



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 11 OF 2018

HARRISON WACHIRA WANJOHI.....PLAINTIFF

VS

BETHWEL MWANGI GITHINJI.....1ST DEFENDANT

STEPHEN MUGANE.....2ND DEFENDANT

WILLIAM KUNGU KARANJA.....3RD DEFENDANT

CYRUS WAMBUGU MIGWI.....4TH DEFENDANT

EQUITY BANK (K) LIMITED.....5TH DEFENDANT

JUDGMENT

1. By a plaint dated the 7/12/18 the Plaintiff sued the Defendants for the following orders;

a. An order of permanent injunction restraining the 1st -4th Defendants either by themselves, agents' servants and anybody claiming through them from dealing and or interfering with the suit property.

b. An eviction order do issue upon the 4th Defendant his agents employees servants and whomsoever else claiming under him from dealing selling cultivating alienating removing all erected illegal structures thereon trespassing or howsoever doing any illegal act and interfering trusteeship of the Plaintiff in land parcel No LOC14/GAKURWE/805 and the same to be cancelled/revoked from the 4th Defendants name and the Plaintiff be registered as the owner of the same.

c. Costs of the suit.

2. The Plaintiff avers that the suit land was registered in the names of Karanu Waithathu, deceased. That he became a trustee of the suit land on behalf of the estate of the late Ngunju Karani, the daughter of the original owner Karanu.

3. It is his case that the 1st -3rd Defendants acquired the suit land fraudulently and sold it unlawfully to the 4th Defendant.

4. Through the leave of the Court, the 5th Defendant, the chargee of the suit land was enjoined to the suit in 2019. It is to be noted that the Plaintiff has not adverted any claim against the 5th Defendant.

5. The 1st -3rd Defendant denied the Plaintiff's claim and stated that the suit land devolved to them vide the judgement of the RMCC Succ. Cause No 123 of 1978 which judgment was confirmed on appeal in High Court Appeal No 25 of 1980 where the Court determined that the suit land belonged to them. That they have owned and controlled the suit land from 1980 to 2015 when they sold it to the 4th Defendant.

6. The 4th Defendant contends that he purchased the land from the 1st -3rd Defendants after carrying out due diligence which revealed that they were the registered owners of the suit land. That thereafter he charged the suit land to the 5th Defendant to secure a loan facility in the sum of Kshs 1,237,500/-.

7. He stated that upon purchase he took over possession of the land and has developed it since 2015 when he acquired it.

8. It is the averment of the 4th Defendant that he actually met with the Plaintiff when he went to inspect the land. That he informed him that

the land belonged to the 1st -3rd Defendants and that it had no dispute.

9. The 5th Defendant explained how the 4th Defendant approached it for a loan which was advanced after all due diligence showed he was the registered owner of the suit land. It denied any fraud or wrongdoing on its part in charging the suit land and urged the Court to dismiss the case. It stated that the orders sought by the Plaintiff will infringe on its rights as a chargee of the suit land.

10. At the hearing the Plaintiff led evidence that he is a trustee of the estate of Ngunju Karanu and has filed suit to protect the suit land for the sake of the late Ngunju Karanu's children who are now adults. He informed the Court that the suit land belonged to Karanu Waitathu and became registered in his name in 1966. That after his death in 1965, his daughter was to inherit the land but the 1st -3rd Defendants acquired the suit land fraudulently under mysterious circumstances. He informed the Court that the 1st Defendant misled the Court that the late Karanu had given their father (of the 1st -3rd Defendants) the suit land during his lifetime.

11. Further he informed the Court that he is not related to the family of Karanu Waitathu. He stated that he held no grant of letters of administration in the estate of the late Ngunju Karanu either. That he was aware that the said late Ngunju had filed 3 cases in relation to the land against the 1st -3rd Defendants and was aware that the High Court upheld the decision of the RMCC Court that the 1st - 3rd Defendants were the owners of the suit land. That Ngunju lost the case. He stated that he did not appeal against the decision of the High Court in HCCA No 25 of 1980.

12. The witness informed the Court that he filed the suit after the land had been sold to the 4th Defendant. That the transaction was fraudulent.

13. PW2- Onesmus Kihara Mutua informed the Court that the suit land belonged to Karanu. That the Plaintiff is the trustee of the late Ngunju Karanu. That the 1st -3rd Defendants are not related to the late Karanu and therefore not entitled to the suit land. That the sale of the land to the 4th Defendant was fraudulent.

14. PW3 and PW4 adduced similar evidence with PW2 word for word.

15. The Plaintiff closed his case.

16. The 1st -3rd Defendants led evidence through DW1- Bethwell Mwangi Githinji on his behalf and that of the 2nd and 3rd Defendants. He informed the Court that they acquired the land through the judgement of the High Court which decreed that the land belongs to them. That the suit land was subject to two other cases in the lower Court where the dispute pitted them and Ngunju Karanu wherein she lost the case in their favour. He stated that the decision has not been appealed set aside or vacated. That they held the suit land in their possession from 1980 to 2015 when they sold it to the 4th Defendant.

17. The witness refuted the claims of the Plaintiff that he held the land under trust. That though Ngunju died about 4 years ago, she left behind a son Benard Mwangi Ngunju who is now an adult and legible to lay a claim (if any) without doing so through a proxy, the Plaintiff. He stated that the Plaintiff is not a relative of the said Ngunju.

18. In selling the land to the 4th Defendant he disclosed to the Court that they obtained land control board consent and executed all the due documents to effectuate the transaction. He refuted any fraud in the transaction.

19. DW2, Peter Mucheru testified and stated that he is the Credit Manager of the 5th Defendant. That on being approached by the 4th Defendant for a loan facility, they conducted their due diligence on the suit land which revealed that it was owned by the 4th Defendant having become registered as such on the 20/7/15. The land was free from all encumbrances. There was no disclosed trust on the register either. Satisfied, the bank advanced the 4th Defendant a loan in the sum of Kshs 1.2 Million which is still being serviced by the 4th Defendant.

20. DW3 – Cyrus Wambugu Migwi testified that he purchased the suit land from the 1st and 3rd Defendants after carrying out a search which indicated that they were the registered owners of the suit land. He stated that he visited the suit land to inspect it and part of his due diligence was to inquire from the neighbors as to the state of the suit land. That one of the people he met was the Plaintiff who invariably informed him that the suit land was owned by the 1st - 3rd Defendants and that it had no dispute and was up for sale. He stated that the Plaintiff warned him to steer away from parcel LOC14/GAKURWE /1013 which he said had a legal dispute.

21. DW3 informed the Court that he entered into sale agreement, obtained Land control board consent and executed the transfer forms and paid the full purchase price to the registered owners.

22. That upon acquisition he charged the suit land to the 5th Defendant to secure a loan facility in the sum of Kshs 1.2 Million which is still outstanding.

23. Further he informed the Court that he was not aware of the history of the land, the legal disputes that subsisted about 40 years before. That the 1st - 3rd Defendants showed him the Court ruling which disclosed that the land was given to them and he refuted any wrong doing on the part of his Co – Defendants.

24. He stated that during the pendency of the case the Plaintiff telephoned him and asked for a payment of Kshs 500,000/- in order to withdraw the case against the Defendants, an offer that he flatly rejected.

25. Parties filed written submissions which I have read and considered and will refer to them in the judgement.

26. Having read, heard and considered the pleadings, the evidence adduced at the hearing, the written submissions and the issues for determination are;

- a. Whether the Plaintiff is a trustee of the suit land/estate of Ngunyu Karanu.
- b. Whether the 1st – 3rd Defendants acquired the property fraudulently.
- c. Whether the 4th Defendant acquired a valid title.
- d. Whether the charge in favour of the 5th Defendant is valid
- e. Is the Plaintiff entitled to orders of permanent injunction?
- f. Who pays the cost of the suit?

27. According to the certified copy of the green card adduced in evidence, the suit land became registered in the name of Karanu Waitathu on the 29/9/1966. On the 20/9/1978 a caution was registered in favour of Ngunju Karanu claiming beneficial interest. On the 4/6/1979 it was registered in the names of the 1st and 3rd Defendants inter alia to hold jointly. The 4th Defendant became owner on the 20/7/2015 and on the 6/10/15 the suit land was charged in favour of the 5th Defendant for a sum of Kshs. 1, 237,000/-.

28. The Plaintiff's case is that he filed suit as the trustee of the suit land on behalf of the late Ngunju Karanu. He claimed that he sued the Defendants to recover the suit land for and on behalf of the son of Ngunju Karanu as a trustee.

29. It is trite that the question of how a trust is created is a question of fact to be proved by evidence. It may be express or implied. In the latter case, circumstances surrounding the case may allow the Court to infer that a constructive or a resulting trust was created. To succeed on the latter, the Plaintiff had to demonstrate that a trust existed which clothed him with capacity to bring this claim.

30. Section 66 of the Land Registration Act states as follows;

“(1) A person acquiring land, a lease or a charge in a fiduciary capacity may be described in that capacity in the instrument of acquisition and be registered with the addition of the words “as trustee”, but the Registrar shall not enter particulars of any trust in the register. (2) An instrument that declares, or is deemed to declare, a trust, or a certified copy, may be deposited with the Registrar for safe custody; but the instrument or copy shall not form part of the register or be deemed to be registered. ...”

31. It is clear from the record the Plaintiff did not place before the Court any documents to demonstrate that he is registered as the trustee of the suit land.

32. In the case of **Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] Eklr** the Court also held that It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

33. The Plaintiff has not adduced evidence as to the nature of the trust that he holds over the suit land. It is not clear whether he is pursuing a customary trust or a registered trust. Whichever of the two he may be basing his claim on, the burden of proof rested on his shoulders to lead evidence and proof trusteeship in the suit land and or on behalf of the estate of Ngunju Karanu.

34. Section 107 (1) and (2) of the Evidence Act states as follows;

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

35. It is the finding of the Court that the Plaintiff has not demonstrated the nature and substance of his trusteeship and the claim is therefore unfounded.

36. It is instructive to note that the Plaintiff did not exhibit any letters of grant of administration in respect to the estate of the late Ngunju Karanu to entitle him to bring the suit on behalf of her estate. He admitted that he does not possess any grant but filed suit to recover the suit land for the sake of her son whom he disclosed that despite being an adult, was not interested in pursuing the case.

37. Locus standi is defined as the capacity to bring claim or urge rights before a Court of law. In the case of **Alfred Njau & Others v City**

Council of Nairobi [1982-88] 1 KAR 229 the Court of Appeal gave meaning to the term locus-standi by stating:

“.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

38. In the case of Rajesh **Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama [2014] eKLR** where the Court of Appeal, sitting in Mombasa held that;

“.....a litigant is clothed with locus standi upon obtaining a limited or full letters of administration in cases of intestate succession.....”

39. It is trite law that a party purporting to bring suit on behalf of a deceased person must obtain letters of grant of administration to gain legal standing. In respect to the estate of the late Ngunju Karanu, it is the finding of the Court that the Plaintiff has no locus.

40. As to Whether the 1st – 3rd Defendants acquired the property fraudulently, it is the Plaintiff’s case that the Defendants acquired the suit land through fraud and consequently the transfer of the suit land to the 4th Defendant was tainted by fraud. The Defendants denied the allegations of fraud.

41. It is trite that fraud must be pleaded, particularized and proved. Though the Plaintiff alleged fraud, he did not plead any particulars to enable the Defendants to counter them in evidence. My analysis of the Plaintiffs’ evidence is that it fell below the threshold of the standard of proof required in fraud cases which is higher than the balance of probabilities but slightly lower than beyond reasonable doubt.

42. It is on record that the 1st – 3rd Defendants are brothers. They acquired the suit land pursuant to the orders of the High Court in HCCA No 5 of 1980. The register shows that the land was registered in their names on the 4/6/1979. There is no evidence that was led to show that the said judgment had been set aside, appealed and or vacated.

43. The 1st -3rd Defendants led unchallenged evidence that since 1980 till 2015, they had possession and ownership of the suit land. That they sold the land in 2015 to the 4th Defendant. It was their contention that being the registered owners there was no legal basis to procure the consent of the Plaintiff.

44. It is the view of the Court that the Plaintiff failed to plead and proof fraud on the part of the Defendants and his claim on that account fails.

45. As to whether the 4th Defendant acquired a valid title, evidence was led by the 4th Defendant that he purchased the suit land from the 1st – 3rd Defendants after carrying out due diligence and ascertaining that they were the duly registered owners of the suit land. That he signed the agreement for sale which was exhibited on trial, obtained land control board consent, executed the transfer and paid the purchase price in full. That the official search on the title did not reveal any proprietorship, interest or title in the name of the Plaintiff nor any trust on the title.

46. He informed the Court that he visited the suit land, made inquiries from the local chief, the neighbors and even the Plaintiff who urged him to go ahead and purchase the suit land because it had no dispute. He asked him to stay away from parcel LOC14/GAKURWE /1013 that the 4th Defendant had shown interest as it had a dispute. The Plaintiff did not rebut this line of evidence and the Court takes it to be truthful.

47. Section 26 of Land Registration Act directs Courts to take the certificate of title as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner contained or endorsed in the certificate subject to limitations permitted in law. The law is clear that a title can only be challenged on two grounds; fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

48. The Plaintiff has not proved any form of illegality fraud misrepresentation or corrupt scheme or improper procedure in the acquisition of the said title. It is the finding of the Court that the 4th Defendant holds a valid title.

49. The 5th Defendant on the other hand led evidence that it carried out due diligence and established that the 4th Defendant had a valid and good title over the suit property. That in advancing the loan to the 4th Defendant it followed all the legal processes including ascertaining the status of the property and whether it was free from any encumbrances.

50. It is the view of the Court that the Plaintiff failed to lead any evidence that could impeach the charge in favour of the 5th Defendant.

51. Is the Plaintiff entitled to an order of permanent injunction? There being no evidence of fraudulent acquisition of title and the Plaintiff’s failure to prove his claim, this Court cannot conclude that he has a prima facie case that would warrant granting orders of permanent injunction. Instead there has been no evidence adduced that he has any rights let alone that his rights have been infringed. This prayer is declined.

52. Before I pen off it is crucial to inquire on this question. Is this suit resjudicata? None of the parties addressed me on this. However my review of the final appeal before Okubasu J in Nyeri Appeal 5 of 1980 in which the Court observed inter alia that ;

“In essence, the matters before this Court have been subjected to trial by Courts of competent jurisdiction and there has been a determination as to whether the 1st -3rd respondents were entitled to shares of the estate of the late Waithathu Karanu and more particularly the suit land.

The Court cannot relitigate and /or attempt to set aside a decision that was done almost 40 years ago .The Plaintiff's brings claim on behalf of the late Jane Njungu who was a party to the proceedings and had already had her day in Court .She and /or her agents were barred from litigating over the matters that had been determined and /or subsequent transactions and chain of events that were informed on the judgement.”

53. It is my view that the Plaintiff too in seeking to claim under the late Ngunju Karanu is barred from bringing this suit by section 7 of the Civil Procedure Act. The final judgment in Nyeri Appeal No 5 of 1980 was a judgment in rem, which is binding on, and effective against the whole world as regards ownership of the suit property. It is a good public policy that litigation must come to an end.

54. It is the finding of the Court that to the extent that the Plaintiff has filed the case under an alleged trust in the estate of the Ngunju Karanu which in essence is a disguised pursuit of title ownership, the suit is resjudicata.

55. In the upshot the Plaintiff's claim fails and is dismissed.

56. The costs shall borne by the Plaintiff in favour of the Defendants.

57. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 21ST DAY OF NOVEMBER, 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Present in person

1st Defendant: Present in person

2nd Defendant: Absent

3rd Defendant: Absent

Kinuthia HB for Mrs Wamuyu for the 4th and 5th Defendants

Ms Irene and Ms Njeri, Court Assistant