



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CIVIL APPEAL NO. 131 OF 2013

JOSPHAT MWANGI MWEA.....APPELLANT

VERSUS

LAWRENCE WACHIRA NGIRIGACHA.....1ST RESPONDENT

GLADYS WANGECHI KOORI.....2ND RESPONDENT

JUDGMENT

***(BEING AN APPEAL AGAINST THE JUDGMENT OF E.M. NYAGA – R.M. DELIVERED ON 20TH SEPTEMBER 2008 –
KERUGOYA IN P.M.C.C. NO. 205/2008)***

BACKGROUND

The appeal arises from a suit filed by the Appellant before the Lower Court seeking the following orders:-

- 1. Declaration that the 1st Respondent obtained transfer and registration of LR INOI/KARIKO/2067 fraudulently and therefore had no good title to pass to the 2nd Respondent.***
- 2. Title of LR INOI/KARIKO/2067 be rectified by cancelling the 2nd Respondent's names and restoring his names as the owner of the land or***
- 3. In the alternative the 1st Respondent compensates him with the current value of LR INOI/KARIKO/2067.***

According to the trial Judge, the Appellant failed to prove his claim and his witnesses particularly the Land Registrar and Clinical officer adduced evidence which does not favour him. The trial magistrate also held that the 1st Defendant demonstrated that on 12.01.2002 he entered into a sale agreement for LR INOI/KARIKO/2067.

APPELLANT'S CASE

The Appellant in his testimony before the trial court stated that his father had a shamba and that they did a succession cause whereby everybody was bequeathed equal share of the family land. His brother Joel Gachoki Mwea who is mentally disturbed received L.R. INOI/KARIKO/2067 – 0.29 Ha and obtained title deed. He placed a caution on the suit land but it was removed without his knowledge and registered under 1st Respondent who transferred to the 2nd Respondent. He stated that no Land Board Consent was sought and obtained and that his brother did not have capacity to transact.

He sought to have the land returned to his brother and the register be rectified or the 1st Respondent to pay the current value of the land.

P.W.2 was the Clinical officer who produced a medical record of Joel Gachoki Mwea who has a Psychiatric problem and he formed the opinion that he suffer from Schizophrenia. During cross-examination he stated that he saw the said Joel Gachoki Mwea for the first time in 2009 when he came specifically for a medical report. He did not have his records prior to the year 2009.

P.W.3 was the Land Registrar who stated that he had a copy of transfer from Joel Gachoki Mwea to the 1st Respondent. According to the register records, entry No. 4 is the removal of a caution by Joel Gachoki Mwea and consent issued by Land Control Board.

1ST RESPONDENT'S CASE

The 1st Respondent confirmed having entered into a sale agreement with Joel Gachoki Mwea on 12.02.2002 for a consideration of Ksh.380,000/=. He stated that the vendor's witness was one Julia Wanjira Njue his wife and thereafter they obtained the consent and title deed. He then transferred the land to the 2nd Respondent.

D.W.2 was James Munene Ndumbi who confirmed that he entered into a sale agreement with Joel Gachoki Mwea and Julia Wanjira Njue whereby he sold to them land parcel MUTIRA/MWERUA/1638 and on 20.03.2002 at a price of Kshs.298,000/=. He stated that the buyer Joel Gachoki Mwea appeared normal to him.

2ND RESPONDENT'S CASE

The 2nd Respondent confirmed having bought the suit land from the 1st Respondent for a price of Kshs.530,000/= in the year 2002. She did not know how the 1st Respondent came to be the owner but the land had a clean title and had no encumbrances.

ISSUES FOR DETERMINATION

The issue for determination before the trial Court is one of fraud. Fraud is a serious matter which requires proof on a standard higher than the civil standard of balance of probabilities.

The Court must require such a high degree before acting on allegations of fraud.

Section 26 of the Land Registration Act, No. 3 of 2012 states:-

“26 (1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon transferor 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, un-procedurally or through a corrupt scheme”.

Under *Section 26 (1) (b)* above, the title of an innocent purchaser is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The Appellant through his plaint before the trial Court challenged the Respondent's title on grounds of fraud. From the finding of the trial magistrate the Appellant did not prove that the Respondent committed fraud.

The 1st Respondent produced documentary evidence including a green card of the suit land, and application for consent, a letter of consent from the Land Control Board, transfer documents and sale agreement in respect of the suit land. The same showed that the seller Joel Gachoki Mwea sold his land to him after executing all the statutory documents.

It has not been proved that the title to the Respondent was obtained fraudulently or illegally, un-procedurally or through a corrupt scheme. Though P.W.2 (Clinical officer based in Kerugoya District Hospital) testified and alluded to Joel Gachoki Mwea (vendor) having a history of sickness since 1970's, he only saw him once on 19.3.2009. He did not even produce clinical records for the said Joel Gachoki Mwea for the year 2000, and 2002 when he allegedly sold the suit land.

The witness did not even produce the alleged letter 19.6.2009 where he stated he relied on medical records from 1978 and treatment cards from the hospital. The claim by the Appellant that Joel Gachoki Mwea was not of sound mind at the time the sale transaction was being entered was not proved. The Appellant did not produce medical records or call a doctor to produce documents showing that indeed Joel Gachoki Mwea had medical condition and therefore had no capacity to enter into any transaction especially at the time the sale agreement was entered into.

The medical report produce by P.W.2 was for the year 2009 when he saw Joel Gachoki Mwea for the first time when the patient went specifically for the report. The Appellant did not prove that in 2002, his brother was of unsound mind. I therefore concur with the analysis by the trial Court.

I therefore find no reason to disturb the judgment by the trial magistrate. The same is hereby upheld. In the upshot, this appeal lack merit and the same it hereby dismissed with costs. It is so ordered.

READ and SIGNED in open Court at Kerugoya this 12th July 2019.

E.C. CHERONO

ELC JUDGE

12TH JULY, 2019

In the presence of:

- 1. Mr. Ngigi for the 1st Respondent*
- 2. Karinga holding brief for Wanjiru Wambugu for 2nd Respondent*
- 3. Appellant in person Josphat Mwangi Mwea*
- 4. Court clerk - Okatch*