



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO.51 OF 2017

CATHERINE WANJIRU GATHITU.....PLAINTIFF

VERSUS

SUSAN NJOKI MWANGI.....1ST DEFENDANT

JAMES KAMWEA NJOKI.....2ND DEFENDANT

JUDGMENT

1. Before me is a suit filed by the Plaintiff against the Defendants seeking orders for;

a. A declaration that the Plaintiff is the absolute proprietor of all that land parcel No MAKUYU/KIMORORI/ BLOCK3/2414.

b. A permanent injunction restraining the Defendants either by themselves their agent's servants and or employees from entering trespassing developing or in any other way interfering with all land parcel known as MAKUYU/KIMORORI/ BLOCK3/2414.

2. It is the Plaintiff's case that at all material times to the suit she is the registered owner of the suit land having acquired it through purchase from the Defendants.

3. She avers that the Defendants have unlawfully entered into her land and fenced with barbed wire, planted maize and deposited building stones with the aim of commencing construction.

4. The 1st Defendant denied the Plaintiffs claim and contends that the title being held by the Plaintiff is illegal as it was obtained unlawfully. She denied any involvement in the purported sale and transfer of the suit land to the Plaintiff. That the Plaintiff has never taken vacant possession of the suit land at all and denied any unlawful entry and asserts that she has been in possession of the suit land to the exclusion of the Plaintiff.

5. in her counterclaim the 1st Defendant avers that the suit land belongs to the estate of the late Mwangi Macharia whose estate remains unsucceeded and undistributed. She pleaded the particulars of fraud on the part of the Plaintiff and or her agents in the acquisition of the suit land.

6.. She urged the following orders in her Counterclaim;

a. declaration that the title held by the Plaintiff over the suit land is invalid.

b. An order for cancellation of the title MAKUYU/KIMORORI/BLOCK3/2414 and the restoration of the name of Mwangi Macharia deceased in the register of the said suit land.

c. An order of injunction against the Plaintiff from trespassing into the suit land.

7. The 2nd Defendant though served did not enter appearance nor file any defence, the Plaintiff's claim against the 2nd Defendant is therefore undefended.

8. At the trial the Plaintiff led evidence and called 4 witnesses in support of her case. She relied on her witness statement on record. She produced the list of documents contained in the list dated the 3/2/17 in support of her claim.

9. She informed the Court that she is a lecturer by profession and an ongoing PHD student. That she did not involve an advocate in the

transaction but trusted the Defendants. The consideration was Kshs 600,000/- out of which Kshs 405,000/- was paid leaving the balance of Kshs 195,000/-. She entered the 1st agreement dated the 21/11/11 with the 2nd Defendant who is the son of the 1st Defendant. That she was aware that the suit land belonged to a deceased person and that the 2nd Defendant did not own the suit land. That the agreement stated that it was subject to succession proceedings in respect to the estate of the owner. At the signing of this agreement the 1st Defendant was absent.

10. She testified that she paid the money to the 2nd Defendant. Though she informed the Court that the 2nd Defendant was an agent of the 1st Defendant, she did not produce any agency agreement in support.

11. The 2nd agreement was entered a day later on the 22/12/11 between the 2nd Defendant and the Plaintiff with the 1st Defendant as a witness.

12. She further stated that the transfer form was executed at the Land Control Board offices in Makuyu and not at an Advocates office. She admitted that there were no photos on the transfer, no authentication by advocates on the signatures, no PIN certificates.

13. She stated that she does not know how the title of the 1st Defendant was obtained. She stated that she was showed the title of the 1st Defendant and informed by the 2nd Defendant that it was held in trust for him. She did not meet any lawyer least of all D.N Mburu that is purported to have witnessed her signature on the transfer form.

14. That she was denied vacant possession by the Defendants.

15. PW2- David Maina Kamau stated that he is the husband of the Plaintiff. He also witnessed the agreement dated the 21/11/11. That he does not know who authored this agreement which he found with the 2nd Defendant already drafted. He had no knowledge that the suit land belonged to a deceased person. The 1st Defendant was not present in the meeting held on the 21/11/11. He did not have any official search in respect to the suit land nor any title to show that the 2nd Defendant was the registered owner.

16. In respect to the 2nd agreement dated the 22/12/11 he informed the Court that he authored the said agreement and witnessed it after the Plaintiff and the 2nd Defendant had signed. The 1st Defendant signed as witness. In both agreements the 2nd Defendant was the seller of the suit land. That the Defendants and the Plaintiff obtained LCB consent

17. He stated that he did not know how the title in the name of the 1st Defendant was obtained. He admitted that no succession documents were presented to them in respect to the estate of the late Macharia Mwangi. He stated that he did not see the transfer forms that were signed by the 1st Defendant and the Plaintiff.

18. PW3- Elijohn Mwangi testified and informed the Court that he is a documents examiner with the Directorate of Criminal Investigations (CID). He holds a BSC degree in information Technology and trained and certified as a forensic examiner in Khartoum and the United Kingdom.

19. PW3 presented his report and in summary concluded that the signatures on the transfer documents matched those of the Plaintiff and the 1st Defendant and opined that the parties did sign the transfer documents.

20. PW4- Beatrice Chepngetich Koskey introduced herself as police officer who investigated the criminal case in which the 1st and 2nd Defendants were charged with interalia intermeddling with the estate of a deceased person in Criminal case No 230/171/2013, Muranga. She informed the Court that she did not get the documents in the lands office and therefore unable to tell how the titles were obtained. That the title in the name of the 1st Defendant was not handed over to the forensic examiner for examination.

21. PW5- Jane Wanja Waruinge, the administrative officer in the Regional Commissioners office stated that she chaired the Land Control Board and it is impossible to recall all parties who appeared before her at the Land Control Board then. She stated that there is no register that parties sign at the Land Control Board. She produced the minutes dated the 22/12/11 and confirmed that the transfer was approved. She refuted claims that transfers were prepared in her office. She informed the Court that the Land Control Board minutes together with the approvals are forwarded to the Land Registrar.

22. DW1- Susan Njoki Mwangi stated that she is the mother of the 2nd Defendant. That she saw the Plaintiff for the first time at the CID offices in Muranga when she was summoned to record statements. She relied on her witness statement dated 20/2/17 as her evidence in chief. She also produced documents contained in the list dated the 16/7/18.

23. In respect to the green card produced in Court she stated that the suit land is registered in the name of the late Macharia Mwangi. She refuted any involvement in the agreements dated the 18/11/11 and 21/11/2011. She denied ever signing them. She contended that her signature was forged on the documents presented and purported to have been signed by her. In respect to the title in her name, she informed the Court that she does not know how the title was obtained. She contended that the said title is a forgery. In respect to the transfer of the suit land to the Plaintiff she refuted any involvement and averred that the said transfer was a forgery/fraudulent.

24. DW2-Nicholas Mburugu Mukindia , informed the Court that he works with the Registrar of births and deaths and produced a copy of the death certificate for the late Macharia Mwangi who died on the 6/12/97.

25. DW3- Fidelis Munyanse Muthui , the assistant Land Registrar stated that the transfer on record has a number of gaps such as ; no presentation date; no receipt of stamp duty; no authentication of the passport photo by any advocate; no assessment of fees on the face of the transfer; not registered – it is blank; the presenter is undisclosed. He pointed out that at the time of transfer of the suit land there was no

requirement for photographs of the parties on a transfer document. He expressed his doubt that the documents may have been prepared later and not in 2007 as alleged.

26. He handed over the parcel file for the suit land to the Court for its perusal and return after the delivery of the judgement.

27. At the conclusion of the trial parties filed written submissions which I have read and considered.

28. The issue for determination are;

- a. Whether the 1st Defendants' counterclaim is competent.
- b. Whether the Plaintiff holds a valid title to the suit land
- c. Whether the Plaintiff is a bonafide purchaser for value without notice
- d. What orders should the Court give
- e. Who meets the cost of the suit

29. According to the green card on record the suit land became registered in the name of Mwangi Macharia on 7/7/1988 and a title issued thereto. According to the certificate of death adduced in evidence by DW2, the said owner died on the 6/12/1997. DW1 stated in Court that the estate of the said Mwangi Macharia has not been succeeded. Indeed, no evidence of letters of administration were adduced in evidence.

30. The 1st Defendant in her claim filed by way of counterclaim has accused the Plaintiff of obtaining title by fraud. The 1st Defendant led evidence that she did not own the title to the suit land and has disowned the title allegedly registered on the 29/11/11 in her name. That being the case it follows that the counterclaim being a suit is incompetently before the Court because of lack of locus to sue on behalf of the estate of the said Mwangi Macharia. The action of the 1st Defendant is tantamount to intermeddling with the estate of the deceased under Section 45 of the Succession Act which provides as follows;

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person“

31. In buttressing this point, I rely on the case of **Re Estate of M'Ngarithi M'Muriti [2017]eKLR** as guided by the observation of the Court in; **Benson Mutuma Muriungi Vs C.E.O Kenya Police Sacco & Another [2016] eKLR** where the Court defined what would constitute intermeddling as follows:-

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law of grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under Section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the Court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) or protection of the estate against any person.”

32. It is the finding of the Court that the 1st Defendant has not taken out letters of grant of administration in respect to the estate of her husband and therefore has no locus standi. She is not clothed with power to sue on behalf of the estate of the said deceased. The counterclaim is therefore incompetent and is struck out.

33. Section 26 mandates the Court to take a title of a proprietor as a prima facie evidence of ownership of the said title to land. it provides as follows;

“ Section 26. (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.

34. Having struck out the 1st Defendants claim which was centred on fraud, I shall now turn to the second limb of Section 26 of Land Registration Act in answer to the issue whether the Plaintiff has a valid title.

35. The Plaintiff led evidence that she entered into an agreement of sale on the 21/11/11 with the 2nd Defendant with full knowledge that the said 2nd Defendant was an imposter, that is to say that he did not possess any title in the suit land. In a causal and naïve manner, she paid the sum of Kshs 405,000/- to the said 2nd Defendant without carrying out any search / due diligence to satisfy herself that the land belonged to the 2nd Defendant. A month later she rushed to clear the balance of the purchase price in the sum of Kshs 195,000/- to the said “vendor (s)”.
36. I have examined the said agreements and I note that the fact of the title belonging to the deceased Mwangi Macharia was disclosed. The fact that the estate had not been succeeded was also disclosed in the said agreement. The Court finds that the Plaintiff had both notice and knowledge that the suit land did not belong to either of the Defendants.
37. The finding of the Court is that the Plaintiff engaged in knowingly intermeddling with the deceased’s estate and cannot turn around and blame the Defendants for duping her into buying land that they had no proprietorship interest.
38. It was also adduced by PW1 and PW2 that no copies of titles were shown to them at the time the purported agreements were signed. How can one pay such colossal sums of money without even carrying out basic search on who owns the land?. The Plaintiff introduced herself as a Lecturer at the University and therefore cannot be said to be illiterate and or unexposed in dealing with land. It would appear that the 2nd Defendant prepared the 1st agreement and the Plaintiffs husband prepared the 2nd one.
39. Further it emerged from the evidence that though the land control board consent was obtained, it is not clear who procured it. Evidence was led that the transfer form was prepared and signed at the periphery of the land control board premises at Makuyu and not before D N Mburu as alleged in the evidence.
40. DW3 laid bare the incompleteness and tardiness of the transfer form allegedly signed by the Plaintiff and the 1st Defendant. It emerged at the trial that there are two sets of transfers; both are not registered at the lands office and therefore in its state it is incapable of having conveyed any interest and or title in the suit land to the Plaintiff. Further the 1st Defendant led unchallenged evidence that she did not sign the transfers nor obtain land control board consents.
41. The Plaintiff presented expert evidence to prove that the Defendant executed the transfer forms. The report is conclusive .The Court reserves the right to be persuaded by the expert opinion to enable it form its own independent opinion.
42. In the case of Juliet **Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988**, the Court of appeal held that expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.
43. Likewise in the case of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** the Court of appeal held:
- “Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”
44. In this case there is no evidence presented to the Court to rebut the forensic report .The findings were that the Plaintiff and the 1st Defendants executed the transfer forms, the land office also stamped it and the chair of the land board at Makuyu signed the letter of consent. In the case of **Mutonyi vs. Republic [1982] eKLR**; the Court of Appeal held that:
- "Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like...Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence."
45. It is submitted that the nature of evidence here does not fall within general knowledge of such facts that the Court may take judicial notice of .The Defendants counsel could only succeed to challenge the report through his observations if he had corresponding expert opinion .In this case the Defendant did not seek to obtain a second opinion to persuade the Court that the findings were doubtful .It is doubtful if counsel’s observation can succeed to displace the forensic expert’s report .
46. The Court is inclined to find in favour of this report noting that PW3 had led taken the specimen of the signatures and produced these as exhibits , these were compared with the signatures in the documents that had been disputed by the defence to wit the transfer forms and those that were involved in the process. The methodology was also set out in the report and oral evidence laying basis of the findings. There is nothing that has been presented to suggest that the methodology was inadequate or erroneous. PW3 stated that the specimen was subjected to magnifying procedures and image enhancement for better visibility and inspection of individual characteristics. He also explained that this was sufficient to resolve the Defendants contestation on pen lifts and characteristics.
47. Further still, the Plaintiff and the Defendant did not dispute that their signatures had been taken during the criminal proceedings and that they had appeared at the DCIO for forensic examination.
48. In the light of the above authorities, I have considered the opinion of the forensic expert who stated that the signatures of the 1st Defendant matched on the transfer documents, that is to say that the 1st Defendant signed the transfers. Even if it is argued that she did

execute the transfers, she had no interest to pass to the Plaintiff on two grounds; no power to divest the undistributed estate of a deceased and further she had no title in her name in the first place.

49. According to the evidence adduced by the Plaintiff, the 1st Defendant produced a title in her name along the way. The evidence pieced together shows that a title had to be manufactured in the name of the 1st Defendant to complete the plot. I have perused the green card which shows the registered owner of the title as at 7/7/1988 was Mwangi Macharia. According to the death certificate presented by DW2, the said Mwangi Macharia died on the 6/12/97. In order to fix the puzzle, a land control board consent dated the 8/11/2007 purporting to transfer land to the 1st Defendant was adduced. Alongside that a transfer registered on the 29/11/2011 purporting to transfer the suit land to the 1st Defendant. The Plaintiff would want the Court to believe that poor Mwangi Macharia (long dead) rose from his grave and attended the land control board at Makuyu in 2007 and obtained a consent, died again and resurrected the second time in 2011 to execute a transfer in favour of the 1st Defendant and rested! This is not plausible. The only explanation is that the said documents are forgeries.

50. It is the view of the Court that despite the denials by the 1st Defendant of her involvement, the Court is not persuaded that she was an innocent bystander.

51. Having held that the title of the 1st Defendant is a forgery, it then follows that the 1st Defendant received no interest/title from a dead man and consequently transferred no title to the Plaintiff. The 1st Defendant transferred nothing and Plaintiff received nothing. The transaction is a nullity.

52. In the case of **Elijah Makeri Nyangwāra v Stephen Mungai Njuguna & Anor [2013] EKLR**, the Court stated that ;

“.....for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

53. It is the finding of the Court that the title of the Plaintiff is a candidate for cancellation. I shall make the final orders in the end.

54. Is the Plaintiff a bonafide purchaser without notice? In the case of **Katende v Haridar & Company Ltd [2008] 2 EA 173**, the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchase 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 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; and
- g. he was not party to the fraud.”

55. Equally in the case of **Kenya Anti Corruption Commission vs. Ahmed Karama Said & 2 Others (2011) eKLR**, where the Court held that;

“... although the 2nd Defendant has taken the position that it was an ‘innocent purchaser for value without notice of irregularity’, that principle is in my opinion, incapable of protecting the land acquisition. Generally as already noted, the innocent purchaser for value without notice of defect of title, will be treated as the darling of equity and will be allowed to retain ownership. But this is subject to the qualification that the creation of the title is not in flagrant breach of statute law so that it amounts to a nullity ab initio...”

56. Further in the case of **Samuel Kamere Vs Land Registrar (2015) EKLR** the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).

57. The Plaintiff submitted that she is a purchaser for value without notice. Going by the overwhelming evidence as analysed in the preceding paras, the answer to this issue is a NO. The Plaintiff had both notice and knowledge of the legal defects (illegalities, procedural taint) that the title suffered and cannot fall in the bracket of bonafides. The vendor had no apparent title in the face of unsucceeded estate of the real owner. This was brought to the knowledge of the Plaintiff at the time of the negotiations.

58. As analyzed above there is no evidence that the Plaintiff carried out any due diligence.

59. The Plaintiff confirmed at the hearing that she was not given vacant possession of the land. Having failed to prove a valid title, she is not entitled to any of the prayers. Her claim fails. The Plaintiff's remedy lies elsewhere.

60. Section 80 further allows the Court to direct the Registrar to rectify the Register by directing that any registration be cancelled or amended if the Court is satisfied that the registration was obtained, made or omitted by fraud or mistake. Further that by ordering rectification under Section 80 as read together with Section 26 (1) (b) of the Land Registration Act and Section 3A of the Civil Procedure Act, the Court will be making orders that are necessary for the ends of justice to be met.

61. Based on the totality of the evidence and all the materials placed before this Court I make the following orders;

- a. The Plaintiff's claim fails. It is dismissed.
- b. The counterclaim of the 1st Defendant is struck out.
- c. The title held by the Plaintiff in the suit land be and is hereby cancelled.
- d. The Land Registrar is ordered to rectify the title of MAKUYU/KIMORORI/BLOCK3/2414 by cancelling entries Nos 4 to 8 (both inclusive) on the title.
- e. The title for MAKUYU/KIMORORI/BLOCK3/2414 be and is hereby reverted to MWANGI Macharia, deceased.
- f. None of the parties were successful in their claims. I make no orders as to costs.

62. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 7TH DAY OF NOVEMBER 2019

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Chege HB for Mbiu Kamau for the Plaintiff

Ndegwa HB for Mbuthia for the 1st Defendant

2nd Defendant – Absent

Ms Irene and Ms Njeri, Court Assistants