



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 554 OF 2016

JOSHUA NYANGAU MANGERA PLAINTIFF

VERSUS

MOSES NYANDUSI MACHOGU 1ST DEFENDANT

JAMES KIPRONO SANG 2ND DEFENDANT

JUDGMENT

1. By plaint dated 13th December 2016, the plaintiff averred that through a written sale agreement dated 25th April 2016, he purchased the parcel of land known as Title No. Nakuru/Baraget Settlement Scheme/1622 measuring approximately 1.2 hectares (hereinafter “the suit property”) from the 1st defendant at a consideration of KShs 183,000 which amount he paid in full upon execution of the agreement. That the 1st defendant surrendered to him the original of the title deed for the suit property and he took possession of the property. He further averred that the 1st defendant later purported to sell and transfer the suit property to the 2nd defendant, a transaction which he has branded fraudulent and illegal.

2. The plaintiff therefore sought judgment against the defendants jointly and severally for:

- a) *A declaration that the plaintiff is the rightful owner of all that parcel of land known Nakuru/Baraget Settlement Scheme/1622.*
- b) *An order for cancellation of title number Nakuru/Baraget Settlement Scheme/1622 in the name of 2nd defendant and registration of the plaintiff as the rightful owner of the land.*
- c) *Costs of the suit.*
- d) *Any other relief this Honourable court may deem fit to grant.*

3. Despite being served with summons to enter appearance, the defendants neither entered appearance nor participated in the hearing of the suit. Accordingly, the plaintiff’s suit is unopposed.

4. At the hearing, only the plaintiff testified. He adopted his Witness Statement dated 9th December 2016 as his evidence in chief. He had stated as follows in the said statement:

1. *I am Joshua Nyangau Mangera of P O BOX 2489 KISII.*
2. *I am currently a resident of Nyamira County and a farmer.*
3. *I recall sometimes in the year 2006 I was looking for land to buy at Molo Bararget settlement.*
4. *In the process I was informed by a friend who is a resident of Molo of land that was being sold at Bararget Settlement scheme Molo. The friend was called Sagwe Nyarae.*
5. *I travelled from Nyamira to Molo Bararget settlement scheme where I was shown a 3 acre piece of land and I was told the owner was selling it.*
6. *It is then that I was taken to Keringet town where I met Moses N. Machogu who confirmed that he was the owner of land parcel Nakuru /Baraget Settlement scheme/ 1622. He was introduced to me by Sagwe Nyarae.*

7. I negotiated with Moses Nyandusi Machogu on the purchase price and agreed the purchase price to be Kshs. 61,000.00 per acre making a total of Kshs. 183,000.00.

8. On the 25th April 2006 after raising the full purchase price we went with Sagwe Nyarae to Keringet town where we met Moses Nyandusi Machogu and together we travelled to Molo town to the offices of Omonywa Mamwancha & Co. Advocates. A sale agreement was prepared and I paid Moses Nyandusi Machogu the full purchase price. All of us signed the sale agreement. Moses Nyandusi Machogu at the time of signing the sale agreement said he did not have his PIN and National Identity Card which he promised to avail at the offices of Omonywa Mamwancha & Co. Advocates.

9. After signing the sale agreement he surrendered the original title to me for L.R. NAKURU/BARARGET SETTLEMENT SCHEME/1622 and I was to collect later the duly executed transfer forms together with the completion documents from the offices of Omonywa Mamwancha & Co. Advocates.

10. I took possession of the land after the sale agreement.

11. Before we could complete the transfer there were election post violence (sic) of 2007-2008 and as a consequence Moses Nyandusi Machogu relocated from Keringet.

12. In the year 2013 we traced Moses Nyandusi Machogu at Golgorian Kilgoris. We went to the shamba and found the same had been fenced off.

13. On enquiry we learnt that the land had been fenced off by James Kiprono Sang who was alleging that he had purchased the same land from Moses Nyandusi Machogu.

14. I lodged the complaint with the assistant chief and later to the Deputy County Commissioner for Kuresoi Sub County. The said James Kiprono Sang was summoned to the offices of the deputy commissioner but he did not appear,

15. The sale of the land by Moses Nyandusi Machogu to James Kiprono Sang was fraudulent. Having sold the land to me he had no proprietary rights in the land that he was now purporting to sale.

16. I pray for cancellation of the title issued to James Kiprono Sang and a declaration that the suit land belong to me as the first purchaser in time.

That is all I wish to state.

5. The plaintiff produced the following documents among others as exhibits: Sale agreement dated 25th April 2006, original of the title deed for the suit property in the name of Moses N. Machogu and letter Deputy County Commissioner Kuresoi Sub County dated 20th April 2015.

6. At the conclusion of the hearing, counsel for the plaintiff filed written submissions. It is argued in the submissions that having received the full purchase price and having put the plaintiff in possession, the 1st defendant no longer had any proprietary rights in the suit property capable of being transferred to the 2nd defendant. Relying on **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, counsel submitted that the plaintiff's claim should not be defeated despite the 1st defendant not having availed all completion documents including consent of the Land Control Board to him.

7. I have carefully considered the pleadings, the evidence and the submissions in this matter. The plaintiff's case is uncontroverted. From the material placed before the court, I am satisfied that the 1st defendant was the registered proprietor of the suit property and that he sold it to the plaintiff pursuant to the sale agreement dated 25th April 2006, that the plaintiff paid the purchase price in full and that he was put in possession. According to the plaintiff, the 1st defendant later sold the very same property to the 2nd defendant in the year 2013 or thereabouts.

8. As far as the plaintiff is concerned, the 2nd defendant is the current registered proprietor of the suit property. It is for that reason that the plaintiff seeks at prayer (b) of the plaint, cancellation of registration of the 2nd defendant as proprietor of the suit property. Unfortunately, the plaintiff did not produce any evidence that the 2nd defendant is the registered proprietor. The title deed produced shows that the 1st defendant was registered proprietor as at 12th October 2005. Whereas the plaintiff produced an application for official search dated 3rd May 2006 as well as payment receipt for the same, no certificate of search was produced. So as to be sure that this was not an oversight, I perused the list of documents as well as the bundle of documents filed by the plaintiff. I found neither certificate of search nor a copy of title document showing the 2nd defendant as registered proprietor. I also note that the application for official search as well as payment receipt which were produced were dated 3rd May 2006, a whole 12 years before the trial of this suit. The plaintiff ought to have been more diligent.

9. In such circumstances as demonstrated above, I am unable to order cancellation of a title whose current registered owner I cannot ascertain. Similarly, I cannot issue a declaration that the plaintiff is the lawful owner of the suit property when I cannot ascertain that the registered proprietor of the suit property has been given a hearing. I cannot even rely on the title deed which shows that the 1st defendant was registered proprietor as at 12th October 2005 when the plaintiff's own testimony is that that is no longer the case.

10. In view of the foregoing I dismiss this suit with no order as to costs.

Dated, signed and delivered in open court at Nakuru this 26th day of September 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Kipruto holding brief for Mr Ndubi for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd defendant

Court Assistants: Beatrice & Lotkomoi