



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 149 OF 2007

ESTHER NYAMBURA NGOTHO.....PLAINTIFF

VERSUS

HARBANS M. SINGH BIRDI.....1ST DEFENDANT

MANMOHAN KAUR BIRDI.....2ND DEFENDANT

AND

CHIEF LAND REGISTRAR.....THIRD PARTY

JUDGEMENT

1. The Plaintiff brought this suit as executor of the will of Mr. Evanson Ngotho Rubia who died on 28/10/2000, based on the grant of probate issued to her by the court on 12/3/2001 claiming that the land known as Nairobi Block 94/150 (“the Suit Property”) forms part of the estate of her late husband. In the Amended Plaintiff dated 26/9/2016, the Plaintiff seeks a mandatory injunction to restrain the Defendants from dealing with the Suit Property which is situated in Nyari Estate, Nairobi. She also seeks a declaration that the certificate of lease held by the Defendants over the Suit Property is void and was obtained through fraud. In addition, she seeks general damages for trespass, special damages and an order directing the Defendants to remove their materials from the Suit Property. The Plaintiff also seeks a declaration that she is entitled to ownership and exclusive use of the Suit Property and that the sale and transfer of the Suit Property to the Defendants was illegal.

2. The Plaintiff averred that on or about 11/5/2007 the 1st Defendant moved lorry loads of cement onto the Suit Property with the intention of developing the land. The Plaintiff approached the 1st Defendant and requested him to desist from any further trespass on the land and to remove his cement from the Suit Property which request the Defendant failed to heed. The Plaintiff learned after filing this suit that the Defendants had a transfer and certificate of lease showing that Kenneth Njoroge Ngugi sold the Suit Property to the Defendants. The Plaintiff set out particulars of fraud and misrepresentation regarding the acquisition of the Defendant’s title over the Suit Property in her Amended Plaintiff.

3. The Defendants denied the Plaintiff’s claim in their defence filed in court and took out a Third Party Notice against the Chief Land Registrar, seeking indemnity or contribution in respect of any judgement that the Plaintiff may obtain against the Defendants. The Third Party filed its defence in court denying the Plaintiff’s claim while stating that according to the records held at the lands registry, the Defendants were the registered owners of the Suit Property pursuant to a transfer registered on 1/11/2006. The Third Party further averred that it was upon the Defendants to prove the circumstances under which they acquired the land and got to be registered as the proprietors of the Suit Property.

4. The Plaintiff gave evidence together with her son Owen Ngotho Rubia. She stated that her husband, Evanson Ngotho Rubia died on 28/10/2000. Her husband owned the Suit Property and upon his death, it devolved to his estate. Before her husband died, the Plaintiff stated that the title deed over the Suit Property was deposited at the Aga Khan Hospital where her husband was admitted as security for payment of the hospital bill on 16/6/2000. She stated that her family continued to enjoy possession of the Suit Property after her husband died and that she would plant Napier grass on the land. She stated that the Defendants trespassed on the Suit Property and deposited building materials on the land on 11/5/2007. She demanded that the Defendants desist from trespassing onto the Suit Property and remove their materials from the land but they did not do so. The Plaintiff reported the trespass to Gigiri Police Station and the Defendants continued with the trespass.

5. The Plaintiff claimed that she still held the original lease and title over the Suit Property. She filed this suit on 5/6/2007 together with an application for injunction. She stated that she formed the opinion that fraud had been committed when she saw the copy of the title annexed by the Defendants to their replying affidavit sworn in opposition to the application for injunction. She lodged a complaint over the forgery of her title with the Criminal Investigation Department (CID) who referred the matter to the Chief Land Registrar.

6. The Chief Land Registrar issued summons to all the parties and heard the dispute on 26/3/2009. In her report, the Chief Land Registrar

recommended that the parties await the outcome of this suit and the investigations that were being carried out by CID. After considering the evidence, the Chief Land Registrar formed the opinion that the current registered owners bought the Suit Property but that it did not belong to the seller based on the fact that if Evanson Ngotho Rubia had sold the Suit Property, the certificate of lease he held would have been submitted to the lands office for cancellation. The records at the City Council of Nairobi Rating Section as well as the land rent sections still reflected Evanson Ngotho Rubia as the owner of the suit land. The Land Registrar further noted that entry numbers 2 to 6 in the proprietary section of the register did not look genuine as well as the certificate of lease issued in the name of Kenneth Njoroge Ngugi who it is alleged sold the Suit Property to the Defendants.

7. The Plaintiff and her son referred the case to the police for investigation but they did not receive much help from the police. The Plaintiff reported the matter to the Kenya National Commission on Human Rights who followed up the matter with the County Criminal Investigation Officer. The investigator formed the view that the Land Registrar should have cancelled the documents and title held by the Defendants. The CID sought further documents from the Plaintiff which were subjected to forensic examination. The Plaintiff stated that the green card relating to the suit land was missing at the lands office. The Plaintiff caused a caveat to be registered against the suit land when she learned that the Defendants were trying to sell the land to third parties. The Plaintiff stated that she was not aware that her husband had sold the Suit Property to the Defendants and that she had the original title.

8. Owen Ngotho Rubia gave evidence confirming the facts relating to the acquisition of the Suit Property. He confirmed that the title was in their possession before they gave it to hospital as security for his father's medical bill. He stated that there were no documents showing that his father transferred the suit land during his life time. The Plaintiff also called Jacob Mugeni Oduor, a Forensic Document Examiner to testify. He produced the report which he prepared after carrying out forensic analysis of the signatures on the documents. On cross examination he confirmed that the copy of the green card was not brought to his attention when he carried out the forensic analysis of the documents relating to the Suit Property. The conclusion he drew from the forensic examination was that the signatures of Raymond Njenga and S. Mwendwa who it was claimed had signed the Defendants' documents were different from the known specimen signatures of these two lands officials.

9. The Defendants called Stephen Ndung'u Boro, an employee of Taibjee and Bhalla Advocates as a witness. Mr. Boro confirmed he accompanied the 1st Defendant when he went to the lands office and saw the binder in respect of the Suit Property. He stated that he noted with Mr. Birdi that there were 8 entries against the parcel of land. Entry number 1 was in the name of Evanson Rubia while entry number 2 showed a certificate of lease was issued to Mr. Rubia on 13/1/1983. Entry number 3 indicated that a certificate of lease was issued to Geoffrey Munira Kamau of P. O Box 13073 Nairobi while entry number 4 showed that a certificate of lease was issued to him on 16/6/1989. Entries numbers 5 and 6 showed that a certificate of lease was issued to Kenneth Njoroge Ngugi on 26/10/1995. Entries numbers 7 and 8 indicated that the 1st and 2nd Defendants were registered as proprietors of the Suit Property and a certificate of lease issued to them on 1/11/2006. The witness stated the owner of the land was not satisfied with the search and wanted to see the binder. He stated that they did a search thereafter which confirmed the owner.

10. The 1st Defendant gave evidence and stated that his wife who is the 2nd Defendant in this case had given him authority to give evidence on her behalf. He stated that he purchased the Suit Property from Kenneth Njoroge Ngugi of identity card number 9266023 in July 2006 together with his wife following an advertisement in the *Daily Nation* of 6/7/2006. He produced a copy the advertisement which read "Nyari ½ acre 6,000,000/= Tel: 0733426502 no agent". He stated that he instructed his advocate to conduct an official search which reflected Kenneth Njoroge Ngugi as the owner of the Suit Property. He produced a copy of the certificate of lease which Kenneth Ngugi gave to him to confirm ownership of the land.

11. Having verified the ownership of the land, the Defendants entered into a sale agreement for the purchase of the property on 24/7/2006 at the agreed consideration of Kshs. 4,200,000/=. He produced a copy of the sale agreement. He stated that he paid a deposit of Kshs. 420,000/= being 10% of the purchase price to his advocates Messrs Taibjee and Bhalla Advocates to hold as stakeholder since this firm of advocates was acting for both the vendor and the purchasers in the sale transaction. He instructed the advocates to release Kshs. 200,000/= to the vendor on 25/8/2006. The Defendants made a further payment of Kshs. 150,000/= to the advocates on 12/10/2006 and instructed the advocates to pay Kshs. 300,000/=. He produced copies of these letters together with a copy of the cheque.

12. The 1st Defendant stated that the advocates paid rates of Kshs. 34,009/= to Nairobi City Council on 15/8/2006 to enable them obtain a rates clearance certificate for the land. He also produced a copy of the cheque for Kshs. 7545/= which was paid as land rent to the Commissioner of Lands to enable them seek consent to transfer the Suit Property. Thereafter, a transfer of lease was prepared by his advocates which he signed together with his wife and the seller. He stated that the stamp duty was assessed at Kshs. 128,000/= and they paid it on 18/10/2006. A certificate of lease was issued to the Defendants on 1/11/2006. The court notes that the certificate of lease indicates the lessor as Government of Kenya and the lessee as Evanson Ngotho Rubia in Part A on the property section. The 1st Defendant produced his advocates' letter dated 21/11/2006 which forwarded the balance of the purchase price of Kshs. 3,574,976/= less legal fees and disbursements. The 1st Defendant produced building plans for the development of a residential house that they proposed to erect on the Suit Property. He also produced a rates demand note addressed to Mr. and Mrs. S. H. Birdi issued on 17/3/2014 and evidence of payment of land rent and land rates for 2014.

13. The 1st Defendant stated that he did not agree with the report prepared by CID because it had errors on it. He conceded that he did not write to CID to complain about the errors. He stated that the signature of Sarah Mwendwa was compared with that of Veronica Ngina by the CID officer. He stated that he had paid rates to the City Council of Nairobi up to 2017. During cross examination he was referred to the rates demand notes dated 21/3/2017 and 5/4/2014 which indicated that Evanson Ngotho Rubia was the ratepayer. He confirmed that Evanson Rubia did not sell the Suit Property to him but was emphatic that Evanson Rubia sold the land to Geoffrey Munira Kamau in 1989 who in turn sold it to Kenneth Ngugi in 1995. Kenneth Ngugi then sold the Suit Property to him and his wife.

14. He stated that he could not trace Kenneth Njoroge Ngugi, which is why he did not join him as a party to this suit. He confirmed that he had never occupied the Suit Property and stated that he fenced the land and took possession in November 2006. He stated that he deposited building materials on the Suit Property and built a structure to store the cement. He claimed that the fence he had put up on the Suit Property was blown off by the wind and the iron sheets were stolen. He also stated that he dug up trenches for the foundation of the development that

he wanted to put up on the land but it was demolished by the Plaintiff's agents.

15. Edwin Wafula who works at the Ministry of Lands and Physical Planning gave evidence for the Third Party. He stated that the documents relating to the Suit Property that he perused showed that the Suit Property was leased to Evanson Ngotho Rubia on 13/1/1983. According to him, a transfer to Geoffrey Munira Kamau was registered on 16/6/1989 and a certificate of lease issued. The Suit Property was transferred to Kenneth Njoroge Ngugi on 26/10/1995 and a certificate of lease issued to him. He further stated that the transfer to the Defendants was registered at the lands registry on 1/11/2006. He produced a copy of the white card showing these entries on part B which is the proprietorship section.

16. He maintained that the Third Party's officials acted in good faith in all the transactions relating to the Suit Property and in the discharge of their duties and obligations in registering documents. Further, that the action of the Third Party was as a result of the execution of documents presented by the Defendants' advocates or their agents and the relevant entries made on the registers. According to this witness, there was no fraud or illegality disclosed against the Third Party. The court asked the witness whether the original documents in respect of the transactions reflected in the white card were in the lands office and he responded that he did not check for the transfers but that they should be at the lands office.

17. Parties filed submissions which the court has considered. The issue for determination is whether the court should grant the orders sought by the Plaintiff in the Amended Plaintiff. The Plaintiff submitted that she was the legal representative of the estate of the late Evanson Ngotho Rubia. She relied on Sections 24, 25, 26, 30, 31 and 32 of the Land Registration Act in support of the argument that a registered owner enjoys full interests conferred by registration and that the title she holds is conclusive evidence of proprietorship of the Suit Property unless it can be proved that the title was obtained through fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme.

18. The Plaintiff also relied on Section 31 of the Land Registration Act which stipulates that a certificate of title shall be cancelled upon transfer and a new certificate may be issued to the new proprietor in urging that since she still holds the original certificate of lease, it confirmed that the Suit Property had never been transferred as the Defendants contended. The Plaintiff challenged the copy of the white card produced by the Third Party witness arguing that it was not dated and was not certified as required by Sections 26, 34 and 35 of the Land Registration Act. In addition, the Plaintiff contended that the witness called by the Third Party should have furnished documents confirming the transfers reflected on the white card and submitted that the lands officials acted fraudulently when they transferred the suit land to the Defendants.

19. The Defendants maintained that they were not trespassers on the suit land having purchased it and taken possession of the land following their registration as proprietors of the land on 1/11/2006. They urged that the Third Party's witness confirmed that their title was clean and valid and that they did not commit any fraud in the acquisition of the suit land. The Defendants urged the court to dismiss the suit.

20. The Third Party submitted that there was no right of indemnity as the Defendants contend, since there was no contract between the Defendant and the Third Party. It submitted that it would only be liable to pay the costs if any, based on the fact that the Defendants did not frame any questions to be determined by the court as to liability between the Defendant and the Third Party. The Third Party submitted that the Plaintiffs had failed to prove fraud to a standard higher than the balance of probabilities but lower than beyond reasonable doubt. The Third Party challenged the evidence of the forensic document examiner for failing to examine the signature of the Land Registrar who signed the lease issued to Kenneth Ngugi. The Third Party also argued that the document examiner did not examine documents that proved that there was a transfer from Evanson Ngotho to Kenneth. It is doubtful whether these documents really exist in the records of the Third Party since they were not produced by the witness who testified on behalf of the Third Party. In further support of the argument that no fraud was committed, the Third Party submitted that no criminal charges were preferred against the Defendants, Kenneth Ngugi or the lands officers. The Third Party submitted that the Defendants had proved how they acquired and took possession of the Suit Property.

21. The Land Registration Act came into force in May 2012. At the time the transactions that are the subject matter of this suit took place, the repealed Registered Land Act (RLA) was applicable to the Suit Property. Section 15 of RLA provided that registration, which is defined under the Act as making an entry, note or record in the land register, would be effected by an entry in the land register in the form prescribed by the Chief Land Register, and by the cancellation of the entry which it replaced. Section 33 of RLA required the production of the certificate of lease on the registration of any dealing in relation to that parcel of land, unless the Registrar dispensed with its production. In case of a transfer, the old certificate if produced had to be destroyed when a new certificate was issued to the new proprietor.

22. Had the Plaintiff's late husband, Evanson Ngotho Rubia, transferred the Suit Property as the Defendants and Third Parties contend, then the original certificate of lease which the Plaintiff has in her possession should have been produced at the time of transfer for destruction by the Registrar before a new certificate of lease was issued to Geoffrey Munira Kamau on 16/6/1989. There is no evidence to show that the Land Registrar dispensed with the requirement for Evanson Ngotho Rubia to produce the original certificate of lease over the Suit Property at the time it is claimed the land was transferred to Geoffrey Munira Kamau who subsequently transferred it to Kenneth Ngugi in 1995, for Kenneth Ngugi to have transferred the suit land to the Defendants.

23. It is not in dispute that the Plaintiff still holds the original certificate of lease over the Suit Property. The Third Party who is the custodian of land records did not produce the transfers and other documents held in the parcel file relating to the Suit Property, which would have assisted the court to establish that indeed the late Evanson Ngotho Rubia transferred the Suit Property. The 1st Defendant stated that he could not trace Kenneth Ngugi Njoroge who sold him the suit land, which raises doubt as to the genuineness of the transfer of the Suit Property to the Defendants. The court is persuaded that the suit land was illegally transferred to the other parties whose names appear on the extract of the white card produced by the Third Party.

24. The court agrees with the Plaintiff that the extract of the white card produced by the Third Party should have been certified by the Registrar as a true copy of the extract for this court to receive it as *prima facie* evidence of its contents in accordance with Section 37 of the RLA.

25. The Defendants sought indemnity or contribution against the Third Party in respect of any judgement that the Plaintiff may obtain against

them. In the court's view, any claim for indemnity the Defendants may wish to pursue against the Third Party should be made under Part X of the RLA. Section 144 of RLA sets out the instances when the right to indemnity would arise while Section 146 sets out the procedure for claiming indemnity against the Government.

26. The Plaintiff has proved her case on a balance of probabilities. The court grants prayers a, b, c, i, j and k of the Amended Plaint dated 26/9/2016. The Plaintiff is awarded the costs of the suit to be borne by the Defendants and the Third Party.

Dated and delivered at Nairobi this 27th day of September 2019

K.BOR

JUDGE

In the presence of: -

Mr. R. Ngare for the Plaintiff

Dr. J. Khaminwa for the Defendants

Ms. R. Kemunto for the Third Party

Mr. V. Owuor- Court Assistant