



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 165 OF 2017

FORMERLY NAKURU ELC 151 OF 2016

FLORENCE W. KURIA.....1ST PLAINTIFF

JOB ELIJAH KURIA.....2ND PLAINTIFF

-VERSUS-

JOEL KIPKOSGEI CHIRCHIR.....DEFENDANT

JUDGEMENT

By an Originating Summons dated 3rd May, 2016 the Plaintiffs who are the Joint Administrators and representatives of the estate of Francis Kuria Njoroge sought to be declared as the legal owners of land parcel No. NAROK/CIS MARA/NKOBEN/77 having acquired beneficial interest of the aforesaid land by virtue of being confirmed as the lawful Administrators of the estate of Francis Njoroge Kuria deceased vide Succession Cause No. 15 of 2005 and further that the registration of the Defendant as the registered owner of the suit land be declared null and void and the Plaintiff name be entered in the register in lieu of the deceased. The Plaintiffs/Applicants further sought for an order directing the Defendants, his servants and agents to vacate from the suit land plus costs of the suit.

It is the Plaintiffs' case that the suit land was originally allocated to the deceased and after his death the Defendant fraudulently caused the land to be transferred to himself notwithstanding that the deceased had acquired ownership on 13th December, 1980 by virtue of the fact the Defendant fraudulently acquired access to the deceased documents and caused the suit land to be transferred to himself without the consent of the Plaintiffs/Applicants.

In support of the Originating Summons was also a supporting affidavit sworn by the Plaintiffs/Applicants who deponed that they commenced the instant suit as Joint Administrators of the Estate of the late Francis Kuria Njoroge who was the original owner of the suit land prior to the same being transferred and registered in the Defendant's name fraudulently.

The Plaintiffs/Applicants further averred that the Defendant who had accessed the deceased documents without their consent forged their respective signatures and consequently caused the land transferred to him.

The Originating Summons was opposed by the Defendant/Respondent who filed a Replying Affidavit in which he deponed that he was a purchaser for value of the suit land and he paid the consideration after conducting due diligence at the District Land Registrar at Narok and a title to the land issued to him on 18th February, 2014. He further averred that he has been in possession and occupation of the land until June, 2015 when the Plaintiffs/Applicants came to lay claim on the land alleging fraud.

The Plaintiffs/Applicants by leave of the court filed a further affidavit in which they denied the Defendant/Respondent contention that he was a purchaser for value and contend that all the documents that the Defendant/Respondent were obtained fraudulently and caused the same to be transferred in his name.

When the Originating Summons came up for hearing Florence Wanjiku Kuria who is the widow of the late Francis Kuria testified. She stated that she is a first administrator of the estate of the deceased jointly with her son. She produced as exhibits 1,2,3 a death certificate, certificate of grant and a title deed to the suit land in the name of the deceased.

The 1st Plaintiff/Applicant stated that in 2003 she was unfortunately diagnosed with cancer and has been in and out of hospital and couldn't administer the estate effectively as her other co-administrator who is her son was out of the country. She learnt on 29th April, 2016 that the Defendant caused the transfer of the land to himself. She produced a certificate of official search.

Even though the Defendant/Respondent had filed a replying affidavit that was adopted as a defence he never appeared to defend the suit herein despite being given a number of chances to do so.

I have heard the testimony of the Plaintiff and have read the Defendant's Replying Affidavit and the submissions filed by the Plaintiff and the issue for determination before me is:-

- (i) Who is the legal and bonafide owner of the suit land
- (ii) Whether the Plaintiffs have satisfied the conditions for grant of a permanent injunction
- (iii) Whether the defendant should be evicted from the suit land

It is the Plaintiff's case that the suit land was registered in the name of her late husband. She has produced before court an original title, green card issued in 1980 showing that the suit land was previously registered in the name of the deceased. The Defendant on his part claimed that he is a purchaser for value of the land having purchased the same and paid full consideration and consequently had the suit land transferred to him.

From the evidence and the testimony, the Plaintiff had produced the original title to the land, the defendant though claiming that he purchased the suit land had neither annexed to his replying affidavit the sale agreement in respect neither does he state when he purchased it and what was the consideration thereof.

The Defendant does not categorically state if he purchased the suit land from the deceased and the Plaintiffs have vehemently denied ever signing any sale agreement or transfer in respect of the suit land.

From the above I find that the Plaintiff/Applicant has discharged the burden of proof on a balance of probabilities that the Defendant had obtained title to the land fraudulently in order to dispose it. Furthermore, the Defendant has failed to challenge and contravene the evidence of the Plaintiff and he failed to produce any document to show how he came to be registered as the owner of the suit land.

In the case of *Benja properties limited-versus-Syedna Mohammed Burhannudin Sahed & 4 Others (2015)EKL*R the court held that where two titles exist the applicable law shall be section 23 (1) of the Registration of Titles Act wherein it is provided that a certificate issued to a purchaser upon transfer shall be taken by all courts as absolute and indefeasible and not subject to challenge unless obtained by fraud or misrepresentation.

In the instant case I find that the Defendant's title was obtained fraudulently.

On whether the Plaintiff has established the grounds for the grant of a permanent injunction the condition for the grant of the same is now well established. I find that the Defendant has no claim and colour of right whatever in respect of the land he has not demonstrated that he has an interest in the land and since I have found that he has obtained the transfer of land fraudulently I order that he vacates from the suit land and he is restrained permanently from the said land.

In conclusion therefore I enter judgement for the Plaintiffs against the Defendant in the following terms:-

1. A declaration do issue that FLORENCE WANJIKU KURIA and JOB ELIJAH KAMAU KURIA being administrators of the estate of the late FRANCIS KURIA NJOROGE are beneficial owners of land parcel No. NAROK/CIS MARA/NKOBEN 77
2. That a declaration do issue that the registration of the Defendant/Respondent JOEL KIPKOSGEI CHIRCHIR was fraudulent, null and void and consequently his names be deleted from the register.
3. That the Defendant/Respondent do vacate from the suit land within 60 days and in default eviction orders do issue thereafter.
4. Costs of the suit to the Plaintiff/applicant

Orders accordingly.

DATED, SIGNED and DELIVERED in open court at NAROK on this 26th day of September, 2019

Mohammed Kullow

Judge

26/9/19

In the presence of: -

CA:Chuma

N/A for parties and advocates

Mohammed Kullow

Judge

26/9/19