



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 300 OF 2013

GATEI WA NGANDA.....PLAINTIFF

VERSUS

KAMITI FARMERS COMPANY LIMITED.....1ST DEFENDANT

PENINAH WANJIRU NJENGA.....2ND DEFENDANT

WILSON MAINA NJENGA.....3RD DEFENDANT

THE COMMISSIONER OF LANDS.....4TH DEFENDANT

CHIEF LAND REGISTRAR.....5TH DEFENDANT

JUDGEMENT

1. Through the claim filed in court on 26/2/2013, the Plaintiff sought a declaration that he was the *bona fide* owner of the land known as Nairobi/ Block 117/468 (“the Suit Property”) and that the 1st to 3rd Defendants have no claim to this land. The Plaintiff claimed that he purchased the Suit Property from Lucas Kimani Woru who had been allocated the land by the 1st Defendant. He is domiciled in the United States of America (USA) and comes to Kenya from time to time. When he was in Kenya in January 2013, he was shocked to find beacons on the Suit Property indicating an intention to sell the land. The 2nd Defendant laid claim to the Suit Property claiming to have bought it from the 3rd Defendant. The Plaintiff claimed that there was fraud in the registration of the 2nd Defendant as the proprietor of the Suit Property and sought to restrain the 2nd Defendant from dealing with the Suit Property.

2. The 2nd Defendant denied the Plaintiff’s claim and averred that she purchased the Suit Property in good faith from the 3rd Defendant for Kshs. 5,000,000/= through an agreement for sale dated 11/1/2013. She averred that she did due diligence and conducted a search which showed that the 3rd Defendant was the owner of the Suit Property.

3. In his defence filed in court on 22/5/2019, the 3rd Defendant averred that he purchased the Suit Property from Gatei wa Nganda, holder of passport number A158220 who the 1st Defendant confirmed to be the owner of the Suit Property. He stated that no fraud was perpetuated when he bought the suit land. He averred that the Plaintiff has to explain how his passport was used to sell the land to him unless the Plaintiff participated in the fraud. He averred that the Suit Property was on sale along Thika Road and that he met the vendor who identified himself as Gatei wa Nganda, who showed him the land and pointed out the beacons to him. He added that the vendor held a share certificate issued by the 1st Defendant. The 3rd Defendant stated that he met Simon Njuguna, the chairman of the 1st Defendant, who confirmed to him that the Suit Property belonged to Gatei wa Nganda holder of passport number A158220. He entered into a sale agreement with the vendor and paid him Kshs. 4,000,000/= for the land. The vendor surrendered the share certificate and the 3rd Defendant was issued a new share certificate in his own name.

4. Gatei wa Nganda testified. He purchased the Suit Property in 1996 from Mr. Lucas Kimani Woru who was the initial allottee. He produced a copy of the 1st Defendant’s share certificate number 723 together with the letter addressed to him by the 1st Defendant on the Kiwanja Borehole Watere Project dated 1/10/1996. He also produced receipts issued by the 1st Defendant in October 1996 and September 2003. The letter addressed to the Commissioner of Lands by the 1st Defendant dated 26/6/2002 confirmed that Gatei wa Nganda had been cleared by the 1st Defendant and a lease could be issued to him for plot number Nairobi Block 117/468. He also produced the subdivision scheme approval issued by the Commissioner of Lands on 13/3/2002 and a copy of the list of plot owners as at 10/6/1999 revised in May 2005 by the 1st Defendant. The list reflected the Plaintiff’s name against the Suit Property. He produced a copy of his passport Number A158220 which gave his date of birth as 22/1/1963. The passport bears many stamps from the Passport Control Office in Nairobi for the

times the Plaintiff left the country or came to Kenya.

5. He confirmed that he used passport number A158220 when he purchased the suit land. He made the requisite payments to the Commissioner of Lands on 23/7/2007 after the 1st Defendant confirmed that he was the owner of the Suit Property. A lease over the Suit Property was yet to be issued to him. When he visited Kenya in January 2011 he found the Suit Property intact but when he visited again in January 2013, he found beacons on the land indicating subdivision of the land. He erected a sign board on the land to warn people that it was not up for sale. The 2nd Defendant presented herself as the owner of the Suit Property and produced the certificate of lease issued on 12/12/2012. On perusing the records at the lands office, he learnt that the 3rd Defendant obtained a title over the Suit Property on 20/12/2012. He could not obtain certified copies of the official records for the Suit Property from the lands office.

6. The Plaintiff denied entering into any agreement to sell the Suit Property to the 2nd or 3rd Defendants. He stated that between 20/12/2011 and 1/2/2012 he was in the USA and relied on his passport which showed that he arrived in Nigeria on 2/2/2012. He added that the passport produced by the 3rd Defendant bore the number of his passport which expired in September 1999 but was not his passport. The passport used to transact on the suit land was forged. He contended that the 1st, 2nd and 3rd Defendants had fraudulently caused to be procured a certificate of lease over the Suit Property yet they ought to have known that he was the owner. He added that the 4th and 5th Defendants had colluded or abetted the fraud. He confirmed that the Suit Property was undeveloped. He pointed out that the copy of the passport filed by the 3rd Defendant was not his passport. The photograph and the details on the passport were not his. He neither signed the sale agreement nor sold the Suit Property to 3rd Defendant.

7. Emmanuel Karisa Kenga gave evidence for the Plaintiff. He produced the examination report dated 17/5/2019 following the examination of the specimen signatures on the agreement for sale forwarded to him. He concluded that the signatures were different.

8. The 1st Defendant did not call any evidence. The 2nd Defendant testified. She entered into a sale agreement with the 3rd Defendant in January 2013. The 3rd Defendant intimated to her that he was selling the Suit Property because he was relocating to the USA. She paid the full purchase price and the sale was completed. She fenced the land. On 24/1/2013 she was informed that a sign reading "not for sale" had been erected on the Suit Property. She went to the land and found the Plaintiff who laid claim to the same land. They both went to the Assistant Chief's Office to try and resolve the dispute. She was later called to the Criminal Investigations Department (CID) and asked to take along her documents. She recorded a statement and was informed that the CID officers would investigate the matter to determine if a crime had been committed in the ownership dispute.

9. She was informed by her advocates that the deed file in respect of the suit land was missing in the lands office. She produced copies of the search dated 18/1/2013 showing the 3rd Defendant was registered as the proprietor of the Suit Property on 20/12/2012; share certificate number 0453 issued by the 1st Defendant to the 3rd Defendant on 20/4/2012; Subdivision Scheme Approval dated 26/7/2012 issued by the Ministry of Lands; a copy of the certificate of lease issued to the 3rd Defendant on 20/12/2012; and the lease registered on 20/12/2012. She also produced copies of the sale agreement dated 11/1/2013 that she entered into with the 3rd Defendant for the purchase of the Suit Property; the transfer of lease executed by the 3rd Defendant but which was not registered or dated; and the rent clearance certificate issued to the 3rd Defendant by the Commissioner of Lands on 23/1/2013. She stated that she bought the land on the strength of the share certificate and title which the 3rd Defendant presented to her. She paid the full purchase price to the 3rd Defendant who gave her all the documents. Despite filing documents and a witness statement in court, the 3rd Defendant did not testify or call any evidence.

10. Parties filed submissions which the court has considered. The Plaintiff submitted when this suit was commenced, a dispute arose as to who were the *bona fide* officials of the 1st Defendant after different law firms were instructed to represent the 1st Defendant by two different sets of officials. Lady Justice Gacheru summoned the Registrar of Companies who confirmed that *bona fide* officials were those represented by Mbugua Kariuki and so the firm of Henia Anzala and Associates was the firm properly on record for the 1st Defendant.

11. The main issues for determination are who has a valid claim to the Suit Property and whether the court should grant the orders sought by the Plaintiff. The 3rd Defendant stated in his witness statement and defence that he would demonstrate during the hearing that he acquired the Suit Property lawfully. The 3rd Defendant did not attend court on 3/7/2019. His advocate requested an adjournment and indicated that the 3rd Defendant would be available to testify on 30/9/2019. The case was adjourned but he did not attend court on that day when his advocate closed his case.

12. The Plaintiff submitted that his evidence was uncontroverted. He submitted the 3rd Defendant acquired the Suit Property fraudulently. He relied on the definition of fraud in the Black's Law Dictionary as consisting of some deceitful practice or wilful device resorted to with the intention to deprive another of his right or in some manner do him an injury. The Plaintiff submitted that under Section 26 of Land Registration Act the title of an owner can be challenged on grounds of fraud or misrepresentation to which the owner is proved to be a party. The Plaintiff submitted that the 3rd Defendant was issued a title through fraud based on the fact that the Plaintiff never met the 3rd Defendant nor did he sell the Suit Property to him.

13. Further, that he was not in Kenya on the date of the alleged sale and in any event by that date the passport used in the sale transaction had expired way back in 1999. The photo appearing on the passport used by the 3rd defendant was of a different person and bore a different date and place of birth from those of the Plaintiff. The Plaintiff added that the 3rd Defendant stated that in his defence that he met Simon Njuguna, the alleged official of the 1st Defendant who confirmed to him that the Suit Property belonged to Gatei wa Nganda whose identification was passport number A158220. Lady Justice Gacheru already made a finding that Simon Mbugua was not an official of the 1st Defendant and had no authority to represent it in any transaction. The Plaintiff also relied on the evidence of the document examiner that the signature used to transfer the Suit Property did not belong to him.

14. The Plaintiff relied on the case of **Lawrence Mukiri v Attorney General and 4 others [2013] eKLR** on the criteria for who is a *bona*

fide purchaser for value. One must prove that he holds a certificate of title; he purchased the property in good faith; he had no knowledge of the fraud; the vendor had an apparent valid title; and that he purchased the land without notice of any fraud and was not party to any fraud. The Plaintiff pointed out that the 2nd Defendant does not hold a certificate of title over the Suit Property. Further that the 2nd Defendant had not tendered evidence of any payment for the Suit Property. The Plaintiff faulted the 2nd Defendant for not conducting due diligence and concluded that the 3rd Defendant acquired title of the Suit Property through fraud and did not have a good title which he could pass to the 2nd Defendant. The Plaintiff submitted that the 2nd Defendant's recourse under Section 24 of the Land Registration Act was to bring an action to recover damages against the person who sold the land to her or who acquired title through fraud, error or misdescription.

15 The 1st Defendant filed submissions and confirmed that it was the registered owner of L.R No. 8570 from which the Suit Property was excised. It submitted that the Suit Property was transferred to the Plaintiff by Lucas Kimani Woru and the 1st Defendant issued a share certificate to the Plaintiff. The 1st Defendant denied participating in any other transaction over the Suit Property and maintained that Simon Njuguna had never been chairman or director of the 1st Defendant while relying on the ruling of the court given on 27/8/2013. The 1st Defendant submitted that it had never dealt with the 3rd Defendant and that as far as it was concerned, the Plaintiff was the owner of the Suit Property. The 1st Defendant added that the 3rd Defendant did not adduce any evidence to support his claim to the Suit Property or counter the evidence adduced by the Plaintiff. It added that the 3rd Defendant does not have a good title to the Suit Property and that his title was obtained fraudulently.

16. The 2nd Defendant submitted that the Plaintiff had failed to prove fraud against the 3rd Defendant. She further submitted that Sections 25 and 26 of the Land Registration Act protected the rights of a registered proprietor of a first registration. The 2nd Defendant submitted that the Plaintiff failed to prove fraud to the standard required and that he had failed to prove that there was collusion between the lands officials and the 2nd and 3rd Defendants. The 2nd Defendant contended that the Plaintiff sold the Suit Property on 3/1/2012 to the 3rd Defendant and relied on the sale agreement prepared by Kimani Kahete and Company Advocates.

17. The court is persuaded on a balance of probabilities that the Plaintiff did not sell the Suit Property to the 3rd Defendant based on his own evidence and that of the document examiner. A forged copy of the Plaintiff's passport bearing different particulars was used in the fraudulent transaction that purported to transfer the suit land to the 3rd Defendant. No evidence was adduced to prove that the 3rd Defendant bought the suit land from the Plaintiff. Simon Njuguna, who the 3rd Defendant claimed in his defence was the chairman of the 1st Defendant who issued a share certificate to him was not called to give evidence on the transfer of the land to the 3rd Defendant. The 1st Defendant which originally owned the land confirmed that according to its records, the Plaintiff was the genuine owner of the Suit Property.

18. The Plaintiff has proved his case on a balance of probabilities and the court grants prayers (a), (b), (c), (d), (e) and (f) of the plaint dated 22/2/2013. The Plaintiff is awarded the costs of this suit to be borne by the 2nd and 3rd Defendants.

Dated and delivered at Nairobi this 13th day of December 2019

K.BOR

JUDGE

In the presence of:-

Mr. K. Rono for the Plaintiff

Mr. W. Kabugu holding brief for Ms. Mueni for the 1st Defendant

Ms. W. Kihiu for the 2nd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 3rd, 4th and 5th Defendants