



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 545 OF 2010

PAUL NG'ANG'A NDUNG'U.....PLAINTIFF

VERSUS

STEPHEN WAINAINA WANG'OMBE.....1 ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2 ND DEFENDANT

THE ATTORNEY GENERAL.....3 RD DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit through a plaint dated 15/11/2010. The plaint was amended on 9/2/2013. He contended that he was at all material times the legitimate registered proprietor of Land Title Number **Juja/Juja East Block 1/1306 (the suit property)**. In July 2010, he learnt from his mother and from a Mr Ndegwa that the suit property was up for sale. He subsequently established that in February 2010, without his knowledge or approval, the 1st defendant had fraudulently and illegally caused the suit property to be transferred into his name. Consequently, he brought this suit seeking the following reliefs:

i. That there be a declaration that the transfer of LR NO JUJA/JUJA EAST BLOCK 1/1306 to the 1st defendant was fraudulent and illegal.

ii. Cancellation of the title deed held by the 1st defendant and rectification of the register to LR NO JUJA/JUJA EAST BLOCK 1/1306 to be in the plaintiff's name.

iii. A permanent injunction restraining the defendants, their agents and/or servants or anybody claiming under the defendants from trespassing, selling, alienating, disposing and/or interfering with the plaintiff's land.

iv. Costs of this suit.

v. Any other remedy.

Case of the Plaintiff

2. The plaintiff's case was that he is the legitimate proprietor of the suit property and was its registered proprietor until February 2010 when the parcel register of the suit property was fraudulently altered to reflect the 1st defendant as the registered proprietor. He contended that the transfer to the 1st defendant was procured without his knowledge and was fraudulent and illegal.

Case of the 1st Defendant

3. The 1st defendant filed a statement of defence in which he denied the plaintiff's claim of ownership of the suit property and the allegation of fraud in the transfer of the suit property into his name. The 1st defendant contended, in the alternative, that the suit property was sold to him by the plaintiff's late father, Michael Ndung'u Nginya and the said sale was done with the full knowledge, consent and participation of the plaintiff and was for the benefit of the plaintiff. The 1st defendant further contended that the plaintiff was a dishonest person who alongside his mother was out to take advantage of his late father's demise to undo what was done during his lifetime.

Case of the 2nd and 3rd Defendants

4. The 2nd and 3rd defendants filed a joint statement of defence in which they denied the allegations of fraud on part of the 2nd defendant. They further contended that the transfer of the suit property into the name of the 1st defendant was based on documents presented to the 2nd defendant's offices and the 2nd defendant effected the transfer after exercise of due diligence and on the belief that the said documents were

genuine. It was the case of the 2nd and 3rd defendants that the 2nd defendant performed his duties as prescribed by the law, without negligence or fraud.

Evidence by the Plaintiff

5. Hearing commenced on 12/10/2017. The plaintiff testified as PW1. He adopted his witness statement dated 25/4/2011. He testified that he was the owner of the suit property. He stated that the suit property was bought by his mother who had it registered in his name. He informed the court that he learnt from Mr Ndegwa, a land broker, that his land was up for sale. Together with Mr Ndegwa, they proceeded to Thika where they met the 1st defendant who showed them a title bearing the 1st defendant's name. Thereafter, they proceeded to Thika Lands Registry where he obtained a search certificate which bore the 1st defendant's name as the registered proprietor of the suit property. He stated that he reported the matter to the police. He denied selling or transferring the suit property to the 1st defendant. He added that he had never attended any Land Control Board. PW1 stated that in 2003, he was already an adult aged 22 years and had obtained an identity card. He denied being a party to the agreement of sale dated 19/8/2003 purported to be between the 1st defendant and his deceased father, Michael Ndung'u Nginya. He stated that his father died in the year 2006. He informed the court that his original certificate of title was stolen during a robbery.

6. During cross-examination by counsel for the 1st defendant, he stated that Gazette Notice No 2224 which itemized the title of the suit property as stolen was procured by his late father. He stated that the CID registered a restriction against the title after the Thika Land Registrar declined to register a caution. In cross-examination by the 2nd defendant's counsel, he stated that the consent used to procure the transfer was from Ruiru Land Control Board which did not have jurisdiction over the suit property which is situated in Juja. He further stated that he did not change the details of the parcel register to remove the word "minor" after he attained the age of 18. In re-examination, he stated that his father had reported six titles as missing and not all missing titles were registered in his father's name. He produced the following documents: (i) copy of share certificate dated 25th February 1984; (ii) copy of official search dated 17/9/1999; (iii) copy of Gazette Notice Number 2224; (iv) copy of Gazette Notice receipt dated 15/04/1999; (v) copy of receipt in respect of caution; (vi) copy of letter to the police; (vii) copy of application for caution; (viii) copy of map showing the plots; (ix) copy of plaintiff's identify card (x) copy of official search dated 30/9/2010; (xi) copy of notice to the Attorney General dated 24/08/2010; and (xii) copy of death certificate relating to Michael Ndungu Nginya.

7. On 20/3/2018, Maryanne Wanjira Ndungu testified as PW2. She stated that the plaintiff was her son. She adopted her witness statement dated 25/4/2010 and filed in court on 18/6/2012. She testified that together with her late husband, they purchased six plots through acquisition of three equal shares from Kiganjo Location Ranching Company. The six plots were registered in the names of Angelina Ndungu, Maryanne, Paul Ng'ang'a, Janerose Wangari Ndungu, John Nginya and Michael. She stated that they took possession and later three of the six plots were sold. The registered proprietors signed the transfer instruments. She stated that her late husband never sold the suit property to the defendant. She informed the court that they were robbed in 1999 and during the robbery, they lost various title deeds. She stated that the suit property was registered in the plaintiff's name when he was still a minor. During cross-examination, she stated that she bought the suit property at Kshs 15,000 from Kiganjo Location Ranching Company. She stated that Gazette Notice No 2224 was procured by her late husband, Michael Ndungu Nginya. She added that she was in possession of the title deeds when they got lost.

Evidence by the 1st defendant.

8. The 1st defendant testified as DW1. He adopted his witness statement dated 26/7/2012. He stated that he purchased the suit property for a consideration of Kshs.650,000 from Michael Ndung'u Nginya who was the plaintiff's father in 2003. He stated that at the time of purchase, the suit property was registered in the plaintiff's name. He informed the court that the title he purchased was a re-issued title because the original title was lost. He stated that the consent to transfer was obtained by the vendor at Ruiru Land Control Board in 2005. He stated that he was aware that a fraud was reported at the CID but he was never charged. During cross-examination, he stated that he signed the transfer at the office of a Macharia Njoroge who was an advocate. He added that he did not have the original agreement for sale, triplicate copy of the transfer signed by the deceased, and receipt relating to stamp duty. He further stated that he lodged the transfer for registration in 2005 and got the title in 2010. He stated that he did not have documentary proof of payment of purchase price because he he paid the purchase price in cash. He added that he did not have any evidence that the plaintiff's father had the plaintiff's consent to transfer the suit property given that the plaintiff was an adult by the time of transfer. Lastly, he stated that the signature on the application for consent was endorsed by the plaintiff's father. He produced the following documents: (i) copy of sale agreement dated 19th August 2003; (ii) copy of letter of consent dated 2nd August 2005; (iii) acknowledgment receipt dated 5th August 2005; (iv) copy of the certificate of official search dated 30th September 2010; (v) letter dated 5th October 2010 from D.C.I.O Thika; and (vi) copy of the certificate of official search dated 13th October 2010.

Evidence by the 2nd Defendant

9. Robert Mugendi Mbuba, Thika Lands Registrar, testified as DW2. He stated that the suit property measured approximately 1.174 hectares. He added that the parcel register (green card) was opened on 12/5/1993 and the land was registered in the plaintiff's name. He testified that when the plaintiff became of age, his Identification Number 22761529 (sic) was entered in the parcel register. He said that on 8/11/1999, a title deed was re-issued pursuant to Kenya Gazette Notice Number 2224 dated 23/4/1999. He stated that the 1st defendant was registered as the owner of the suit property on 28/1/2010 and was subsequently issued with a title deed on 29/1/2010. He informed the court that the parcel file did not have a copy of the transfer to the 1st defendant. He added that, ordinarily, a parcel register should contain the transfer documents, land control board consent, application form, copies of IDs and PINS of the parties. The parcel file did not have those documents. He produced a green card which was marked as Defence Exhibit No 8.

10. During cross-examination, he stated that the transfer to the 1st defendant was registered by Mr Gichuki who at the time of trial was stationed in Nyandarua. He stated that the suit property did not have any encumbrance and was registered in the name of the 1st defendant. He further stated that the re-issuance of the title was made after the plaintiff's father reported that the original title was lost. He referred to entry number 5 which related to the transfer to the 1st defendant on 28/1/2010 which was supposed to have been executed by the plaintiff. He stated that as at 1993, the plaintiff was still a minor and could not deal with the title. During further examination, he stated that the re-issued title should have come out in the name of the plaintiff. He further stated that when a transfer is presented, the registrar looks at the

certified copies of the national identify card and the Kenya Revenue Authority personal identification number which should tally with the details of the registered proprietor. He testified that he could not confirm whether there was compliance in terms of the requisite documents. He added that in practice, a transfer is prepared in triplicate; for the registry, for the transferee, and for the transferor. He stated that the restriction against the register by the CID was as a result of a possible fraud. He further stated that the application for consent and the transfer should have been signed by the plaintiff, not by the plaintiff's father.

Submissions by the Plaintiff

11. Counsel for the plaintiff filed written submissions dated 12/2/2019. He framed the following as the six issues following for determination in the suit: (a) whether the sale agreement dated 19th August 2003 between the 1st defendant and the plaintiff's father was valid; (b) whether the plaintiff's father had power to transfer LR Juja/Juja East Block 1/1306 to the plaintiff; (c) whether the plaintiff had proved fraud/forgery on the part of the 1st and 2nd defendants; (d) whether the Land Registrar exercised due diligence when he transferred the suit land to the 1st defendant; (e) whether the plaintiff was entitled to the orders sought; and (f) who should pay the costs of the suit.

12. Counsel for the plaintiff submitted that the deceased had no capacity to either enter into a sale agreement with the 1st defendant or transfer the suit property to the 1st defendant. He added that the deceased did not have the capacity to procure consent from the land control board. He contended that the purported consent was a fraud because the plaintiff was not privy to it. Counsel further argued that given that the plaintiff did not execute the transfer, the transfer of the suit property to the plaintiff was illegal and unprocedural. Counsel faulted the Land Registrar for failing to notice that the plaintiff had not executed the transfer document and the person presenting the instrument of transfer had not paid the requisite statutory payments such as stamp duty. Counsel added that the transfer of the suit property to the 1st defendant was tainted with illegalities and fraud and was null and void. He urged the court to grant the orders sought in the plaint.

Submissions by the 1st Defendant

13. The 1st defendant filed written submissions dated 25/6/2019. He framed the following as the eight issues falling for determination in this suit: (i) whether the suit property was fraudulently registered by the 1st defendant in his name; (ii) whether the plaintiff had any legal capacity to own property; (iii) whether upon determination of (i) above, the plaintiff had capacity to sell or in any way deal with the suit property based on his *minor age* status on the face of the title; (iv) whether upon the attainment of the age of majority the plaintiff had a lawful duty to regularize his age status on the face of the title; (v) who had initially purchased the property, the plaintiff's mother or the plaintiff father? (vi) Does (v) have any force of law on who subsequently sells during subsistence of a marriage? (vi) the legal effect on the determination of the fraud allegations lodged at the Criminal Investigation Department, Thika Office, on this suit; (vii) whether the 1st defendant was an innocent purchaser for value without notice; and (viii) the 2nd defendant legal duty as custodian of the green card (sic).

14. Counsel for the 1st defendant submitted that the burden of proof lay on the plaintiff. He added that as registered proprietor, the 1st defendant's title was indefeasible. The 1st defendant further submitted that as the legal custodian of lands records, the 2nd defendant had a duty to ensure that proper procedures relating to registration of titles were adhered to and he never found anything irregular or inconsistent with regard to the registration of the 1st defendant's title. He faulted the plaintiff for not presenting himself to the Land Registrar at the time he attained the age of majority. The 1st defendant added that the Criminal Investigation Department had found nil culpability on part of the 1st defendant. He urged the court to dismiss the plaintiff's suit.

Submissions by the 2nd and 3rd Defendants

15. The 2nd and 3rd defendants, through Ms Rose Nyawira, Litigation Counsel, submitted that there was no evidence of fraud, illegality or negligence on the part of the 2nd defendant in registering the transfer in favour of the 1st defendant. She contended that the 2nd defendant always relied on documents presented by the parties to a transaction to register entries on the green card. She added that the fact that the parcel file was missing from the Lands Registry had been explained by the Land Registrar. She submitted that the plaintiff had not proved fraud on part of the 2nd defendant.

Analysis & Determination

16. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. Similarly, I have considered the separate issues framed by the parties in their respective submissions. Two key issues fall for determination in this suit. The first issue is whether the transfer of the suit property to the 1st defendant was procured illegally, unprocedurally or through fraud or misrepresentation. The second issue is whether the plaintiff is entitled to the prayers sought in the plaint.

17. The Thika Land Registrar produced a certified extract of the Parcel Register for the suit property, **Title Number Juja/Juja East Block 1/1306**. The parcel register shows that it was opened on 12/5/1993 in the name of the Government of the Republic of Kenya and on the same day, it was registered in the name of Paul Ng'ang'a Ndungu (the plaintiff). On 28/1/2010, the land was transferred to Stephen Wainaina Wangombe (the 1st defendant). The transfer to Stephen Wainaina Wangombe is what is in contest in this suit. At the time the impugned transfer was procured, transfer of the material land was governed by the legal framework in the repealed Registered Land Act, Chapter 300 of the laws of Kenya (**the repealed Act**). Part VI of the repealed Act contained an elaborate mandatory framework on how instruments disposing interests in land were to be executed and disposed by the registrar upon registration after-registration. Relevant to the key questions in this suit was Section 109(1) which required that any instrument evidencing a transfer be executed by the persons shown by the register to be proprietors of the interest to be transferred. It provided thus:

“109(1) every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the interest:

Provided that the registrar may dispense with execution by any particular party (other than the transferor or transferee) where he considers that the execution is necessary”.

18. Secondly, the legal framework in Section 112 required the land registrar to keep in the registry every instrument registered by him for as long it supported a current entry in the register and for a further period of six years after the entry ceased to be current. Thirdly, Section 113 permitted the registration of a minor as proprietor of land but outlawed dealings in land by a person under the age of 21 years. Section 113 required the registrar to enter a restriction on every parcel register where a minor was registered as proprietor.

19. In the present suit, the plaintiff produced his identity card showing that he was born in 1981. He testified that in 1999, he was 18 years old. It is not in dispute that the suit property was registered in the plaintiff's name in 1993. The official search issued on 17/9/1999 shows that the word "minor" was endorsed in the register to notify the public that the land belonged to a minor. The 1st defendant contends that, he purchased the suit property from the plaintiff's father on 19/8/2003. The 1st defendant further contends that together with the plaintiff's deceased father, they obtained consent from Ruiru Land Control Board to transfer the suit property to the 1st defendant in August 2005. The 1st defendant adds that 5 years later, he procured registration of the suit property into his name. The plaintiff's father died in 2006.

20. From the evidence presented to the court, it is clear that in 2003, the year the 1st defendant contends to have purchased the suit property from the plaintiff's father, the plaintiff was 22 years old. The plaintiff was not privy to the said sale agreement. In 2005, the year when the 1st defendant contends that, together with the plaintiff's deceased father, they appeared before the Ruiru Land Control Board and procured a consent in the name of the plaintiff, the plaintiff was 24 years old. The plaintiff was not privy to the application for the consent. In 2010, the year the 1st defendant procured the execution of the transfer by the plaintiff's father and registration of the suit property into the 1st defendant's name, the plaintiff's father was dead, having died in 2006. The plaintiff who was 29 years old in 2010 was not privy to the said transfer. Since the dead tell no tales, the court does not know whether what is attributed to the plaintiff's deceased father indeed happened.

21. It is clear from the legal framework in Part VI of the repealed Act that the plaintiff having attained the age of 21 in the year 2001, the suit property could not be legally sold or transferred to the 1st defendant by persons other than the plaintiff. The plaintiff alone or through a duly appointed attorney had the statutory capacity to sell and transfer the suit property. The purported sale agreement, consent and transfer, procured in the years 2003, 2005 and 2010, respectively, were illegalities and are therefore null and void.

22. I would have given the 1st defendant the benefit of doubt in relation to the allegation of fraud. I however note that the application for registration of the impugned transfer shows that the transfer was dated 20/8/2010. There is uncontroverted evidence that the plaintiff's father died in 2006 and could not have resurrected from the grave to execute a transfer in August 2010. Secondly, there is uncontroverted evidence that the Ruiru Land Control Board did not have jurisdiction over the suit property which is situated in Juja and could not issue a valid consent to facilitate a transfer relating to property situated in Juja in the year 2010. There is therefore sufficient evidence of fraud and misrepresentation on part of the 1st defendant, in addition to the illegalities and unprocedural elements analysed above. It is therefore my finding that the plaintiff has proved that registration of the 1st defendant as proprietor of the suit property was procured illegally, unprocedurally, fraudulently and through misrepresentation.

23. The 1st defendant contended that Michael Ndungu Nginya properly sold and transferred the suit property to him because he is the one who had caused a gazette notice to be published in 1999 notifying the public about loss of the title to the suit property. In my view, placement of the gazette notice was one of the activities contemplated under Section 114(3) of the repealed Act. It did not confer upon Michael Ndungu Nginya the power to sale or transfer the suit property which belonged to the plaintiff.

24. The 2nd and 3rd defendants argued that there was no impropriety or fraud on part of the 2nd defendant. Firstly, the official search issued in 1999 showed that the register clearly indicated that the registered proprietor was a minor. Secondly, the law required the 2nd defendant to place a restriction on the suit property because it belonged to a minor. Thirdly, there is uncontroverted evidence that in 2010, the Ruiru Land Control Board did not have jurisdiction over the suit property. Against that background, the 2nd defendant proceeded to effect a transfer against the subject title without bothering to find out the age and whereabouts of the registered proprietor who in 1993 was a minor. He did so without questioning the validity of the consent uttered to him. Fourthly, as custodian of lands records, the 2nd defendant clearly abdicated the statutory duty requiring him to keep the transfer instrument together with the accompanying documents throughout the currency of the existing registration and keep them for a further period of six years upon change of proprietorship in the register. Because of the foregoing, it is my view that the registrar who effected the illegal transfer knew or ought to have known that the registration was illegal, fraudulent and irregular.

25. Having come to the finding that the transfer to the 1st defendant and the resultant title held by him were obtained fraudulently, irregularly, through misrepresentation, and contrary to the statute, the legal status of the said title is well settled in our jurisprudence as outlined in a line of decisions, among them: **(i) Arthi Highway Developers Limited & 6 Others (2015) eKLR**; and **(ii) Charles Karathe Kiarie & 2 Others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others (2013) eKLR**. The title is a nullity in law.

26. The last issue is whether the plaintiff is entitled to the orders sought in the plaint. The plaintiff sought a declaration that the impugned transfer was fraudulent and illegal. He also sought an order cancelling the title held by the 1st defendant. Thirdly, he sought a permanent injunction against the defendants. Lastly, he sought costs of the suit. Having found that the impugned transfer was procured fraudulently, unprocedurally, through misrepresentation, and in contravention of the express provisions of the Registered Land Act, the prayers sought by the plaintiff are in my view appropriate.

Disposal Orders

27. In summary, it is my finding that the plaintiff has proved his case on a balance of probabilities. Consequently, I make the following orders in tandem with the prayers sought in the plaint:

a) It is hereby declared that the transfer of Land Title Number Juja/Juja East Block1/1306 to the 1st defendant was fraudulent and illegal.

b) It is ordered that the resultant title deed held by the 1st defendant stands cancelled and the relevant Land Registrar is ordered

to rectify the Parcel Register for the said piece of land to reflect Paul Ng'ang'a Ndung'u as the registered proprietor.

c) A permanent injunction is hereby issued restraining the 1st defendant together with his agents and servants and anybody claiming title under him against trespassing on or dealing with the suit property.

d) The 1st defendant shall pay the plaintiff costs of this suit

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF OCTOBER 2019.

B M EBOSO

JUDGE

In the presence of:-

No appearance for the parties

Court Clerk - June Nafula