



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 95 OF 2017

LUCY WANGUI KIMANI.....PLAINTIFF

VS

JAMES NJOROGE IRUNGU.....1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL..... 2ND DEFENDANT

JUDGMENT

1. Lucy Wangui Kimani the Plaintiff herein filed suit against the Defendants on 13/10/2016. She avers that at all material time she was the registered owner of Mitubiri/Wempa Block 2/2502 having acquired it from Methi and Swani Farmers Cooperative Limited (hereinafter referred to Methi) vide share certificate No. 469 and was issued with a title deed on 6/9/11.

2. That on the 29/2/14 the 1st Defendant became registered as owner of the said property and his name was entered in the Register at the lands office. Thereafter the 1st Defendant caused the unlawful eviction of the Plaintiff from the said land. The Plaintiff's claim is for cancellation of 1st Defendant's title and eviction of the said 1st Defendant from the suit property.

3. The Plaintiff has sought the following orders from the Court;

- a) An order declaring that the Plaintiff is the bonafide owner of land parcel number MITUMBIRI/WEMPA BLOCK 2/2502.
- b) An order for the cancellation of the title and registration of MITUMBIRI/WEMPA BLOCK 2/2502 in the name of the 1st Defendant and rectification of the register to have the subject land read in the Plaintiff's name.
- c) A permanent injunction restricting the 1st Defendant, his servants, employees and or assignees from entering or howsoever dealing with the subject land.
- d) The eviction of the 1st Defendant from the above mentioned parcel of land.
- e) The OCS Kabati Police Station to enforce compliance of the said eviction.
- f) Costs of this suit and interests thereof at Court's rates.

4. In his defence the 1st Defendant denied the Plaintiff's claims and states that he entered into a sale agreement with one Lucy Wangui Kimani of P O Box 156 Gatundu in respect to the suit land at a consideration of Kshs 1.5 M. Upon completion of the purchase he was put into occupation.

The Plaintiff's case

5. The Plaintiff testified and stated that she bought the shares from one Kamau Kibe who was a member of Methi, whereupon she was issued with share certificate No. 469 for 4 shares dated 30/6/1980. That each share certificate represented land. That she was shown the land and later was issued with a title deed in her name on 6/9/11. That she embarked on cultivation of her land until August 2014 when her worker was forcefully removed by the 1st Defendant who claimed ownership. That armed with the information she carried out a search at the lands office Murang'a where it dawned on her that her land had become registered in the name of the 1st Defendant on 29/2/2014. That on 13/10/15 she wrote a letter to Methi to register the complaint but to date the liquidator has not responded. That later the 1st Defendant was summoned by the liquidator of the land buying company but refused to vacate the suit land and hence the suit herein.

6. The Plaintiff stated that she did not sell the suit land to the 1st Defendant; she did not apply to the Land Control Board for consent to transfer; did not enter into any agreement with the 1st Defendant; she denied signing the agreement dated 10/8/13 purportedly entered between the Plaintiff and the 1st Defendant; that she did not appear before the alleged Advocate, Muchoki D M & Co. Advocates to execute the agreement or any such document; she has her original title deed issued to her on 6/9/11 and has not surrendered it to anyone; she did not receive any monies for the sale of her land; she did not know the 1st Defendant and only met him later after filing the case in Court;

7. The Plaintiff urged the Court to order for the eviction of the 1st Defendant from her land which he is occupying illegally.

8. PW 2 – Peter Ngugi Mungai informed the Court that he is a former honorary secretary of the land buying company. That he was aware of the complaint made by the Plaintiff in respect to the trespass of the land by the 1st Defendant. He confirmed that the Plaintiff is a genuine member of Methi. That he holds a share certificate No. 469 and Ballot No. 1787 as well as the owner of the LR MITUMBIRI/WEMPA BLOCK 2/2502. He confirmed that the share certificate was signed by the then Pharis Wachira (Chairman) and Barnabas Mburu Treasurer and Ndebu as the Secretary, all of whom were known to him. That he was in the team of officials of Methi that compiled the Register of members and oversaw the issuance of titles to members, one of whom is the Plaintiff registered as No. 71 in the Register. He further confirmed that the Plaintiff collected her title from Methi. He also confirmed that the Plaintiff is the bonafide owner of the suit land according to their records. He stated that Methi & Swan Cooperative Farmers Ltd the was not involved in the alleged sale of the suit land to the 1st Defendant.

The 1st Defendant's case

9. The 1st Defendant testified that he was introduced to Lucy Wangui Kimani the owner of the suit property by Julia Wairimu Guchu. That on 10/8/2013 they met at Kenol and negotiated the purchase price of the land at Kshs.1,500,000/= whereupon she (Lucy Wangui Kimani) produced the documents, ballot certificate, share certificate receipts for payments, title deed, PIN & her National Identity Card.

10. Satisfied that the said Lucy Wangui Kimani was the owner of the suit land he entered into an agreement for sale which sale agreement was witnessed by Antony Stephen Ngugi Irungu and Julia Wairimu Guchu. That he paid the purchase price in cash.

11. That thereafter the documents of transfer were executed by the parties and delivered to an undisclosed individual at the Methi offices. It was his evidence that the transfer documents were presented to the Murang'a Land Control Board and the officers of Methi was to follow up the issuance of the Land Control Board consent and process the title in his name. That in February 2014 he was issued with a title whereupon he took over possession of the land.

12. On cross-examination by the Plaintiff's Learned Counsel Ms. Wambui the 1st Defendant without assigning any reasons plainly admitted that he did not present any of the following documents; the copy of transfer duly executed; stamp duty payment receipt; application for Land Control Board consent, Land Control Board consent; booking form and registration receipt for the transfer; original title or copy held by the seller; ID PIN of the seller; Official search in respect to the suit land to the Court in support of his case.

13. He conferred and admitted that the Lucy Wangui Kimani that "sold" the land to her was not the Plaintiff who was present in Court. He stated that the said Lucy Wangui Kimani could not be traced and hence was not going to be called as a witness in the case.

14. Further he indicated that he inspected the suit land before entering into the agreement. Without producing any evidentiary documents, he stated that he paid the stamp duty and registration fees to Methi on submitting the transfer documents. He stated that he did not attend the Land Control Board nor obtain for consent of the said Land Control Board to transfer the suit land.

15. DW 3 – Julia Wairimu Guchu reiterated the evidence given by the 1st Defendant on how he introduced the alleged seller Lucy Wangui Kimani to the 1st Defendant. That the said Lucy Wangui Kimani was her neighbour and she informed her to source a buyer for the suit land which she did through the brother of the 1st Defendant. That after she introduced 1st Defendant to the said Lucy Wangui Kimani and met at Kenol Town. That she witnessed the agreement of sale on behalf of the said Lucy Wangui Kimani.

16. When asked whether the said Lucy Wangui Kimani was in Court, she clarified that the Lucy Wangui Kimani she knew was different from Lucy Wangui Kimani the Plaintiff. She admitted that she did not know the Plaintiff and had never met her. When asked if she knew the whereabouts of Lucy Wangui Kimani she stated that she had lost her number and cannot trace her.

2nd Defendants case

17. The 2nd Defendant denied the Plaintiff's claim and put her to strict proof. In the alternative it stated that the 1st Defendant's name became registered owner based on documents presented before the 2nd Defendant for registration. That the 2nd Defendant exercised due diligence and believed the documents to be genuine.

18. Ms Nancy Nyambura Njenga, the District Land Registrar Murang'a took the Court through the process of registering a transfer in the lands office; that to successfully register a transfer, the Applicant submits a duly executed transfer, original title of current owner (or indemnity in lieu of original title by the land owner), ID, PIN, Photographs of the parties; Land Control Board consent, stamp duty payment receipt to enable the document to be stamped; payment of registration fees receipt; all these documents are lodged at the registry where the Applicant is given a booking form which indicates the date and details of the documents booked for registration. The booking form also serves as a reference to the Applicant on the status of the registration of the documents. In the particular case she indicated that since this was not a first registration it was the purchaser to present the documents for registration. That the land buying Company presents documents for registration when they are issuing titles to its members for the first time. In this case the title had been issued to a member and the transaction being a transfer, the land buying company had no role in it.

19. She pointed out to the Court that the process adopted by the 1st Defendant was unprocedural since the original title deed was not surrendered before a new one was issued. Ordinarily the old title deed must be surrendered to the registry together with the transfer to allow cancellation of issuance of a new one. She stated that the parcel file for the suit land which is maintained at the Land Registry was missing and therefore was unable to tell how the title registered in the name of the 1st Defendant was processed. That she was unable to vouch for its validity by just looking at its face value. Though she admitted that there are instances where the Registry can issue two titles for one parcel without following procedure, such a title however cannot be said to be valid for want of legal procedure.

20. Parties elected to file written submissions however the 1st Defendant did not file any by time of writing this Judgement. I have carefully considered the written submissions filed by learned counsels in arriving at the determination.

Determination

21. Having considered the evidence, witness statements, written submissions where filed, the attachments, issues for determination filed by the Plaintiff and the relevant law applicable the issues that commend themselves for determination are:

Whether the 1st Defendant is the legal registered owner of the suit land?

Whether the title of the 1st Defendant should be cancelled?

Whether the 1st Defendant should be evicted from the suit land?

22. The 1st Defendant in his statement of defence has stated that he acquired the suit land by purchase from one Lucy Wangui Kimani at Kshs. 1.5 Million which he duly paid. That he became registered owner on 19/2/14 and subsequently was put in occupation by the alleged seller. It transpired at the hearing that there were two sets of Lucy Wangui Kimani. The 1st Defendant admitted in evidence which evidence was corroborated by DW 2 Julia Wairimu Guchu. That the Lucy Wangui Kimani (hereafter named for convenience sake Lucy Wangui Kimani 'B') who sold the land to the 1st Defendant is different from the Lucy Wangui Kimani, the Plaintiff. The 1st Defendant did not call the said seller to give evidence. On cross-examination both the 1st Defendant and the DW 2 feigned ignorance on the whereabouts of the said seller. That notwithstanding the fact that the 1st Defendant and his witness disclosed to the Court that indeed the Plaintiff did not sell the suit land to them corroborates and is consistent with the Plaintiff's evidence that he neither sold the land nor knew the 1st Defendant. It is consistent with her evidence that she neither applied for a Land control board consent to sell; did not sign agreement for sale; never appeared before the Advocate; never received any payments; never showed the 1st Defendant her land; never put the 1st Defendant in possession. All these are legal processes that a seller of land is obligated to take in order to comply or actualize a sale. The only conclusion that this Court can make is that this was a glaring fraudulent transaction involving fly by night fraudsters who prey on properties of unsuspecting owners to reap where they have not sowed.

23. The 1st Defendant disclosed that he did not apply for Land Control Board consent this being an agricultural land, shows that the transfer was registered without Land control board consent. Taken against section 6 of the Land Control Act, it amounts to an illegal transaction which is subject to similar sanctions. This renders the transaction null & void to the extent it offends section 6 of the Land Control Act.

24. Further it is the Plaintiffs testimony that she still retains in her possession the original title of the suit land. I observed the demeanor of the Plaintiff while giving evidence and she impressed me as a truthful old lady in her 70s. Unlike the 1st Defendant and DW 2 they gave themselves away as untruthful. Given the conduct and demeanor of the 1st Defendant it is doubtful if the purchase price was paid. No evidence was tendered to support any payment.

25. Section 107 of the Evidence Act Cap 80 of Laws of Kenya states as follows;

“(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

The PW 2 denied issuing the share certificate No. 552. A close scrutiny of the same reveals that the name has been rubbed to denote an alteration. It is so authenticity is in doubt.

The burden of proof rested on the 1st Defendant to rebut the evidence of the plaintiff by placing before the Court documents to prove that his title is genuine. He neither produced any and save for the title deed in his name and agreement. He failed to produce the transfer documents, Land Control Board consents etc, including payment of stamp duty on the transfer. The conclusion is that those documents were not available. No stamp duty was paid on the transaction.

26. The Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina (2013) EKL**R pronounced itself as thus;

“we state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances..”

27. Further in the case of **Kassim Ahmed Omar & Another vs. Anwar Ahmed Abed & Others , Malindi ELC No. 18 of 2015** the Court

held that;

“A certificate of title is an end process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court.”

Such is the title in the hands of the 1st Defendant. A hollowed title tainted beyond rescue.

28. Section 26 of the Land Registration Act states;

“(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”.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

In the face of the illegalities already exposed above, it is clear that the title of the 1st Defendant is not protected by the law. The evidence adduced by the 1st Defendant and his witness demonstrate that the 1st Defendant was involved in the said fraud, misrepresentation, illegalities and the machinations. In the end the Court finds and holds that the 1st Defendant cannot be said to be the registered owner of the suit land.

29. The Court having found that the title of the 1st Defendant does not enjoy the protection of law as contemplated by section 26 of the Land Registration Act the same stands cancelled for the reasons advanced above.

30. The 1st Defendant’s averment that he was put into possession by the Plaintiff is untrue. The 1st Defendant is a trespasser on the land. He is in occupation without the consent of the owner. Trespass is defined in Black Law Dictionary, 9th Edition as;

“ an unlawful act committed against the person or property of another, especially wrongful entry on another’s real property”

Having been in occupation illegally, the Plaintiff’s prayer for eviction is founded and the Court does not see any reason not to grant. It is so granted.

31. The final orders are as follows;

a) It is hereby declared that the Plaintiff is the bonafide owner of LR No. MITUMBIRI/WEMPA BLOCK 2/2502.

b) It is hereby ordered that the title of the 1st Defendant be and is hereby cancelled by deleting entries Nos. 3, 4, 5 in the register and reversing the title to the Plaintiff.

c) Consequently the 1st Defendant is ordered to vacate the suit land with immediate effect, in default eviction to issue.

d) Costs of the suit are payable by the 1st Defendant.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 12TH DAY OF APRIL, 2018.

J G KEMEI

JUDGE