



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 62 OF 2017

KARANJA GUCHU.....PLAINTIFF

VS

SABERA WANJIKU GUCHU.....1ST DEFENDANT

JOSEPH MWANGI KARIOKOO.....2ND DEFENDANT

PURITY WACHERA KIHARA.....3RD DEFENDANT

DISTRICT LAND REGISTRAR, MURANG'A.....4TH DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against Defendants on 14/10/15 seeking the following orders; -

- a) A declaration that the subdivision and subsequent transfer of land parcel No. Makuyu/Kimorori/Block 111/539 to the 1st, 2nd and 3rd Defendants is unlawful, fraudulent, null and void and of no legal consequence.
- b) An Order directed to the 4th Defendant to cancel the titles issued to the 1st, 2nd and 3rd Defendants and revert land parcel No. Makuyu/Kimorori/Block 111/539 in the name of the Plaintiff.
- c) Punitive costs by the 1st, 2nd and 3rd Defendants as general damages of illegal and fraudulent transfer of the Plaintiff's land.
- d) Cost of the suit.
- e) Any other or better relief the Honourable Court may deem fit to grant.

2. It is the Plaintiffs case that he is the registered owner of Makuyu/Kimorori/Block 111/539. That the said land was fraudulently transferred to the 1st – 3rd Defendants without his knowledge and consent. He has itemized 3 counts of fraud on the part of the 1st – 3rd Defendant & 4th Defendant respectively.

3. The Plaintiff avers that he is the registered owner of Makuyu/Kimorori/Block 111/539 and was issued with a title. A copy of the title registered in his name was annexed as well as a certificate of search dated 27/5/2013.

4. That in or about September 2015 the Plaintiff conducted an official search at Murang'a Lands Office and the 4th Defendant declined to grant him the outcome of the search claiming the Makuyu/Kimorori/Block 111/539 did not exist at the Registry further that on 14/9/15 he bought a green card and discovered that plot Makuyu/Kimorori/Block 111/539 had been closed upon subdivision into plot Makuyu/Kimorori/Block 111/5120 & 5121 and the plots registered in the names of 2nd & 3rd Defendants respectively. That he later learnt that the transfer of Makuyu/Kimorori/Block 111/539 to the 1st-3rd Defendants was pursuant to a Succession Cause SPMCC No. 194 of 2012 - Murang'a. That he enquired from the Executive officer of the Court about the case file for SPMCC No 194/2012 with a view to perusing the same but he was informed that there was no such Succession Cause filed in that Court. That the Succession matters in 2012 closed at No. 47 in that year.

5. That the transfer & subdivisions of Plot Makuyu/Kimorori/Block 111/539 were illegal and fraudulent and has particularized 3 counts each on the part of the 1-3rd Defendants and the 4th Defendant.

6. He further avers that the Defendants are strangers to him.

7. The Defendants (1-3) were served by way of substituted services on 24/12/15 but did not enter any appearance nor file defence. The Plaintiff sought and obtained judgement in default against them on 25/2/16 and set the matter for formal proof.

8. The 4th Defendant filed a defence on 4/10/16 opposing the Plaintiff's claim on the ground that the Plaintiff has never been the registered owner of the suit property. It denied all the allegations of fraud and further that if the 4th Defendant registered the suit property in the names of the deceased, it did so based on the documents presented before the 4th Defendants officers, who exercised due diligence and the said documents being believed to be genuine were thus registered.

9. At the hearing of the case the 4th Defendant was absent despite being served with the hearing notice. Affidavit of service dated 24/11/17 refers. The Court being satisfied of service to the 4th Defendant directed the case to proceed for formal proof against the 1-3rd Defendants and exparte against the 4th Defendant. It is only the Plaintiff that filed written submissions which I have reviewed.

Determination

10. It is not in dispute that the original owner of the suit land is the Plaintiff. A copy of the title for Makuyu/Kimorori/Block 111/539 registered in the name of the Plaintiff and dated 1/7/88 refers. This is consistent with the certificate of search dated 27/5/13 and the entry No. 2 in the green card. The address in the title and that in the green card of the Plaintiff are similar. The Plaintiff tendered his copy of ID No. 3571195/66 which is similar with the one on the Title No. Makuyu/Kimorori/Block 111/539.

11. Section 26(1) of the Land Registration Act states as follows;

“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”. Guided by the above section of the law I hold and find that the Plaintiff was indeed the registered owner of Makuyu/Kimorori/Block 111/539 going by the documents presented in Court.

12. Further section 24(1) vests the Plaintiff the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto.

13. Has the Plaintiffs proved fraud? Black's Law Dictionary, 9th Edition defines as thus;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:**

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (**Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308**).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (**see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (**Davy V Garrett (1878) 7 ch.D. 473 at 489**). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

see **Insurance Company of East Africa vs. The Attorney General & 3 Others HCCC No 135/1998** it was held that whether there was fraud is, however, a matter of evidence.

It is on record that the Plaintiff has averred that he did not transfer his land to the Defendants. That he holds the original title and has been in possession. That nobody has come to disturb his occupation. He has also averred that he does not know the Defendants and indeed he enquired from the area Chief who in turn did not know them or their whereabouts. That explains why he did seek and obtained a Court Order to serve them by substituted services through an advert in the Daily Newspaper. Even then they did not make appearance in Court.

It is also on record that the Plaintiff reported the matter to the OCS Makuyu Police station to investigate the matter. He avers that by the time of the trial he had not received any feedback from the police on the outcome of the investigations.

14. The 4th Defendant filed documents and pleadings in Court on 25/9/17 which clearly indicates that the 1st Defendant purported to obtain letters of grant of administration in 2012 for the estate of Karanja Guchu who is said to have died in Kenyatta National Hospital on 8/5/08. A death Certificate was however not attached. That on 12/2/13, the 1st Defendant obtained a confirmed grant where the property was distributed to the 1st Defendant; 0.164 Ha and 2nd and 3rd – 0.04 Ha. I have seen a gazette notice purporting to advertise the loss of title for Makuyu/Kimorori/Block 111/539 dated 21/6/12 as well as one dated 4/1/12 gazetting the probate and administration cause of No. 194 of 2012. Armed with the purported confirmed grant the 1st Defendant purported to apply for Land Control Board consent. On the 21/5/14 she proceeded to subdivide the land into Makuyu/Kimorori/Block 111/5120 & 5121 which were registered on 1/7/14 in the names of the Defendants.

15. It has been submitted by the Plaintiff that the gazette notices are a forgery and fake. He produced his original ID to show that he is alive. He also stated that it is not possible for the SPMCC Court to have registered 194 Succession Causes between 2/1/12 to 4/1/12 and that the documents purporting to be letters of grant were mere forgeries used to fraudulently transfer this land to the Defendants.

16. From the above I find and hold that the Plaintiff has proved fraud to the required standard as set out in the Court of Appeal in the **Arthi Highway** Case aforesaid.

17. The 4th Defendant has explained that the registration of the 1st-3rd Defendants was done by its officers based on the documents presented before the registry and had no knowledge of any fraud being undertaken. I reviewed the evidence as presented in the pleadings and have not found any culpability on the part of the 4th Defendant. In any event the Plaintiff has not tendered evidence to otherwise prove fraud on the part of the 4th Defendant.

18. Though the Plaintiff has pleaded for general damages for illegal and fraudulent transfer of the plaintiff's land, he has not presented to the Court any evidence to guide the Court on the quantum of the general damages. I decline to so grant this prayer.

19. In the end I find and hold that the Plaintiff has proved his case to the required standard and grant Orders as follows;

a) A declaration that the subdivision and subsequent transfer of land parcel No. Makuyu/Kimorori/Block 111/539 to the 1st, 2nd and 3rd Defendants is unlawful, fraudulent, null and void and of no legal consequence.

b) An Order directed to the 4th Defendant to cancel the titles issued to the 1st, 2nd and 3rd Defendants and revert land parcel No. Makuyu/Kimorori/Block 111/539 in the name of the Plaintiff.

c) Costs to be met by the 1-3rd Defendants.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 23RD DAY OF FEBRUARY, 2018.

J G KEMEI

JUDGE