



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 216 OF 2013

PETER KENGERE MANWAH.....PLAINTIFF

VERSUS

RAEL OTUNDO.....1ST DEFENDANT

SAMWEL ONDIEKI.....2ND DEFENDANT

KISII CENTRAL DISTRICT LAND REGISTRAR.....3RD DEFENDANT

J U D G M E N T

Background;

1. The plaintiff commenced this suit by way of a plaint dated 9th May, 2013 filed in court on 16th May, 2013. He prayed for the following orders against the defendants jointly and severally;

- a) A declaration that the plaintiff is the bona fide purchaser of the suit land now registered as Wanjare/Bogiakumu/2429.
- b) An order for the cancellation of the suit land Wanjare/ Bogiakumu/2429 from the 2nd defendant and transfer of the same to the plaintiff's name in default, the Executive Officer of this honourable court be authorized to sign all the necessary forms and do the necessary requirement to affect transfer of the suit portion in favour of the plaintiff.
- c) Costs of this suit.
- d) Interest on (c) and (d) above at court rates.
- e) Any other relief that this court may deem fit to grant.

2. The plaintiff stated that he entered into an agreement on 23rd July 1992 with one Simon Ombaso Moracha for purchase of half an acre portion of land to be excised from a land parcel known as Wanjare/ Bogiakumu/722. The Plaintiff stated further that he financed the prosecution of Kisii High Court Succession Cause No. 104 of 1985 to facilitate transfer of the land from the name of the seller's deceased father Zachary Ombaso and that he was granted vacant possession of the land soon after paying the purchase price of Kshs. 105,000/=. He averred that on 25th February 1993, he applied for the consent of the Land Control Board for transfer of his portion which was issued and following subdivision the portion of his land became land parcel LR. Wanjare/Bogiakumu/2429 (herein "the suit land"). At the time of the transaction, the Plaintiff stated he was scheduled to leave for the USA for further studies and he therefore entrusted the completion of the transfer process to the 1st defendant who was his wife. He averred that he later discovered that the 1st defendant colluded with the 3rd defendant and caused the parcel of land to be fraudulently transferred to the 2nd defendant. He urged the court to cancel the 2nd defendant's title and declare him the proprietor of the suit land.

3. The 1st Defendant filed her defence dated 10th June 2013 on 13th June 2013. She averred that the Plaintiff's name had appeared in the sale agreement only as a trustee for herself as she had funded the entire transaction. She stated that during their cohabitation they acquired the suit land and land parcel Nyaribari Chache/B/B/Boburia/5094. She stated that when they separated, it was resolved that she takes the suit land while the plaintiff obtained title to land parcel Nyaribari Chache/B/B/Boburia/ 5094. She averred that by the time the Plaintiff left the country in 1994, he was satisfied with the division of the properties. The 1st Defendant further stated that she acquired title to the suit land from Zakariah Ombaso who was the legal representative of the estate of Kerubo Nkangi lawfully and she denied the Plaintiff's contention that she had fraudulently transferred the land to the 2nd defendant and asserted that the Plaintiff was aware of the sale to the 2nd defendant.

4. The Attorney General entered appearance for the 3rd Defendant and filed a statement of defence on 2nd July 2013 denying the Plaintiff's claim.

5. After consent had been entered to set aside an interlocutory judgment entered against him, the 2nd Defendant filed his defence and

counterclaim on 16th October 2015. He stated that he purchased land parcel Wanjare/Bogiakumu/2429 from the 1st Defendant in January 1994 and took possession of the land having verified that the 1st defendant was the registered owner and had good title to pass. He stated that he was oblivious of the relationship between the Plaintiff and the 1st Defendant as it had not featured during the purchase or transfer of the suit land. He asserted that due process was followed in the registration of his name as proprietor of the suit land and pleaded a counter claim where he sought the following orders;

- a. That the Plaintiff's suit be dismissed with costs.
- b. That the counter-claim be allowed and judgement entered in favour of the 2nd Defendant by way of a permanent injunction restraining the plaintiff himself, his servants, agents and or persons acting on behalf of the plaintiff by whatever name called from encroaching upon, interfering with, occupying and or taking possession of the subject property Wanjare/ Bogiakumu/2429.
- c. Costs of the counter-claim in favour of the 2nd Defendant.

Evidence by the Parties;

6. When the matter came up for hearing, the plaintiff testified that he purchased land parcel Wanjare/Bogiakumu/2429 from Simon Ambaso Moracha (now deceased) and the 1st defendant who was his wife at the time, had witnessed that agreement. He admitted that Simon Moracha did not have title to the land when he purchased it but averred that he was supposed to be a beneficiary of the estate of Kerubo Nkangi as per the grant in HC Succession Cause No. 104 of 1985. He testified that his name was cancelled and the 1st Defendant's name inserted in an application he had made for the Land Control Board's consent. The Letter of Consent was then issued in the name of the 1st Defendant who processed the title in her name and immediately transferred the land to the 2nd Defendant. He testified that in her work as a valuer at the lands office in Kisii it would have been easy for her to commit fraud. On cross-examination the Plaintiff stated that by the time he left for the USA in 1994 he was aware that the land had been transferred to someone else (the 2nd Defendant). He also conceded that the 1st Defendant would occasionally make monetary contributions towards the purchase of the property.

7. The 1st defendant (DW1) testified that she had lived with the Plaintiff from 1990 to 1993 and they had two children together. During that time they acquired 2 properties namely land parcel Wanjare/ Bogiakumu/2429 and NyaribariChache/B/B/Boburia /5094. When they parted ways in 1993, the 1st Defendant explained they had a family meeting where it was agreed that Parcel 2429 be registered in her name and Parcel 5094 be registered in the name of the Plaintiff. She told the court that she had contributed the bulk of the money for the purchase of the suit land but the land was registered in her husband's name out of respect. She maintained that due procedure was followed when the property was transferred and averred that they had gone to the Land Control Board together as the requirement then was that husband and wife should be both present.

8. The 1st Defendant further stated that she had signed the transfer form dated 2nd March 1993 and title was issued in her name on 3rd March 1993. Subsequently, she transferred the land to the 2nd Defendant on 23rd February, 1994 having followed the required process. She testified that the plaintiff was present when she sold the property to the 2nd Defendant and did not raise any issue. He had also been in the Country on numerous occasions thereafter and never once complained. In cross examination she admitted that she had been a civil servant from 1990 to 2011 and had free access to the land registry but asserted that all transactions were done openly and were above board. She denied that she had colluded with the land registrar to have the land transferred to the 2nd Defendant.

9. Kennedy Benard Otundo (DW2) told the court that the 1st Defendant was his sister. He confirmed that the Plaintiff and the Defendant were living together as husband and wife and had two parcels of land one at Mwembe and the other one at Biogiakumu. There had been a joint family meeting when his sister and the plaintiff were about to part ways. He testified that he was present at the meeting as well as the Plaintiff's father and uncle. He stated it was resolved that the Plaintiff was to take the land in Mwembe and his sister was to take the land in Bogiakumu. His testimony was corroborated by the evidence of the 1st Defendant's younger sister Isabella Kemunto Otundo (DW3) who testified that she was also present during the meeting which had been held at the Plaintiff's house.

10. On his part, the 2nd defendant (DW4) testified that he got information that the 1st defendant intended to sell a parcel of land namely Wanjare/Bogiakumu/2429. He carried out a search to confirm whether she was the registered owner of the land. He testified that he paid the purchase price and they both went to the Land Control Board at Suneka. He was issued title to land parcel Wanjare/ Bogiakumu/2429 on 28th March 1994 and had been in possession of the land ever since. He informed the court that the plaintiff had only lodged a caution on the land on 29th May 2013 and stated that he was unaware of any adverse claim against the land at the time he purchased it

Issues, Analysis and Determination;

11. I have duly considered the pleadings, the oral evidence and the parties' submissions. The following issues arise for determination are;

- a. Whether the Plaintiff had any valid claim to land parcel Wanjare/Bogiakumu/2429 capable of being enforced?
- b. Whether the 1st defendant colluded with the 3rd defendant to acquire title to land parcel no. Wanjare/Bogiakumu/2429 fraudulently to the prejudice of the Plaintiff;
- c. Whether the 2nd defendant acquired good title to land parcel no. Wanjare/Bogiakumu/2429;
- d. What reliefs/orders should the court grant in regard to the Plaintiff's suit and the 2nd Defendant's counterclaim respectively?

12. There is no contest that land parcel Wanjare/Bogiakumu/2429 is registered in the name of the 2nd Defendant. The plaintiff's case is that the process used by the 2nd Defendant to acquire the title was improper. The Plaintiff contended that the 1st Defendant colluded with the 3rd Defendant to fraudulently register the suit land firstly in the 1st Defendant's name and thereafter transferred title to the 2nd Defendant. The Plaintiff stated that the suit land was excised from land parcel Wanjare/Bogiakumu/722 which was the subject of Kisii HC Succession Cause

No. 104 of 1985. The grant in those proceedings was confirmed in favour of three purchasers, who included the Plaintiff. The Plaintiff testified that for unexplained reasons, the 3rd Defendant failed to comply with the grant and transferred title to the 1st Defendant who was not a beneficiary of the estate. The Plaintiff contended that the 1st defendant lacked capacity to deal with the suit land and any dealings between her and the administrator were null and void. He stated that the 1st Defendant took advantage of working for the 3rd Defendant and cancelled the application for consent which had been approved in his favour and there was therefore no consent to transfer the land to the 1st Defendant.

13. The 1st Defendant for her part contended that the Plaintiff's claim was based on an illegal contract which could not be enforced by the court. She submitted that by dint of Section 45 of the Law of Succession Act which prohibits intermeddling with the deceased property and Section 82 of the Law of Succession Act which prohibits the sale of immovable property before confirmation of grant, Simon Ombaso Moracha, who sold the suit land to the plaintiff, had no legal capacity to confer interests or rights over an estate of the deceased when the succession process had not been completed. To the extent that Simon Ombaso Moracha purported to enter into a sale agreement with the Plaintiff in 1992 before he had a confirmed Grant of Letters of Administration such agreement would be unenforceable as he lacked the capacity to enter into any binding agreement on behalf of the deceased estate.

14. The Plaintiff asserted that he was a beneficiary in the estate of Kerubo Ngangi and as proof thereof he annexed an excerpt of the proceedings in Kisii HC Succession Cause No. 104 of 1985 but did not avail a copy of the confirmed grant. It is therefore impossible to tell the manner in which the court distributed the deceased's land parcel No. Wanjare/ Bogiakumu/722 or confirm the plaintiff's assertion that he had been listed as a beneficiary of the deceased's estate. It is however agreed that Zakariah Ombaso was the administrator of the deceased's estate. The copy of the green card shows that land parcel No. Wanjare/ Bogiakumu/722 was transmitted from Kerubo Ngangi to Zakariah Ombaso. A mutation form was prepared in respect of that parcel of land resulting in land parcel numbers 2425 to 2429. On 25th February 1993 the Land Control Board consented to the transfer of land parcel No. Wanjare/Bogiakumu/2429 from Zakariah Ombaso to the 1st defendant and the transfer was subsequently effected.

15. The Plaintiff alleged that the 1st Defendant obtained title to the suit land fraudulently. The Plaintiff pleaded the allegations of fraud as against the 1st and 3rd Defendants under paragraph 12 of the plaint. The Plaintiff in particular alleged that the 1st Defendant had forged the various documents from the Land Control Board and had presented forged documents before the 3rd Defendant for registration. The Plaintiff further alleged there was collusion between the 1st defendant and the 3rd Defendant resulting in the 1st Defendant being irregularly registered as the owner of the suit property. It is trite law that allegations of fraud when made must be proved by evidence and it is not enough to merely allege fraud and leave it at that. The standard of proof where fraud is alleged is on a higher pedestal than proof on a balance of probabilities as is the norm in civil suits though proof need not be beyond a reasonable doubt as is required in criminal cases.

16. In the present matter, the Plaintiff has merely made allegations but has offered no proof. He has for instance alleged the 1st Defendant cancelled his name in the application to the Land Control Board and inserted her own name. The 1st Defendant however gave a plausible explanation as to what led to the cancellation of the Plaintiff's name in the forms.

17. The 1st defendant explained that she and the plaintiff had agreed to divide their matrimonial property, with the plaintiff when their union crumbled. She stated the Plaintiff was to get land parcel Nyaribari Chache/B/B/Boburia/5094 and she was to take land parcel No. Wanjare/ Bogiakumu/2429. Her evidence was corroborated by the testimony by DW2 and DW3. I find this version of events more probable in the absence of proof of fraud by the Plaintiff. I therefore accept the Defendant's explanation as to how she got to be registered as the owner of the suit property.

18. On the issue of whether the 2nd defendant had good title to land parcel No. Wanjare/Bogiakumu/2429, the plaintiff submitted that the 2nd defendant had failed to avail copies of the transfer or the agreement between himself and the 1st defendant and therefore failed to show that the transaction was above board. He relied on the case of Alice Chemutai Too (suing in her capacity as the personal representative of Kipkoech Tele (deceased) -vs- Nickson Kipkurui Korir & 2 Others ELC Case No. 51 of 2014, where the court ordered cancellation of the title on the grounds that the applicant had no clean title to pass to a third party. The Plaintiff also cited the case of Elijah Makeri Nyangw'ra - vs- Stephen Mungai Njuguna & Anor ELC No. 609 (B) of 2012 where the court held that under Section 26 (1)(b) of the Land Registration Act, a proprietor's title can be challenged where there is proof that title was acquired illegally, unprocedurally or through corruption.

19. On his part, the 2nd Defendant submitted that when he purchased the suit land from the 1st Defendant the records showed that she was the registered proprietor of the land and there was no adverse claim by the Plaintiff or anyone against it. He submitted that he had taken possession of the land as soon as he was issued with the title on 28th March 1994 and had been in possession of the land ever since. He maintained that the Plaintiff was a stranger to him and he was entitled to quiet possession of the property that he had purchased. The 2nd Defendant submitted that he has an absolute and an indefeasible title in terms of Section 26(1) and that there were no grounds on which it could be impeached as he was not party to any fraud that could vitiate the same.

20. Section 26(1) of the Land Registration Act, 2012 which provides as follows;

26 (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.

21. This case can be differentiated from the authorities cited by the Plaintiff. I have found and held that the Plaintiff has not proved that the 1st defendant was involved in any fraud or misrepresentation in the acquisition of her title. The plaintiff also failed to show that the title was issued through a process that was illegal, unprocedural or corrupt. It is thus evident that the 1st defendant acquired good title and could

equally pass a good title to the 2nd Defendant. The fact that the sale agreement between the 1st Defendant and the 2nd Defendant was not exhibited cannot be proof that the transaction did not take place. There are documents that support the transaction. There is an application to the land board, consent to transfer and a transfer duly executed and registered. No vitiating factors have been proved by the Plaintiff who was in any case a third party and was not privy to the contract between the 1st Defendant and the 2nd Defendant.

22. The Plaintiff's claim against the Defendants is further unravelled by his admission on cross examination that he was aware that the land had been transferred when he left the Country for the USA in 1994 and that since that time he had been visiting the County regularly. The 1st Defendant also testified that the plaintiff had been in the country severally but did not raise any complaint regarding the transfer of the land to the 2nd Defendant. Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya is categorical that actions to recover land may not be brought after the end of 12 years from the date when the cause of action arose.

Section 7 of the Act provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

23. Having admitted that he was aware that the title to land parcel No. Wanjare/Bogiakumu/2429 had passed to the 2nd defendant as early as 1994, the Plaintiff did not institute any action to recover the land within 12 years from the date the cause of action accrued with the consequence that as at 13th May 2013 when he filed the present suit his action had become statute barred. Limitation of action as provided under Section 7 of the Limitation of Actions Act had caught up with the Plaintiff and he was non suited. The Plaintiff had up to 2006 to initiate recovery action for the land which he claimed. After that period his action was time barred and could not be brought without leave.

24. In the result, I hold and find the Plaintiff has failed to prove his case on a balance of probabilities and I accordingly order the same dismissed with costs to the 1st and 2nd Defendants. The 2nd defendant was a bonafide purchaser of the suit property from the 1st Defendant and I find and hold his counterclaim has been proved on a balance of probabilities and I allow the same in terms of prayer (b) and award the costs of the counterclaim to the 2nd Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF JULY 2019.

J. M. MUTUNGI

JUDGE