



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 414 OF 2013

SIMON NJAGI NJOKA.....PLAINTIFF

VERSUS

JAMES GATIMU MURIITHI.....1ST DEFENDANT

LEONARD MURIITHI MARITHUKU.....2ND DEFENDANT

JOHNSON CHEGE MWANGI.....3RD DEFENDANT

GATIMU KANYI.....4TH DEFENDANT

JOSEPH MURIUKI GATIMU.....5TH DEFENDANT

FAUSTO MWAI GATIMU.....6TH DEFENDANT

JUDGMENT

BACKGROUND

By a plaint dated 15th February 2009, the Plaintiff filed High Court Civil Case No. 30 of 2009 (Nyeri) seeking numerous orders including an order for a declaration that the cancellation of title numbers BARAGWI/KARIRU/1931 and 1932 was illegal fraudulent null and void.

The Plaintiff also sought for an order of eviction and permanent injunction. The suit was filed contemporaneously with an application for temporary injunction orders under Certificate of urgency.

Upon placing the same before the duty Judge and upon perusing the same, the duty Judge granted temporary injunction orders on 18th February 2009 barring the Defendants from interfering with the suit property land parcel No. BARAGWI/KARIRU/219 pending hearing and determination of the main suit.

During the pendency of the suit the matter was transferred to this Honourable Court and given the present registration number. It was also during the pendency of this suit that the 4th Defendant Gatimu Kanyi passed on and no step was taken to substitute him.

PLAINTIFF'S CASE

It was the plaintiff's evidence that the 4th Defendant was the original registered proprietor of land parcel number BARAGWI/KARIRU/219. However, the Plaintiff lived with his brother Michael Kagari Kanyi in the suit land. He stated that when Michael Kagari Kanyi realized that his brother was keen to disinherit him, he moved to the Land Disputes Tribunal in LDT No. 44/1997 where it was held that he was entitled to half an acre out of the suit property L.R. No. BARAGWI/KARIRU/219. Subsequently, the suit land was sub-divided pursuant to the decision by the Land Disputes Tribunal into two portions namely BARAGWI/KARIRU/1931 and 1932 respectively. The said Michael Kanyi was then registered as proprietor of land parcel number BARAGWI/KARIRU/1932 and on 8th May 2011, he sold the same to Simon Njagi Njoka. The 4th Defendant was not satisfied with the findings of the Land Disputes Tribunal and the Magistrate Court in adopting the same. He appealed to the High Court in Embu which appeal was dismissed. It is stated that on 31.5.2001 the plaintiff was issued with a title deed.

On the 7th February 2006, the Land Registrar reinstated GATIMU KANYI, the 4th Defendant as the registered proprietor of land parcel number BARAGWI/KARIRU/219. It is that entry which the plaintiff is now challenging stating that it was illegal null and void.

THE 1ST, 5TH & 6TH DEFENDANTS CASE

The 1st, 5th and 6th Defendants state that the claim by the Plaintiff relates to actions done by the 4th Defendant and state there is no cause of action against them. They stated that the Plaintiff is complaining that an act of fraud has been committed but the alleged acts of fraud have not been pleaded and/or particularized as against them.

The 1st, 5th and 6th Defendants also argued that the Plaintiff was granted leave to substitute the 4th Defendant on 13th June 2017 but he did not do so and therefore this suit abated as against his Estate. The 1st, 5th and 6th Defendants further stated that the Plaintiff did not enjoin the Land Registrar as a party to these proceeding who reinstated the 4th Defendant as proprietor. They argued that failure to enjoin him as a party is fatal to this suit. In conclusion, the 1st, 5th and 6th Defendants stated that the Plaintiff has not proved his case on the required standard and the same must therefore fail.

3RD DEFENDANT'S CASE

The 3rd Defendant did not offer any evidence in this case. However his lawyer made submissions to the effect that from the pleadings and the evidence adduced by the parties, land parcel number BARAGWI/KARIRU/219 was initially registered in the name of the 4th Defendant, GATIMU KANYI. Thereafter, a dispute arose between the said Gatimu Kanyi and one Michael Kagari Kanyi which was referred to the Land Disputes Tribunal who upon hearing the parties sub-divided the land into two portions namely BARAGWI/KARIRU/1931 and 1932, with parcel No. BARAGWI/KARIRU/1932 measuring 0.20 Ha being transferred in favour of the said Michael Kagari and was later transferred to the Plaintiff herein. The titles for land parcel Number BARAGWI/KARIRU/1931 and 1932 were later cancelled and consolidated to revert to the original Number BARAGWI/KARIRU/219 in the name of the 4th Defendant who then sold 0.20 Ha to the 3rd Defendant. The 3rd Defendant was then registered as a tenant in common on land parcel No. BARAGWI/KARIRU/219 on 17.12.2007 in respect of the portion measuring 0.20 Ha.

Since the registration of the 4th and the 3rd Defendants as the tenants in common on the said 7.2.2007, no caution, prohibitory order or restriction was registered or lodged against the title.

On 13.6.2017, this Court made an order granting the Plaintiff to make the necessary application for substitution of the 4th Defendant (deceased). However, the Plaintiff did not substitute the 4th Defendant (deceased) and that failure to substitute the 4th Defendant (deceased) is fatal to the Plaintiffs case. The 3rd Defendant also submitted that from the green card produced by the Plaintiff, entry No. 5 in which a Court order was issued in LDT No. 44 of 1997 (Kerugoya) was registered by the Land Registrar. The said Court order stated that land title No. BARAGWI/KARIRU/1931 and 1932 be and are hereby cancelled and title Number BARAGWI/KARIRU/219 be reinstated for implementation of the Court order dated 4th March, 1998. The Court order was to be served upon the Land Registrar Kirinyaga for effecting the same. The Plaintiff appears to be faulting the said order saying that there is no such order issued in LDT No. 44 of 2005. It would appear that the Land Registrar acted properly on that order to reinstate land parcel No. BARAGWI/KARIRU/219. The 3rd Defendant submitted that this registration was legal, procedural and proper.

ANALYSIS AND DETERMINATION

The Plaintiff's main claim is for a declaration that the cancellation of title No. BARAGWI/KARIRU/1931 and 1932 in the registers for parcels and reinstatement of the old parcel No. BARAGWI/KARIRU/219 was fraudulent, Illegal and unlawful. The Plaintiff pleaded some particulars of unlawfulness. However, the Plaintiff has not indicated who in particular was involved in those acts of unlawfulness. There are no particulars of fraud pleaded and particularized in the plaint. From the evidence adduced by the Plaintiff particularly the green card produced as P. Exhibits II, the land parcel number BARAGWI/KARIRU/1932 which had been registered in favour of the Plaintiff on 31.05.2001 and a title deed issued the same date was cancelled on 7.2.2006 through a Court order in LDT No. 44/97 under entry No. 5. The Plaintiff has not produced any evidence to the contrary from the Court that order was not issued. The Plaintiff has not also shown how the Defendants in this case were involved in procuring the said order which was issued by the Court. If the Plaintiff is challenging the purported order issued by a Court of law, it was incumbent upon him to produce evidence showing that the Court which is purported to have issued the said order did not and therefore the said order is a nullity. The Plaintiff did not call the Executive Officer or any authorized officer from Kerugoya Law Courts to shed light on the existence or otherwise of the alleged order.

The Plaintiff is expected to have called that witness as the onus of proof squarely rested with him. The same also applies to cases of fraud.

The Court of Appeal in *Jennifer Nyambura Kamau Humphrey Mbaka Nandi (2013) e KLR* considered the applicability of burden of proof and stated as follow:-

“We have considered the rival submissions on this point and state that Section 107 and 1209 of the Evidence Act places the evidential burden upon the Appellants to prove that the signature on those forms belong to the Respondent.

Section 107 provides that “whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

Section 109 stipulates that the burden of proof as to any particulars fact lies on the person who wishes that Court to believe in its existence.

If an expert witness was necessary, the evidential burden of proof was on the Appellant to call the expert witness. The Appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side”.

I agree with the decision by the Learned Judges of the Superior Court whose decision is also binding on this Honourable Court. The Plaintiff in this case did not prove that there was fraud committed and that the Defendants participated in the commission of the same. I also hasten to add that the person who implemented the Court order was the Land Registrar who was not enjoined as party in this suit. The Land registrar was the one who cancelled the title deed and reinstated the original land parcel No. BARAGWI/KARIRU/219.

It was imperative for the Plaintiff to enjoin the said Land Registrar as a party to these proceedings. Failure by the Plaintiff to enjoin the said Land Registrar as a party is fatal to the Plaintiff's claim.

In the final analysis, I find that the Plaintiff has failed to prove his claim against the Defendants on the required standard. Consequently, the same is dismissed with costs. It is so ordered.

READ and DELIVERED in open Court at Kerugoya this 19th day of July, 2019.

E.C. CHERONO

ELC JUDGE

19TH JULY, 2019

In the presence of:

- 1. M/S Githaiga holding brief for Mr. Nduku Njuki*
- 2. Mr. C.S. Macharia holding brief for Mr. J. Ndana*
- 3. Mr. Dachi holding brief for Mr. Nganga*
- 4. Ms Ann Thungu holding brief for Mr. Maina Kagio*
- 5. Mbogo – Court clerk*