



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 216 OF 2016

JOHN MWAI KABURIA.....PLAINTIFF

-VERSUS-

EDWARD MBOGO KARURI.....1ST DEFENDANT

LAND REGISTRAR, NYERI.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. The suit herein relates to the parcel of land known as **Iriaini/Chehe/1813** originally registered in the names of George Kaburia Gichuriu, Martin Thairu Kaburia and John Mwai Kaburia (hereinafter referred to as the suit property).
2. Vide the plaint dated **5th October, 2016** the plaintiff *inter alia* contends that one of the registered proprietors of the suit property without the consent of the other registered proprietors and in outright disregard of the other proprietors of the suit property, entered into an agreement with the 1st defendant for sell of a portion of the suit property to him (read the 1st defendant).
3. Explaining that the seller failed to meet his part of the bargain, the plaintiff points out that the 1st defendant filed a case in Nyeri law courts to wit CMCCC No.181 of 2014 to compel the seller to fulfill his part of the bargain.
4. The plaintiff contends that with intent to disinherit the other registered proprietors of the suit property and while knowing that the other registered proprietors of the suit property were not parties to the suit, the seller and the 1st defendant fraudulently reached a consent dated 6th June, 2014 that the suit property be sub-divided and 1 ½ acres of land be curved off the suit property and be transferred to the 1st defendant.
5. Explaining that the consent was recorded without disclosing to court that the seller was not the only registered proprietor, the plaintiff contends that the 1st defendant colluded with the 2nd defendant to fraudulently cause the subdivision of the suit property and register the subdivision thereof in the name of the 1st defendant.
6. The plaintiff points out that the suit property was subdivided and the resultant parcels of land to wit Iriani/Chehe/2034 and Iriaini/Chehe/2035 registered in the names of George Kaburia Gichuria, Martin

Thairu Kaburia and John Mwai Kaburia (Iriani/Chehe/2034) and the 1st defendant (Iriani/ Chehe/2035).

7. Explaining that the suit property had been registered under joint ownership in order to safeguard the family interest therein, the plaintiff maintains that the sub-division and registration of the resultant portions of the suit property in their names and in the name of the 1st defendant respectively, was effected fraudulently.

8. For the foregoing reasons, the plaintiff urges the court to declare the subdivision of the suit property into Iriani/Chehe/2034 and Iriani/Chehe/2035 and the subsequent transfer of title Iriani/Chehe 2035 to the 1st defendant to have been irregular, illegal and void *ab initio*. The plaintiff also urges the court to order the cancellation of the title held by the 1st defendant and to reinstate the original title to the suit property. The plaintiff further urges the court to order the 1st defendant to vacate the suit property and pay him mesne profits for the period he has been unable to use the land; costs of the suit and any other relief the court may deem fit to grant.

9. The defendants filed statements of defence denying all the allegations leveled against them. Besides denying the allegations made against him, the 1st defendant explains that he got registered as proprietor of Iriani/Chehe/2035 from George Kaburia Gichuru (hereinafter the seller) whom he paid Kshs.1.4 million as purchase price; that the seller failed to transfer the portion he bought to him; that he sued the seller for refund of the purchase price and that they recorded a consent that led to his registration as the owner of Iriani/Chehe/2035.

10. Terming himself an innocent purchaser for value without notice of any fraud as at the time he purchased the land, the 1st defendant contends that it was not brought to his attention that the land was jointly owned.

11. Explaining that he has had quiet enjoyment of the parcel of land registered in his name, the 1st defendant contends that the suit herein cannot proceed without the administrators of the estate of the seller and the estate of Martin Thairu Kaburia, who was also a proprietor of the suit property.

12. Terming the suit herein an afterthought, the 1st defendant contends that there has been unexplained inordinate delay in bringing the suit.

13. Pointing out that he only bought a portion of the suit property and that the plaintiff was left with the remainder of the suit property, the 1st defendant argues that the plaintiff has not demonstrated whether the suit property was held jointly or the ownership was in common.

14. Disputing the plaintiff's contention that they failed to disclose to the court that there were other people with interest to the suit property, the 1st defendant maintains that there was no collusion between him and the seller.

15. Because the orders issued in that suit have never been challenged, it is the 1st defendant's case that the orders remain valid to date.

16. The plaintiff suit is also said to be defective for want of particulars of fraud in the plaint.

EVIDENCE

The plaintiff's case

17. When the matter came up for hearing, the plaintiff reiterated his pleaded claim against the defendant and produced the following documents in support thereof:

- (a) Death Certificate in respect of Martin Thairu Kaburia;

- (b) Copy of Title in respect of Iriaini/Chehe/ 1813;
- (c) Copy of search in respect of Iriaini/Chehe/ 1813;
- (d) Copy of agreement of sale dated 1st March, 2014;
- (e) Copy of pleadings in Nyeri CMCC No.181 of 2014;
- (f) Copy of order dated 6th June, 2014;
- (g) Copies of burial permit in respect of Martin Thairu Kaburia and George Kaburia Gichuru;
- (h) Copy of search in respect of Iriaini/Chehe/ 2034;
- (i) Copy of search in respect of Iriaini/Chehe/ 2035.

18. The plaintiff blamed the 1st defendant for buying the suit property without their consent and urged the court to reinstate the original title so that the suit property can be divided equally amongst the registered owners.

19. Concerning failure to include the administrator of the estate of his father to the suit herein, he explained that the administrator of his father's estate was not one of the registered proprietors of the suit property.

20. Despite not being the administrator of the estate of his late brother, Martin Thairu, he stated that he brought this suit on his own behalf and on behalf of his late brother, his late brother's wife and his sister, Caroline.

The defence case

21. On his part, the 1st defendant reiterated the contents of his statement of defence and produced the following documents in support of his case:

- (i) Search for land parcel No. Iriaini/Chehe/2035 dated 23rd November, 2015;
- (ii) Title deed for Iriaini/Chehe/2035 dated 23rd November, 2015;
- (iii) Sale agreement dated 1st March, 2014 & acknowledgements;
- (iv) Complaint in Nyeri CMCCC No. 181 OF 2014.

22. He acknowledged having conducted a search in respect of the suit property before he bought it. He established that the suit property was registered in the name of the seller and a deceased person.

23. He stated that he was told by the seller that the other registered proprietor of the suit property is not usually there.

24. He confirmed that the plaintiff was not present when they entered into the sale agreement.

25. Whilst in the sale agreement he was purchasing 1 acre, he ended up getting 1 ½ acres. In that regard he explained that the seller asked him to pay more money for an extra portion of the Suit property.

26. The court heard that the 1st defendant and the seller had entered into a second agreement in respect of the extra portion of land. He, however, had no documents capable of showing that he had entered into such an agreement with the seller or that he had made any payment in respect thereof.

27. He acknowledged that in the suit he filed in the lower court, he did not include the other registered proprietors of the suit property.

28. In re-examination, he stated that the seller asked him to pay him more money so that he could transfer 1 ½ acres to him. He paid Kshs. 90,000/- over and above what he pleaded in his plaint.

Submissions

29. At close of hearing, parties filed submissions which I have read and considered.

30. From the pleadings filed in this matter and the submissions, I find the issues for determination to be as follows:

a) Whether the plaintiff's case is fatally defective for want of compliance with mandatory requirements of the law?

b) Subject to the outcome of (a) above, whether the plaintiff has made up a case for being granted the orders sought or any of them?

c) What orders should the court make?

31. With regard to the 1st issue, it is pointed out that the plaintiff's suit is based on fraud and because the plaintiff did not provide the particulars of fraud in his plaint submitted that the plaintiff violated the provisions of **Order 2 Rule 10** of the Civil Procedure Rules which provides as follows:

"10(1) subject to sub rule (2) every pleading shall be containing the necessary particulars of any claim, defence or other matter pleaded including without prejudice to the generality of the foregoing-

a. Particulars of any misrepresentation, fraud, breach of trust, unlawful default or undue influence on which the party pleading relies."

32. Whilst it's true that the plaintiff did not expressly provide the particulars of fraud relied on, I note that vide the averments contained in paragraphs 9, 10, 11, 12 of the plaint filed in this suit, it is discernible what fraud is said to have been committed. The said paragraphs make it categorically clear that the plaintiff's complaint against the seller of the suit property and the buyer thereof is that:

(i) He was not enjoined in the suit pursuant to which the suit property was subdivided and a portion thereof transferred to the 1st defendant yet the parties to the suit knew that he had an interest in the suit property (paragraph 9);

(ii) The consent of other persons with interest in the suit property was not obtained to subdivide the suit land and transfer a portion thereof to the 1st defendant (Paragraph 9);

(iii) That the court was not informed that there were other people with an interest in the suit property at the time a consent for subdivision and transfer of a portion of the suit property to the 1st defendant was made (paragraph 10);

(iv) That the sub-division and transfer of a portion of the suit property to the 1st defendant was done without the knowledge and consent of the other persons with interest in the suit property (paragraph 11 and 12).

33. The statement of defence filed by the 1st defendant shows that the 1st defendant was able to understand the case urged against him and to adequately respond thereto. For instance, vide paragraphs 6 and 12 of his statement of defence, the 1st defendant was able to respond to the allegations of fraud

leveled against him by stating as follows:

“6. The 1st defendant avers that he is an innocent purchaser for value without notice of any fraud as at the time he purchased the land it was not brought to his attention that the land was jointly owned and the only issue on the land was a temporary house of one Christopher Kaburia who had failed to give him vacant possession and he sued him in court and thereafter took vacant possession of the land and he has had quiet enjoyment of the same.

12. The 1st defendant avers that there is nothing he failed to disclose in Nyeri CMCC No.181 of 2014 and there was no collusion as alleged and no one has ever gone to challenge the orders of Nyeri CMCC No.181 of 2014 and the same remain valid to date.”

34. It is clear from the foregoing, that despite the plaintiff having failed to expressly provide the particulars of fraud urged against the deceased and the 1st defendant, the 1st defendant was able to appropriately respond to the case urged against him.

35. Being of the view that the import of requiring for particulars was to make parties be able to respond to the case urged against them and there being evidence that the spirit behind that requirement of the law was met, I find and hold that the failure to expressly provide for particulars of fraud in this case did not render the suit herein fatally defective.

36. The plaintiff's suit is also said to be vitiated by the fact that besides urging his claim, he also claims on behalf of the estate of his brother, George Kaburia (deceased) yet he is his not the administrator of his brother's estate. For that reason, the plaintiff's case is said to be incompetent. Because the suit property was held in common, it is submitted that the plaintiff lacked capacity to bring the suit in the absence of his co-owners of the suit property.

37. Whilst it's true that the plaintiff lacks capacity to urge the case on behalf of his deceased brother because he is not an administrator of the estate of his deceased brother, I am unable to agree with 1st defendant's contention that the plaintiff cannot urge his claim as a beneficiary of the suit property without making his co-owners of the suit property parties to the suit. I say so, because each of the co-owners has an interest in the suit property which he or she is entitled to protect whenever the interest is threatened with violation or has been violated as happened in this case.

38. In view of the foregoing, while acknowledging that there are a number of defects in the plaintiff's suit, I find and hold that the defects do not render the suit fatally defective.

39. On whether the plaintiff has made up a case for being granted the orders sought or any of them, upon review of the totality of the evidence adduced in this case, I find and hold that at the time of entering into the sale agreement that led to an order for subdivision and transfer of a portion of the suit property to the 1st defendant, the 1st defendant was aware of the interest of other persons in the suit property.

40. In disregard of the interests of the other registered proprietors of the suit property and without bothering to enjoin the other registered proprietors of the suit property to the suit he preferred before the lower court for enforcement of the agreement he had entered into with the seller (one of the registered proprietors of the suit property), the parties to the impugned sale agreement recorded a consent for transfer of a portion of the suit property to the 1st defendant.

41. The evidence on record further shows that the court was not informed that there were other people with interest in the suit property as a result of which, the court ended up sanctioning a process that was by dint of the provisions of **Section 103(2)** of the then Registered Land Act (Cap 300, now repealed) and the provisions of **Section 91(6)** of the Land Registration Act, 2012 irregular. The sections provide as follows:

“103(2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing

of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.

91(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.

42. Under **Section 91(1)** of the Land Registration Act, 2012, co-tenancy means ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.

43. From the evidence adduced in this case, it is clear that the subject matter of this suit was owned by the plaintiff, the seller and Martin Thairu in undivided shares.

44. Whereas sub-division and transfer of a portion of the suit property was effected pursuant to a court order, being of the view that the process leading to interference with the title to the suit property was tainted with irregularity and illegality on the part of the seller and the buyer (1st defendant), I find and hold that the 1st defendant did not obtain a good title to the suit property. In that regard, see **Sections 103(2)** of the RLA and **Section 91(6)** of the Land Registration Act, 2012.

45. Having determined that the sub-division and transfer of the suit property to the 1st defendant was tainted with irregularity and illegality, I find and hold that the plaintiff has made up a case for being granted prayers (a), (b), (c), and (e) of the plaint.

46. As regards the claim for mesne profits, from the evidence produced in court, I find nothing capable of forming the basis for the award of mesne profits in favour of the plaintiff.

47. The upshot of the foregoing is that the plaintiff's suit succeeds to the extent contemplated in this suit.

Dated, signed and delivered in Nyeri on this 15th day of February, 2018.

L N WAITHAKA

JUDGE

Coram:

Ms Ndegwa h/b for Mr. Kioni for the plaintiff

N/A for the 1st defendant

Mr. Nderitu for 2nd and 3rd defendants

Court assistant - Esther