



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 116 OF 2013

FRANCIS GITUCHU MURIMI.....PLAINTIFF

VERSUS

ANTHONY KIHU KIMANI.....DEFENDANT

JUDGMENT

1. This suit was initially filed in the High Court as Nakuru HCCC No 259 of 2012. It was later transferred to this court and became ELC 116 of 2013.

2. By plaint dated 19th July 2012, the plaintiff averred that he was the sole registered proprietor of all that parcel of land which was known as **Nakuru Municipality Block 22/661** measuring 2.302 hectares and which parcel he caused to be subdivided into 31 parcels all of which were to be registered in his name. As a result, he was issued with 30 title documents for **Nakuru Municipality Block 22/2471** through to **Nakuru Municipality Block 22/2500** but to his astonishment, the defendant with whom he had no contract or dealings, fraudulently caused himself to be registered as the proprietor of **Nakuru Municipality Block 22/2501**. He therefore sought judgment against the defendant for:

(a) Cancellation of Title Number Nakuru Municipality Block 22/ 2501 currently in the defendant's names and re issuance of the Said Title Deed or Certificate of Lease in the Plaintiff names.

(b) Costs of this case be borne by the defendant.

3. The defendant filed a statement of defence in which he denied the allegations of fraud and averred that he purchased land parcel number **Nakuru Municipality Block 22/2501** from the then registered proprietor Francis Njuguna Kabugi (Now Deceased) and that the plaintiff ought to have directed his claim against the estate of the deceased. He added that if there was any irregularity in transferring the property to the deceased, the plaintiff would not have any claim against him as he is an innocent purchaser for value without notice of defect of title. He therefore urged the court to dismiss the case.

4. At the hearing the plaintiff testified as the sole witness in support of his case. He adopted his witness statement dated 19th July 2012 as his evidence in chief. He had stated as follows in the said statement:

My name is FRANCIS GITUCHU MURIMI an adult male of sound mind residing and working for gain at Nakuru within the Republic of Kenya of PO BOX No. 16421 NAKURU. I am a retired veterinary officer.

Sometime in the year 2001 I instructed one Mr. Francis Njuguna Gabugi (now deceased) a man who was well known to me, trading as Basco Investment Ltd dealing in property investment and as land agents to commence procedures in the subdivision of my parcel of land Nakuru Municipality Block 22/661 of approximately 2.302 Ha into 31 parcels on my behalf. The Parcel of Land was subdivided as instructed by me and I was able to obtain thirty (30) title deeds from Nakuru Municipality Block 22/2471 - Nakuru Municipality Block 22/2500 as I awaited to be issued with the thirty first title deed being Nakuru Municipality Block 22/2501.

When the aforesaid tile took too long to come out I decided to visit the Nakuru Land Registry to enquire about the said title deed for Nakuru Municipality Block 22/2501 of approximately 0.045 Ha and after doing a Land Search I was shocked as it turned out that the aforementioned parcel of land was registered in the name of the defendant, Mr. Anthony Kihu Kamau who was not known to me. I have never met the defendant herein and I have never entered into any land transaction with him over Nakuru Municipality Block 22/2501 nor had I instructed Mr. Francis Njuguna Gabugi (now deceased) to sell the same to anybody.

I frantically started to search for Mr. Francis Njuguna Gabugi (now deceased) and that is when I was informed that he had passed away and his business Basco Investment Ltd had been closed down following his demise.

I fear that Mr. Francis Njuguna Gabugi (now deceased) might have colluded with the defendant, Mr. Anthony Kihu Kamau with the

intention of theft to fraudulently dispossess me of Nakuru Municipality Block 22/2501.

I humbly pray that this Honourable Court enters judgment against the defendant herein, Mr. Anthony Kihu Kamau by cancelling his Title Deed for Nakuru Municipality Block 22/2501 and order the Nakuru Lands Registrar to register me, Francis Gituchu Murimi as the rightful owner of all that parcel of land known as Nakuru Municipality Block 22/2501 further that the Honourable Court issues orders of permanent eviction against the defendant, his agents and or servants to vacate the aforesaid parcel of land and an order of permanent injunction restraining the defendant, his agents and or servants from trespassing, entering, remaining on, developing or in way howsoever from dealing in any manner with my parcel of land Nakuru Municipality Block 22/2501.

5. The plaintiff further stated that he had initially instructed a land agent known as Francis Njuguna Kabugi to subdivide and market the plot. Francis was unable to do it and the plaintiff therefore instructed a surveyor by the name Isaac D. Nzioka to subdivide the plot into 31 sub-plots. Isaac processed and delivered to the plaintiff titles for Nakuru Municipality Block 22/2471 up to Nakuru Municipality Block 22/2500. The plaintiff was not involved in the process but was only dealing with Isaac. The plaintiff received originals of titles for plots 2471 to 2500 but did not receive the title for plot 2501. Isaac fell sick and passed away before the plaintiff had received the title. The plaintiff conducted a search on 24th November 2011 and it showed that plot Nakuru Municipality Block 22/2501 was owned by the defendant since 3rd September 2010. The plaintiff further stated that he never had any dealings with the defendant concerning the plot and that he believes the defendant acquired it unlawfully. He added that he never transferred the plot to Francis Kabugi Njuguna and that the consent of the land control board which the defendant has filed in court has an alteration where the plot number is written. The plaintiff was registered as owner of Nakuru Municipality Block 22/661 on 19th January 1998 while the consent presented by the defendant refers to a board meeting held on 27th November 1997, by which date plots Nakuru Municipality Block 22/2501 and Nakuru Municipality Block 22/661 did not exist. The consent also has an alteration on the name of the transferee. The plaintiff further pointed out that he instructed the surveyor to start the subdivision process in the year 2001.

6. Under cross examination, the plaintiff stated that Nzioka did not explain to him what had happened to the 31st plot. He became sick and passed away. He added that he had initially instructed Francis Kabugi Njuguna to subdivide the plot but he failed to do so. When he failed, Francis Kabugi Njuguna connected the plaintiff with Nzioka. The mutation form was prepared by Nzioka who was a government surveyor. However, the mutation does not have Nzioka's name as surveyor and Nzioka did not sign it. The plaintiff further stated that he did not sell the plot to Francis Kabugi Njuguna and that Francis Kabugi Njuguna's company stopped operations upon his death. He added that there was no agreement that Francis K. Njuguna's payment was to be one plot.

7. The plaintiff's case was then closed.

8. Just like the plaintiff, the defendant testified as the sole witness in support of his case. He stated that he is the registered owner of the suit property and that sometime in July 2009 his father in law Samuel Nderi Waribu who was living in Nakuru called him and told him that he had found a piece of land in Lanet. The defendant had told his father in law that he was looking for land to buy. His father in law told me the land was being offered at KShs 200,000. The defendant came to Nakuru to view the plot and meet the vendor who was Francis Kabugi Njuguna. They met and the vendor showed him the land. They agreed on a purchase price of KShs 200, 000. The defendant conducted a search at the Land Registry Nakuru. It took a bit long for the results to come out. The defendant only had 7 days leave and the results were not out by the time his leave was over forcing him to leave. He asked his father in law to act on his behalf in the preparation of a sale agreement. He left KShs 200, 000 with him with instructions to only proceed with the transaction once he verifies that Francis was the owner through a certificate of search. Before the defendant left Francis showed the defendant his title deed for the plot as well as a copy of his national identity card. He produced a copy of the title deed that Francis gave him as an exhibit.

9. The defendant further stated that a few days later after he left, his father in law called him and confirmed that he had obtained certificate of search and that it showed Francis as the owner. His father in law gave him a copy of the Certificate of Search but he misplaced it. He then asked his father in law to go ahead and enter into a sale agreement on his behalf. His father in law later gave him a copy of the sale agreement dated 24th July 2009 in which the purchaser is shown as Samuel Nderi Waribu, his father in law. He stated that he lost the original of the sale agreement. He was eventually issued with a title deed in his name in the year 2010. Francis Kabugi Njuguna handed to his father in law and a copy of his KRA PIN among other documents. After transfer was registered in his name, he conducted a search on 20th December 2011. He produced the Certificate of Search as an exhibit. He later instructed his father in law to fence the plot. He erected a barbed wire fence around it around December 2009. As at the time of purchase the plot was vacant and was not developed. Sometime in the year 2011, he decided to develop the land. He purchased a lorry of quarry stone and a lorry of sand and delivered them on site. In April 2012 he contracted a local person to sink a pit latrine. After that, around May 2012, the plaintiff started claiming ownership of the land. The plaintiff later removed the fence around July 2012. He added that the allegation that he obtained the title fraudulently is not true since he followed all the processes and obtained a Certificate of Search. He added that consent of the Land Control Board from Francis to himself was issued. He however did not produce a copy of it. He urged the court to dismiss the plaintiff's case with costs.

10. Under cross examination, the defendant stated that besides Francis' title deed, he did not have any document in court showing that he did due diligence. He added that he lost the Certificate of Search showing that Francis owned the land, the receipt for payment of fees for the search and even the receipts in respect of stamp duty paid for the transfer. He also stated that he did not retain a copy of the consent of the land control board and that he did not personally sign the application for the consent of the land control board or even the transfer from Francis to himself.

11. The defence case was then closed.

12. Parties filed and exchanged written submissions. It was argued on behalf of the plaintiff that the defendant had failed to produce any sale agreement between him and Francis Njuguna Kabugi, any transfer duly signed in his favour by Francis Njuguna Kabugi or any evidence of payment of stamp duty. The plaintiff therefore urged the court to grant judgment in his favour as prayed.

13. For the defendant, it was argued that the plaintiff produced no evidence of payment for survey services and further that the plaintiff did not complain about the plot until some 11 years later. The defendant further argued that the plaintiff ought to have joined the estate of Francis

Njuguna Kabugi to the suit. Finally, citing the case of **Dennis Moya v Virginia Wanjiku Ngunjiri & another** [2019] eKLR, the defendant argued that the plaintiff had failed to discharge the burden of proof and that his case should thus be dismissed with costs.

14. I have considered the pleadings, the evidence and the submissions herein. There is no dispute that the plaintiff was the registered owner of the parcel of land which was known **Nakuru Municipality Block 22/661** and that through a mutation form a copy of which was submitted in evidence, the plaintiff subdivided the said parcel into 31 parcels being **Nakuru Municipality Block 22/2471** through to **Nakuru Municipality Block 22/2501**. There is further no dispute that titles were issued in the plaintiff's name for 30 plots being **Nakuru Municipality Block 22/2471** through to **Nakuru Municipality Block 22/2500** but not for **Nakuru Municipality Block 22/2501**. The issues that arise for determination are firstly whether the defendant's title to **Nakuru Municipality Block 22/2501** is tainted by fraud; secondly, whether the defendant is a bona fide purchaser for value and lastly, whether the plaintiff is entitled to the reliefs sought.

15. The defendant is the registered proprietor of **Nakuru Municipality Block 22/2501**. Ordinarily, the court would be duty bound under **Section 26** of the **Land Registration Act** to accept the defendant's certificate of title as proof of ownership. Nevertheless, the defendant's title can be nullified if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme. The section provides:

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or 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, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

16. It is for the foregoing reason that a registered proprietor whose title is under challenge must do more than simply wave the very same title. In **Munyu Maina v Hiram Gathiha Maina** [2013] eKLR the Court of Appeal held thus:

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.

17. The plaintiff's case is that he did not sell or transfer **Nakuru Municipality Block 22/2501** to the defendant and that the defendant acquired it fraudulently. The defendant's case is that he purchased it sometime in July 2009 for KShs 200,000 from the then registered proprietor Francis Kabugi Njuguna (deceased) through a sale agreement that was executed on his behalf by his father in law one Samuel Nderi Waribu. He did not produce the sale agreement, any transfer, any consent of the land control board or any evidence of payment of stamp duty. He claimed that those documents were lost. He did not tender any evidence of any efforts made to retrieve them from the records at the land registry. All that he produced was a copy of the title issued to Francis Kabugi Njuguna on 26th January 2009 and a Certificate of Search as at 24th November 2011 showing that he became registered proprietor on 3rd September 2010. On the proprietorship section of the title which he produced, entry number 2 shows that Francis Kabugi Njuguna became registered proprietor on 24th March 2000 while entry number 3 shows that title was issued to him on 26th January 2009. A title procured and registered without any supporting documents can hardly be said to have been acquired legally, procedurally or without the aid of any corrupt scheme. I therefore find that the defendant's title to **Nakuru Municipality Block 22/2501** is tainted by fraud.

18. The defendant claimed in his defence that is a bona fide purchaser for value without notice of any defect of Francis Kabugi Njuguna's title. To qualify to be a bona fide purchaser, the defendant would need to satisfy the test in the Ugandan case of **Katende vs. Haridar & Company Limited** [2008] 2 E.A.173 cited with approval by our Court of Appeal in **C O Okere v Esther Nduta Kiiyukia & 2 others** [2019] eKLR:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

a) he holds a certificate of title;

b) he purchased the property in good faith;

c) he had no knowledge of the fraud;

d) he purchased for valuable consideration;

e) the vendors had apparent valid title;

f) he purchased without notice of any fraud;

g) he was not party to any fraud.”

19. The defendant has not shown any evidence of having purchased the suit property. No evidence of movement of funds from the defendant to Francis Kabugi Njuguna being payment for the suit property has been tendered. There is thus no proof of any purchase for valuable consideration or any proof of a purchase, let alone a purchase in good faith. All in all, I am not persuaded that the defendant is a bona fide purchaser without notice.

20. Is the plaintiff entitled to the reliefs sought of cancellation of the defendant's title to Nakuru Municipality Block 22/ 2501 and issuance of a title thereto in his name? The plaintiff has demonstrated that he was the registered owner of the parcel of land which was known **Nakuru Municipality Block 22/661** which he subdivided into 31 parcels being **Nakuru Municipality Block 22/2471** through to **Nakuru Municipality Block 22/2501**. Titles for 30 plots being **Nakuru Municipality Block 22/2471** through to **Nakuru Municipality Block 22/2500** were issued in his name but not for **Nakuru Municipality Block 22/2501**, which was issued in the name of one Francis Kabugi Njuguna and later to the defendant. Although the defendant claims to have bought **Nakuru Municipality Block 22/2501** from Francis Kabugi Njuguna, he has failed to demonstrate either the purchase or the process of transfer from Francis Kabugi Njuguna. I am thus satisfied that the plaintiff has proven his case and is entitled to the relief sought.

21. I therefore enter judgment in favour of the plaintiff as follows:

(i) The defendant's title in respect of Nakuru Municipality Block 22/2501 is hereby cancelled.

(ii) The District Land Registrar Nakuru is hereby ordered to issue a certificate of title in respect of Nakuru Municipality Block 22/2501 to the plaintiff.

(iii) Costs of this suit shall be borne by the defendant.

Dated, signed and delivered in open court at Nakuru this 27th day of November 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Kabalika holding brief for Mr Karanja Mbugua for the plaintiff

Ms Cheruto holding brief for Mr Ngure for the defendant

Court Assistants: Beatrice & Lotkomo