



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 366 OF 2017

SUSAN KAREA MUTHAURA (suing as legal representative of

DOUGLAS MUTHAURA DECEASED).....PLAINTIFF

VERSUS

SOLOMON MWOKOBIA NKURARU.....1ST DEFENDANT

JENNIFER KINOTI MUTIGA.....2ND DEFENDANT

DISTRICT LAND REGISTRAR NANYUKI.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

JUDGEMENT

1. Before me for determination is a matter wherein the plaintiff applied for interlocutory Judgment against the defendants vide an application dated the 3rd March 2014 and filed on the 21st March 2014 wherein judgment was entered against the Defendants on the 29th April 2014.
2. It is on record that the 1st defendant was served with the Summons to Enter Appearance together with a copy of the plaint, verifying affidavit, statements and list of documents on the 24th January 2014 through his wife Rose Kagwiria Mwobobia, whereas the 2nd, and 3rd Defendants Defendant were also served with the same documents on the 10th December 2013, and the 4th defendant was served on the 19th December 2013 as per the affidavit of service sworn by one Esther Gathoni Mwangi on the 29th January 2014 and filed in court on the 21st March 2014.
3. The Defendants having failed to either enter appearance or file a defence despite having been duly served, the matter was set down for formal proof on the 30th September 2014.
4. However on that day the said interlocutory judgment was struck out for the same having been obtained against the government without leave of court in contravention of order 10 rule 8 of the civil procedure Rules.
5. The court then granted the defendants 30 days leave to file their respective defences. The Plaintiff was directed to serve the 1st and 2nd Defendants with the order within 7 days.
6. When the matter came up for mention on the 16th March 2016, there was an appearance for the 3rd and 4th Respondents wherein the court was informed that the 1st and 2nd defendants had neither entered their Appearance nor filed their Defence. And suffice to note that although there was the plaintiff's reply to the Defendant's Defence filed on the 30th October 2014, the said Defence is not in the court file.
7. Be as it may, parties were subsequently directed to comply with orders 3,7 and 11 of the Civil Procedure Rules within 30 days and to take directions on the 24th May 2015.
8. Come that date, there was no appearance for the 3rd and 4th Defendants whereas the 1st and 2nd Defendants had still not filed their Memorandum of Appearance or Defences. The court was informed that the plaintiff had applied for interlocutory judgment to be entered against them vide their application dated the 22nd September 2015.
9. That a date for formal proof was subsequently issued on the 29th May 2017 for the hearing on the 19th September 2017.

10. The plaintiff's case was that she was a widow having been married to one Douglas Muthaura who passed away on the 3rd November 2005 and wherein she had applied for letters of succession and was issued with the grant on the 28th March 2011. The Grant which was adduced as exhibit 2 was subsequently confirmed on the 20th February 2012.

11. The plaintiff then filed her complaint dated the 4th October 2013 on the 8th October 2013 in which she sued the defendants and sought for the following orders;

- a. A Declaration that the transfer of land parcel No. Laikipia /Daiga-Umande Block 4/396 to the 1st Defendant and subsequently to the 2nd Defendant was illegal, irregularly un-procedural, and fraudulent.
- b. A Declaration that the 2nd Defendant to re-transfer the said land into the names of the Plaintiff.
- c. An order for eviction of the 1st and 2nd Defendants from the said land.
- d. Costs of this suit.
- e. Any other or such better relief that the Hon court may deem fit and just to make.

12. The Plaintiff's evidence on oath and while relying on her statement is to the effect that her late deceased husband was the proprietor of parcel No. Laikipia /Daiga-Umande Block 4/396 and that he had died in that capacity.

13. That after he had died she had gone through the succession motion wherein on the 20th February 2012, vide HCC succession cause No. 733/2010, the High Court sitting in Nyeri ordered that the suit property herein amongst others, be registered in her name.

14. She testified that on the 9th August 2010 when she conducted a search on the said property the search certificate having been produced as exhibit 3, she had discovered that it had been charged to Kenya Commercial Bank since her late husband had taken a loan therein and had charged it for Ksh 70,000/= but had died before discharging it.

15. The plaintiff testified that before she had filed the Succession Cause, the suit land had still been registered in her late husband's name.

16. That later in the year 2011, she found the 1st Respondent had settled on the land after having bought it. On the 5th April 2011, She went again to conduct another search, the certificate which was produced as exhibit 5, wherein she found that the land was still in her husband's name and still charged to the bank

17. She decided to lodge a caution on the same but was shocked when she went back the following day on the 6th April 2011, with the application for the caution, only to find that the suit property was now in the name of the one Jennifer Kinoti the 2nd Defendant herein whom she did not even know. The certificate of the search was produced as exhibit 5.

18. That when she and her brother in law, Pw 2 tried to inquire from the Lands office as to what might have transpired, they were sent away. They tried to lodge a complaint with the police but were turned away.

19. She produced the green card dated the 27th April 2011 as exhibit 6 which showed that the 2nd defendant had been registered as the proprietor on the 5th April 2011.

20. That she had written to the Kenya Commercial Bank vide her letter dated the 21st January 2013 which was produced as exhibit 7, inquiring on the status of the suit Land wherein vide a letter dated the 4th February 2013, and produced as exhibit 8, the bank responded and informed her that they had not executed any discharge on the suit land. The bank had also informed her that they still held the original copy of the title deed and gave her a copy of the same which to her surprise had the name of the 1st Defendant herein having been endorsed and issued in 2001.

21. She was puzzled as to how the green cards could be in her late husband's name, yet the title with the bank was in the name of the 1st Defendant. She confirmed that she had not discharged the charge with the bank.

22. The plaintiff called Patrick Theophilus as plaintiff witness number 2 who confirmed her evidence and added that when they had approached the 1st Defendant on the suit land, he had adamantly told them that the land was his.

23. That they had met with the 1st Defendant again at the land's office and had confronted him in the presence of the Land Registrar to whom they had asked not to transact any business on the suit, which protest which had resulted into them being thrown out of the office.

24. That when they went back to the lands office on the following day, everything had changed and even the green card was different to the effect that that the 2nd Defendant had now been endorsed as the owner of the land. Their pleas to be heard on their objection fell on deaf ears as they were ejected from the land Register's office once again.

25. The plaintiff thus closed her case and filed her submissions on the 6th October 2017 which submissions basically regurgitated her

evidence and confirmed that there was fraud committed by the defendants when they purported to create another green card on the 7th April 2011.

26. That the green card had showed that the land had been discharged to the bank on the 5th March 2011 wherein the proprietor had long passed on in the year 2005.

27. The Plaintiff's submission was to the effect that since the suit land had been charged to the bank way back on the 4th October 1996, by 5th April 2011, the land was still in the name of the deceased and was still charged with the bank, how then was the same sold to the 1st Defendant in the year 2001? How was it discharged when the bank had not executed a discharge?

28. That the 3rd Defendant herein by purporting to create entries on the register had committed serious fraud.

29. The particulars of fraud attributed to the 1st defendant by the plaintiff were:

- i. Transferring the deceased's land to himself by fraud.
- ii. Grabbing the deceased's land.
- iii. Using corrupt means to have the suit land which had a charge transferred into his name.
- iv. Using corrupt means to influence the 3rd Defendant to backdate the purported date of transfer.
- v. On realizing that the fraud had been discovered, hurriedly transferring the suit land to the 3rd Defendant.
- vi. Colluding with the 4th Defendant to remove a charge over the said land illegally.

30. The particulars of fraud attributed to the 2nd Defendant by the plaintiff are:

- i. Colluding fraudulently with the 1st and 3rd Defendants to have the suit land Registered in her name as a way of making sure the plaintiff would not detect.
- ii. Colluding with the 4th Defendant to transfer the land into her name.
- iii. Having the land transferred into her name un-procedurally illegally and irregularly.

31. The particulars of fraud attributed to the 4th Defendant by the plaintiff are:

- i. Abusing his office by committing fraud.
- ii. Transferring land belonging to the deceased person without following the laid down procedure.
- iii. Colluding with the 1st and 2nd Defendants to deprive the plaintiff part of her husband's estate.
- iv. Enabling the 1st and 2nd Defendants to steal the deceased's land.

32. The plaintiff submitted that the land, upon the demise of its proprietor, could only change hands through transmission by the administrator/administratrix, after a succession cause has been filed and completed.

33. The Plaintiff had prayed for judgment to be entered against the 1st and 2nd Defendants as prayed in the plaint.

34. I have reviewed and considered the uncontroverted evidence of the plaintiff in support of his claim and the issues for determination are:

- i. **Whether the allegations of fraud pleaded against the Defendant have been proved**
- ii. Whether the plaintiff is entitled to be declared as entitled to the orders so sought vide her plaint dated the 4th October 2013.

35. I have duly considered the evidence adduced before court by the plaintiff and find that the same was believable as it was backed by genuine documents and was not contested as the defendant did not appear at the hearing either in person or through counsel.

36. The plaintiff is seeking for the cancellation of the registration of the 2nd defendant as owner of plot Laikipia /Daiga-Umande Block 4/396 and to have her registered as the owner thereof. The plaintiff is also seeking to be issued with a Certificate of Title over the said property and also for eviction orders against the 1st and 2nd Defendants herein

37. It is evident that the 1st and 2nd defendants herein was served with the summons to enter appearance but failed to enter appearance whereas the 4th Defendant entered appearance but did not defend the case. The suit is therefore undefended. However, even if the suit is not defended, the plaintiff still had the duty to formally prove her case on the balance of probabilities as required by law.

38. The Plaintiff produced a copy of the green card as exhibit 6 which showed that the suit land had been registered to her husband Mr. Douglas Muthaura M'etwerandu on the 24th September 1996, wherein the suit land had subsequently been charged to Kenya commercial bank on the 4th October 1996

39. That as per a death certificate herein produced as exhibit 9, her husband had died on the 3rd November 2005 before the charge had been discharged as was evidenced by a letter dated the 4th February 2014 produced as exhibit 8.

40. That even before the Succession cause had been completed as is stipulated by exhibit 1, the land had changed hands between the 1st and the 2nd Defendants herein while the Charge was still registered with the bank. This clearly shows that the Defendants had intermeddled with the deceased's property contrary to section 45 of the Law of succession.

41. Further, fraud was proved by the plaintiff vide the production of exhibit No.4 and 5 in the name of certificates of search dated 5th April 2011 and 6th April 2011 respectively which clearly proved that the suit parcel had changed hands from the Deceased to the 2nd defendant within a day and yet the charge had not been discharged by the bank who still held the title deed.

42. I find that before the Deceased passed away, the suit land was still registered in his name thus making him the registered owner of the suit property thus he was protected by section 26(1) of the Land Registration Act which states as follows:

“the Certificate of Title issued by the Registrar upon registration, 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 the 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

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.

43. Pursuant to the evidence adduced in court as well as the orders in the certificate of confirmation dated the 20th February 2012 and marked as exhibit 2 herein, the court ordered that the suit land herein be registered in the Plaintiff's name. That being the case this court under Section 80(1) of Land Registration Act is mandated with the power to rectify the register herein. The said Section of the Land Registration Act provides as follows:

Section 80 (1) of the Land Registration Act provides:-

80(1) “Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

44. The court has therefore powers under Section 80 of the Land Registration Act to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I am persuaded that the defendants fraudulently obtained the Certificate of Title and that the title of the 2nd Defendant is liable to be cancelled.

45. That being the case, I find that the plaintiff, having proved her case on a balance of probabilities, and having proved further that this case falls within the exceptions provided under section 26 (1) of the Land Registration Act, and further that this court should invoke the provisions of section 80 (1) of the Land Registration Act to correct the anomaly, I therefore proceed to cancel the title of the 2nd Defendant and her registration as proprietor of the suit land.

46. Consequently, the plaintiff having proved her case on a balance of probabilities, I find that she is entitled to the prayers sought in the plaint. I thus enter judgment for her against the defendant in the following terms:

i. A Declaration that the transfer of land parcel No. Laikipia /Daiga–Umande Block 4/396 to the 1st Defendant and subsequently to the 2nd Defendant was illegal, irregularly un-procedural, and fraudulent.

ii. A Declaration that the 3rd Defendant to re-transfer the said land into the names of the Plaintiff.

iii. The title of the 2nd defendant is hereby cancelled and I direct that her name be removed as proprietor of the land parcel No. Laikipia /Daiga–Umande Block 4/396 and further order that the plaintiff be reinstated as the registered proprietor of the leasehold title in the land parcel No. Laikipia /Daiga–Umande Block 4/396 and be so registered as proprietor pursuant to the certificate of grant dated the 20th February 2012 and marked as exhibit 2.

iv. The 1st and 2nd Defendants do forthwith vacate the land parcel No. Laikipia /Daiga–Umande Block 4/396 and if they fail to so vacate, an order of eviction be issued against them.

v. A permanent injunction is hereby issued restraining the 1st and 2nd Defendants from entering into, dealing or in any way interfering with the land parcel No. Laikipia /Daiga-Umande Block 4/396

vi. Costs to the Plaintiff at the lower scale since the suit was undefended.

Dated and delivered at Nyahururu this 15th day of February 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE