and was in possession of a certificate of lease. That on the strength of those documents, he executed the sale agreement for a price of KShs.11 million by making a deposit of KShs. 1,100,000/- and a further deposit of KShs.9, 900,000/- to the 1st Defendant through DW2. Thereafter, the DW1 executed a transfer of lease of the suit land in his (DW1) favour.

17. DW1 gave testimony that he recorded a statement in relation to the suit land on 2nd March, 2016. He relied on the statement and all his documents as exhibits. On cross-examination, DW1 stated that he was together with the 1st Defendant when they did the transaction at his counsel's office. He was satisfied that DW1 owned the suit land and paid 10 percent of the purchase price and the balance paid on various dates by way of bankers cheque through DW2. He testified that he did not get any receipt from the 1st Defendant but maintained that the 1st Defendant existed. The transfer was then done in his name. He said that he last saw 1st Defendant when the Plaintiff claimed ownership of the suit land.

18. He further stated that his counsel made an application for transfer of the suit land and paid for stamp duty and was issued with certificate of title to the suit land. By virtue of section 25 of the Land Registration Act, 2012 (2012) he was a bonafide Purchaser for value without notice. It was his position that he has been in quiet possession of the land until the year 2010 when the Plaintiff claimed its ownership yet he had never dealt with the Plaintiff. He averred that he is wrongly enjoined in this matter for the Plaintiff's recourse is as against the 1st and 3rd Defendants and the Plaintiff had no right to claim fraud against him.

The 2nd Defendant's Submissions

19. In his 14-paged submissions, dated 13th February, 2019, the 2nd Defendant argued that it was incumbent upon the Plaintiff to demonstrate that the transaction between the 1st and 2nd Defendant was fraudulent. He reiterated his averments in the Statement of Defence and maintained that the Plaintiff failed to tender evidence required under section 26 of Land Registration Act, 2012 (2012) to challenge in defeasibility of his title. He placed reliance on the Court of Appeal decision in **Arthi Highway Developers Limited -vs- West End Butchery Limited & 6 Others [2015] eKLR and Katende -vs- Haridars & Company Limited [2008] 2EA 173** on the doctrine of bonafide purchaser for value without notice. He also quoted the **torrens system** of registration which encompasses the **Mirror Principle, the Curtain Principle, Insurance Principle**. He made reference to the case of **Shimon Resort -vs- Registrar of Titles & 5 others [2016]** which emphasize the Torrens system of registration and its accuracy. He argued that the government being the custodian of the register, it ought to guarantee all land owners indefeasibility of their title. He relied on section 3 of the Law of Contract Act and Article 40 of the Constitution of Kenya, 2010.

20. DW1 argued that the Plaintiff has her remedy in an action against the state for recovery of damages. On that basis, he quoted the decision in the case of **David Peterson Kiengo & Others -vs- Kariuki Thuo [2012] eKLR** and that this court could not order a rectification of the Register pursuant to section 80 of the Land Registration Act since there was no fraud on the part of the 2nd Defendant.

The 3rd defendants' case and submissions

21. In their defence dated 5th May, 2014, the 3rd and 4th Defendants deny the plaintiff's claim and termed the contents of the plaint strange. They sought dismissal of the suit with costs. I note the reply to the 2nd Defendant's defence dated 25th April, 2016 for orders (a) and (b) and a reply to 3rd & 4th Defendants defence dated 28th April, 2016 for orders (a) to (c) sought therein . The 3rd and 4th Defendants adduced no evidence.

22. Titus Masaba Kakewa (DW3) stated that the Land Registrar Kiambu had the green card, original Lease document, Title deed and all other documents in relation to the suit land. He confirmed that he had no document showing transfer of the suit land from the Plaintiff to the 1st Defendant. He testified that entry numbers 5 and 6 in P Exhibit 13 were not traceable and no search was done on the suit land. According to him the last entry was number 11 in P Exhibit 13. During cross-examination, he stated that the suit land was first registered in the name of the company and there was no transfer from the Plaintiff to the 1st Defendant in their **Parcel File** containing the original Green Card (P

Exhibit 13). He said that Entry No. 11 in D Exhibit 25 showed suspected fraud.

Issues for determination

23. I have anxiously studied the entire pleadings, evidence adduced and submissions, the plaintiff's list of issues dated 15th September, 2018, the 2nd Defendant's issues dated 15th June, 2016 and issues in the 2nd Defendant's submissions. In the case of **Great Lakes Transport Company (U) Ltd)- Vs- Kenya Revenue Authority (2009) KLR 720**, the Court of Appeal held that issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination. Since each party framed different issues for determination, it is my considered view that the following issues fall for determination;

- a) **Did the 1st Defendant (DW1) acquire ownership of the suit land legally?**
- b) **Consequently, did the 2nd Defendant get a good title for being an innocent purchaser for value without notice?**
- c) **What orders should this court make in view of (a) and (b) above?**
- d) **Who should bear the costs of this suit?**

Analysis & Determination

24. Before I delve into propriety of the 1st and the 2nd Defendant's title to the suit land, I must point out that when a court is called upon to make a determination on an allegation of fraud, the standard of proof is higher than that of balance of probabilities; See **Koinange & 3 others vs Koinange (1986) KLR 23**.

25. The Plaint specifically sets out the details of fraud. The allegations of fraud must be specifically pleaded, set out and strictly proved. In **Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979]eKLR** which quoted with approval the decision In **B.G Patel –vs- Lalji Makanji 1957 E.A 314** the Court of Appeal stated that:-

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”

26. In order to ascertain the propriety of the 1st Defendant's title to the suit property, it is imperative to go to the very root of the title based on the law and the material availed before this court. It is evident from **P Exhibit 2** that the Government of Kenya leased the entire suit land. The lease was registered on 13th January, 1992 and the requisite registration fee paid. The evidence of the Land Registrar (**DW3**) fortified that position as seen in the green card that the company was the very first entry.

27. The suit land was initially owned by the company. PW1 stated that she bought the suit land from the said Company, cultivates the land and lives thereon. DW1 stated that he bought the suit land in the year 2009. In cross-examination by the plaintiff's counsel, DW3 stated that;

“P Exhibit 13 (green card) shows that the initial owner as per entry No, 1 was Mumwe Investments Limited. “

28. PW1 testified that she is the rightful owner of the suit land. That P Exhibit 4 does not contain either identity card or address of the 1st Defendant. That to date PW1 has her title. That the parcel file kept by DW3 does not contain entries showing transfer to the 1st Defendant and the issuance of Certificate of Lease. DW3 stated that he had no documents in the parcel file to verify the alleged fraud and confirms that the 1st Defendant is the registered owner of the suit land.

29. DW1 testified that entry No. 9 in the P Exhibit 13 as well as D Exhibits are in his favour. That DW2 acted for the 1st Defendant in D2 Exhibit 3 hence the suit land was transferred to the 1st defendant. That the 1st Defendant had good title to the suit land thus passed the same to the DW1 and not to any other person.

30. DW1 claims to fall under the category of persons protected by the doctrine of bonafide innocent purchaser for value without notice. In the case of **Katende (supra)** a bonafide purchaser was defined thus;

“a Bonafide purchaser 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 Bonafide doctrine he must prove the following ;(a) He holds a certificate of title

(b) He purchased the property in good faith (c) He had no knowledge of the fraud (d) He purchased the property for valuable consideration (e) The vendor had apparent good title (f) He purchased the property without notice of any fraud and (g) He was not party to any fraud.”

31. Quite plainly, DW1 has set up a claim as a bonafide purchaser of the suit land for value without notice. D2 Exhibit 2 was issued to 1st plaintiff who sold the land to DW1 as per D2 Exhibits 3, 4 to 8 which are in favour of DW1. He has a good title at law and his (DW1) defence is absolute and cogent in the circumstances.

32. In the case of Fletcher –v- Peck 10 US 87 (1810), it was held that;

“but the rights of 3rd persons who are purchasers without notice for favourable consideration cannot be disregarded -----he had no notice that revealed defects cannot be set up against him, -----he had paid money for a title good at law, he is innocent whatever may be the guilt of others and equity will not subject him to the penalties.....”

33. PW1 claimed that DW1 obtained D2 Exhibit 8 by way of fraud. DW3 stated that he had no documents from PW1 to verify the alleged fraud and he did confirm that the land is registered in the name of DW1. Since DW1 had paid money for a good title at law, the allegations of fraud against DW1 have not attained the threshold set out in the case of Ndolo-v-Ndolo (2008)1 KLR (G&F) 72.

34. I bear in mind that the parties in a suit are generally bound by their pleadings; see **Independent Electoral and Boundaries Commission and another -vs- Stephen Mutinda Mule & 3 others (2014) eKLR**.

35. Be that as it may, DW1 averred at paragraphs 3,5,11, 15, 16 and 19 of his statement of defence that he is the legal registered owner of the suit land having lawfully and in good faith purchased it for value from the 1st Defendant. Therefore, the issue of ownership of the suit land does arise from the facts and evidence on record herein for determination; see Odd Jobs –vs- Mubia (1970) EA 476 where it was held, inter alia;

“a court may base its decisions on unpleaded issue if it appears from the course and followed at the trial that the issue has been left to the court for decision”

36. The 2nd Defendant (DW2) has proved by way of evidence including D2 Exhibits 1 to 8 and the testimony of DW3 that he lawfully purchased the suit land as confirmed by DW2. As a result, a constructive trust was created in favour of DW1 who is entitled to the suit land.

37. In the case of Macharia Mwangi Maina and 87 others-vs-Davidson Mwangi Kagiri (2014) eKLR, the court of Appeal discussed about constructive trust and held thus;

“This is a court of law and a court of equity; Equity shall suffer no wrong without a remedy. The reliefs and final orders to be given in this suit are targeted at the delivery of substantive justice rather than technical justice to the parties who have lawful and equitable interest in the land”

38. I am very conscious of Section 80 (1) of the **Land Registration Act, 2016 (2012)** that gives this court the power to order cancellation of a title. The section provides:-

“Subject to subsection (2), the court may 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.”

39. It is quite evident that the 3rd Defendant issued a certificate of lease (D2 Exhibit 8) in the first instance to the 1st Defendant and subsequently to the 2nd Defendant (DW1) without any defect at law. The entries in the register accurately reflect the ownership of land in favour of DW1. Moreover, DW3, confirmed that, DW1 bought the suit land from the 1st defendant who was its registered owner as per P Exhibit 13. Quite plainly, DW1 was and is a bonafide purchaser for value as defined in Katende and Fletcher cases (supra).

40. In the circumstances, it is the title of PW1 and not of the 2nd Defendant that is impeached by Section 80 (1) (supra) as read with **Section 26 of Land Registration Act, (2016) 2012** which provides that:-

“(1) 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”.

41. A fortiori, I find and hold that the Plaintiff has not proved her case against the defendants to the requisite standard. The 2nd Defendant’s claim that he is a bonafide purchaser of the suit land is cogent, sound and has proved against the plaintiff on a balance of probabilities. I therefore make the following final orders;

a) The plaintiff’s suit be and is hereby dismissed

b) The 2nd Defendant is the legal owner of suit land, Kiambu Municipality Block III/112.

c) The Certificate of Title issued in respect of the suit land, Kiambu Municipality Block III/112 in favour of the Plaintiff is hereby declared illegal, null and void.

d) The Land Registrar is hereby ordered to cancel the title of the suit land, Kiambu Municipality Block III/112 in the name of the plaintiff.

e) A permanent injunction is hereby issued restraining the plaintiff whether by herself or agents or anyone acting under him from dealing, alienating, trespassing, interfering or constructing on the suit land, Kiambu Municipality Block III/112.

f) By dint of the proviso to section 27 (1) of the Civil Procedure Act (Cap 21), the decision in Samwel Kamau Macharia and another-vs- Kenya Commercial Bank Ltd and 2 others (2012) eKLR and in view of the circumstances of the case, each party to bear his/her own costs of this suit.

DATED AND SIGNED AT MIGORI THIS 12th DAY OF MAY 2019

G.M.A ONG'ONDO

JUDGE

DELIVERED, SIGNED AND DATED IN OPEN COURT AT THIKA THIS 14th DAY OF JUNE 2019.

L.N.GACHERU

JUDGE

In presence of;

1. Mr. Kiarie holding brief for Mr. Njanja for the plaintiff
2. Mr. Kere holding brief for Mr. Kemboi for 2nd defendant
3. M/s Fatma for 3rd and 4th defendant
4. Lucy –Court Assistant